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SUPREME COURT OF NORTH CAROLINA

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1. Resigned 19 February 1996.
2. Recalled to the Court of Appeals 1 September 1995.

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1. Appointed and sworn in 9 May 1996 to a new position.
2. Appointed and sworn in 3 June 1996 to a new position.
3. Appointed and sworn in 24 April 1996 to a new position.
4. Appointed and sworn in 14 June to replace Andrew R. Dempster who resigned 15 March 1996.
5. Appointed and sworn in 3 May 1996 to a new position.

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15B	CARL R. FOX	Chapel Hill
16A	JEAN E. POWELL	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	BELINDA J. FOSTER	Wentworth
17B	CLIFFORD R. BOWMAN	Dobson
18	HORACE M. KIMEL, JR.	Greensboro
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

ORDERS

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

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

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

PETITIONS TO REHEAR

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF THE UNITED STATES CITED AND CONSTRUED

NORTH CAROLINA CONSTITUTION CITED AND CONSTRUED

Art. V, § 2(1)	Maready v. City of Winston-Salem, 708

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
2	State v. Gregory, 580
4(d)	State v. Marr, 607
10(b)(1)	State v. Jaynes, 249
	Newton v. New Hanover County Bd. of Education, 554
10(c)(1)	Associated Mechanical Contractors v. Payne, 825
10(c)(4)	State v. Jaynes, 249
16	Newton v. New Hanover County Bd. of Education, 554

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 26th day of April, 1996 and said persons have been issued license certificates.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

PETER RANDLE HENRY ..... Asheville
SAMUEL YEBOAH ..... Durham

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 26th day of April, 1996, and said persons have been issued certificates of this Board:

J. PAUL DOUGLAS ..... Charlotte
Applied from the State of Texas
ANSON BRADLEY IVES ..... Charlotte
Applied from the State of New York
DEBORAH STEPP KIRKPATRICK ..... Charlotte
Applied from the State of Virginia
PETER H. PRIEST ..... Chapel Hill
Applied from the State of New York
BARBARA-ANNE ROBERTO ..... Davidson
Applied from the State of New York
MICHAEL G. SAVAGE ..... Cary
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 6th day of May, 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 10th day of May, 1996, and said persons have been issued certificates of this Board:

JEFFREY GARIS ..... Charlotte
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 15th day of May, 1996.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of June, 1996, and said persons have been issued certificates of this Board:

PATRICIA MICHELS ANDERSON ..... Cary
Applied from the State of Texas

WILLIAM H. FUSS ..... Surf City
Applied from the State of Pennsylvania

WENDY LYNN GRODE ..... Wilson
Applied from the State of New York

ROBERT LOUIS JENNINGS ..... Camp Lejeune
Applied from the State of Iowa

CRAIG MYER KABATCHNICK ..... Jamestown
Applied from the District of Columbia

RICHARD EDWARD FRANCIS VALITUTTO ..... Lincolnton
Applied from the State of Ohio

RICHARD W. SIMMONS ..... Charlotte
Applied from the State of Texas

ATHENA AMALIA FRANGOULIS ..... Charlotte
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 14th day of June, 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 as of the 21st day of June, 1996 and said person has been issued a license certificate.

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

KENNETH ROBERT DAVIS ..... Harrells

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

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

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 28th day of June, 1996, and said person has been issued a license certificate:

JULY 1995 NORTH CAROLINA BAR EXAMINATION

JOHN SILAS PARTON . . . . . Bryson City

Given over my hand and seal of the Board of Law Examiners this the 9th day of July, 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. ROBERT WILLIAM WALLS

No. 42A93

(Filed 3 November 1995)

1. Criminal Law § 240 (NCI4th)— first-degree murder—continuance denied—no error

While a motion to continue ordinarily is addressed to the discretion of the trial court, a motion which raises a constitutional issue is fully reviewable on appeal. However, regardless of whether the motion raises a constitutional issue, a denial is grounds for a new trial only when defendant shows that the denial was erroneous and prejudicial.

Am Jur 2d, Continuance § 59.

2. Criminal Law § 261 (NCI4th); Constitutional Law § 274 (NCI4th)— denial of continuance—effective assistance of counsel—no error

There was no error and no denial of effective assistance of counsel in a first-degree murder prosecution where the trial court denied defendant's motion for a continuance. Contrary to his argument, defendant was not denied access to witnesses, but was able with the aid of investigators to interview witnesses to prepare for trial, and he had adequate time to prepare his defense. Lead defense counsel was appointed on 1 June 1992, a continuance had been granted from the 7 December 1992 term to the 11 January 1993 term, defendant had at his disposal two

investigators with funds to hire a third investigator, and it is evident that defendant's counsel represented his interests vigorously. The reasons defendant advanced for a second continuance were less than substantial and it appears that defendant simply wanted yet more time to prepare.

Am Jur 2d, Continuance §§ 63, 108; Criminal Law § 746.

3. **Criminal Law § 107—first-degree murder—criminal records of State's witnesses—not subject to disclosure**

The criminal records of the State's witnesses in a first-degree murder prosecution were not subject to disclosure. It has previously been held that the trial court is without authority to grant such a request, that the failure to order disclosure of the criminal records of the State's witnesses is not violative of due process, and that N.C.G.S. § 15A-903 does not grant defendant the right to discover the names and addresses of State's witnesses, let alone the criminal records. Furthermore, the records in this case were not material.

Am Jur 2d, Depositions and Discovery § 439.

4. **Evidence and Witnesses § 1256 (NCI4th)— first-degree murder—right to counsel invoked—subsequent inculpatory statements—voluntary**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress statements made to a detective where defendant contended that the statements were the result of a custodial interrogation after he had invoked his right to remain silent and could not be spontaneous. While defendant was in custody, he was not interrogated: the court found that the detective asked defendant nothing further after defendant signed a paper that he no longer wished to make a statement, the detective asked defendant what had happened to his hand after he complained that it hurt during fingerprinting, defendant replied that he had hit a tree, the detective asked why, and defendant said, "I should have hit her a little harder so I could really hurt my hand." The detective had no reason to believe that his questions about defendant's hand were reasonably likely to evoke an incriminating response; defendant's remarks were volunteered statements and the detective's questions did not convert the conversation into an interrogation under *Miranda.*

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 719 et seq.

5. Evidence and Witnesses § 1323 (NCI4th)— first-degree murder—inculpatory statement after right to silence invoked—no finding as to who reinitiated conversation

There was no prejudicial error in a first-degree murder prosecution where defendant alleged that he was improperly questioned after invoking his right to counsel and the trial court concluded that the statement made by defendant was spontaneous but did not make a specific finding as to who reinitiated conversation. Assuming that it was error for defendant's statements to have been admitted without an exact finding as to who reinitiated conversation, any error was harmless in light of his other statements, eyewitness testimony, and other corroborating testimony.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 719 et seq.

6. Evidence and Witnesses § 1301 (NCI4th)— first-degree murder—inculpatory statement—finding that defendant not under the influence of alcohol

There was no error in a first-degree murder prosecution where the trial court concluded that defendant freely, knowingly, intelligently, and voluntarily waived his rights after finding that defendant was not under the influence of alcohol where a detective testified that defendant had told the detective that he was under the influence of beer but the detective stated that, although he could smell beer upon defendant and believed that defendant had been drinking, he was not of the opinion that defendant was under the influence. Furthermore, the detective testified that defendant remembered the first set of *Miranda* rights given him in the patrol car. The trial court's findings of fact were based upon competent evidence and therefore are binding on appeal and it cannot be said, viewed under the totality of the circumstances, that the trial court's conclusion of law was error.

Am Jur 2d, Evidence §§ 710 et seq.

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

7. Constitutional Law § 352 (NCI4th)— right to remain silent—testimony concerning—jury not in courtroom—no plain error

There was no plain error in a first-degree murder prosecution where defendant contended that the court allowed the prosecu-

tor to elicit testimony concerning defendant's invocation of his right to remain silent, but the jury had been taken from the courtroom and heard no testimony concerning defendant's exercise of his right to remain silent.

Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq.

8. Jury § 217 (NCI4th)— first-degree murder—jury selection—inability to impose capital punishment—excusal for cause

The trial court did not err in a first-degree murder prosecution by excusing for cause four prospective jurors who allegedly gave equivocal answers to questions concerning the death penalty but three were ultimately unequivocal and the fourth said that she did not believe she could vote to impose the death penalty. It cannot be said that the trial court abused its discretion in determining that the views of the fourth would substantially impair the performance of 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.

9. Jury § 226 (NCI4th)— first-degree murder—jury selection—pretrial motion to conduct thorough voir dire denied—denial of rehabilitation

There was no error in jury selection in a first-degree murder prosecution where defendant argued that the denial of his pretrial motion to conduct a "searching and thorough *voir dire*" of prospective jurors concerning mitigating circumstances and their ability to fairly determine punishment created an environment in which he was not permitted to rehabilitate four prospective jurors who were equivocal about the death penalty. There is absolutely no evidence in the record that, as a result of the denial of the motion, defendant faced any sort of hostile or discourteous environment from the trial court during *voir dire* which restrained him from rehabilitating any prospective juror.

Am Jur 2d, Jury § 189.

10. Jury § 148 (NCI4th)— first-degree murder—jury selection—pretrial motion to ask certain questions—denied

The trial court did not err in a first-degree murder prosecution by denying defendant's pretrial motion that he be allowed "to ask whether prospective jurors can consider as a mitigating circumstance" evidence in regard to defendant's turbulent family history and mental retardation, among others. These questions amounted to an impermissible attempt to stake out jurors and were improper. Defendant was freely permitted to ask prospective jurors whether they could follow the trial court's instructions concerning mitigating circumstances, whether they understood they could individually find mitigating circumstances to exist, and whether their support for the death penalty was so strong that they would find it difficult to follow the law and consider a sentence of life imprisonment.

Am Jur 2d, Jury §§ 205 et seq.

11. Jury § 215 (NCI4th)— first-degree murder—jury selection—juror expressing belief in capital punishment—not excused for cause

There was no error in jury selection in a first-degree murder prosecution where the trial court did not excuse for cause a juror who defendant contended could not fairly consider a life sentence. Defendant failed to object to the trial court's denial of his challenge for cause and did not seek to renew his challenge as to this juror; however, even assuming that defendant properly complied with N.C.G.S. § 15A-1214(h), he would not be entitled to relief because the prospective juror, after initially indicating he felt first-degree murderers should receive the death penalty, stated he could consider both possible sentences and would follow 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.

12. Jury § 151 (NCI4th)— first-degree murder—jury selection—jury in favor of death penalty—questions not allowed

There was no error in jury selection in a first-degree murder prosecution where defendant was not allowed to ask a prospec-

tive juror three questions which were all variations on the theme of whether the prospective juror's belief in the death penalty was so strong that he could not consider life imprisonment. Defendant was allowed to make this inquiry of the prospective juror.

Am Jur 2d, Jury §§ 198, 199.

13. Jury § 257 (NCI4th)— first-degree murder—jury selection—peremptory challenges—not racially based

There was no error in a first-degree murder prosecution where defendant contended that the State exercised its peremptory challenges in a racially discriminatory manner. Even if defendant had timely objected at trial, defendant failed to carry his burden of establishing a *prima facie* case of racial discrimination in the prosecutor's exercise of peremptory challenges. While the prosecutor used more peremptory challenges against blacks than whites, such numbers alone are insufficient to make a *prima facie* case of racial discrimination. The jury which ultimately heard defendant's case was composed of seven African-Americans and five whites.

Am Jur 2d, Jury §§ 244, 262.

14. Jury § 257 (NCI4th)— first-degree murder—jury selection—consistent exclusion of African-Americans

A first-degree murder defendant who contended that his prosecutor consistently excludes African-Americans from jury service failed to show that the prosecutor, as a matter of practice in this or any other case, exercised peremptory challenges on the basis of race alone. It was noted that, under *Batson v. Kentucky*, 476 U.S. 79, a defendant may demonstrate purposeful racial discrimination in the selection of a petit jury by relying only upon the facts regarding jury selection in that individual defendant's case.

Am Jur 2d, Jury §§ 244, 262.

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

There was no error in jury selection in a first-degree murder prosecution where the trial court denied defendant's motion to permit *voir dire* of prospective jurors concerning their attitudes on parole eligibility.

Am Jur 2d, Jury §§ 205 et seq.

16. Jury § 116 (NCI4th)— first-degree murder—jury selection—failure to object to question—waiver of appeal

A first-degree murder defendant who did not object at trial waived the right to assert on appeal error in the trial court allowing the prosecutor to ask a question which he contended impermissibly staked out prospective jurors.

Am Jur 2d, Jury §§ 205 et seq.

17. Jury §§ 132, 142 (NCI4th)— first-degree murder—jury selection—questions regarding presence of defendant, absence of victim—no error

There was no error in jury selection in a first-degree murder prosecution where defendant contended that the prosecutor should not have been permitted to question prospective jurors about whether they would feel sympathy toward defendant because they would be able to see him every day of the trial but would not be able to see the victim. Under *State v. Smith*, 328 N.C. 99, the questions were not designed to suggest to jurors that they should disregard any sympathy they felt for defendant, but to ascertain whether they would feel sympathy for defendant based solely on his presence in court. Additionally, the question was not an attempt to elicit in advance what the jurors' decision would be under a certain state of evidence.

Am Jur 2d, Jury §§ 205 et seq.

18. Constitutional Law § 295 (NCI4th)— first-degree murder—effective assistance of counsel—representation of defendant and a State's witness

A defendant in a first-degree murder prosecution failed to carry his burden of showing that an actual conflict of interest adversely affected his lawyers' performance where the prosecutor, outside the presence of the jury, informed the trial court that one of defendant's attorneys had previously represented a State's witness in district court, that the charge had been appealed and was pending in superior court and that the witness thought defense counsel still represented him; the defense attorney stated that he believed that he had made a limited appearance, had had no contact with the witness since the district court appearance, would not preclude himself from representing the witness, felt no ethical conflict because the cases were not related, and that defendant's other counsel would conduct the cross-examination;

defendant received a vigorous and spirited defense, including a detailed and thorough cross-examination of this witness; and the nature and status of the charge against the witness was explored at the beginning of his direct examination, leaving no ground for the defense to cover on this point. Under *Cuyler v. Sullivan*, 446 U.S. 335, in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. On this record, there are no special circumstances requiring the trial court to conduct any more extensive inquiry than the one it did conduct; however, even assuming that defense counsel did actively represent conflicting interests, defendant has not shown that the alleged dual representation actually affected the adequacy of his representation.

Am Jur 2d, Criminal Law §§ 754 et seq.

19. Criminal Law § 372 (NCI4th)— first-degree murder—cross-examination—objection sustained—not a comment upon the evidence

There was no error in a first-degree murder prosecution where defendant contended that the trial court violated its duty not to comment upon the evidence by sustaining a State's objection. The argument that the court forced the jury to accept the State's theory of the case by simply sustaining an objection is wholly without merit; a trial court's ruling on an objection falls far short of impermissible conduct or improper comment upon the evidence. The trial court's singular act of sustaining an objection did not, in any perceptible or even minute way, amount to an improper comment upon the evidence.

Am Jur 2d, Trial §§ 395 et seq.

20. Evidence and Witnesses § 2874 (NCI4th)— first-degree murder—cross-examination—discretion of court

The trial court did not abuse its discretion in sustaining objections to two questions on cross-examination in a first-degree murder prosecution where defendant contended that the trial court's sustaining of these objections prevented defendant from adequately confronting the most important witness against him. An answer to the first excluded question would have been merely cumulative and, with regard to the second, defense coun-

sel sought to testify himself. He was allowed to continue his cross-examination once the question was properly phrased.

Am Jur 2d, Witnesses §§ 717 et seq.

21. Evidence and Witnesses § 298 (NCI4th)— first-degree murder—cross-examination—impeachment of another witness

The trial court did not err in a first-degree murder prosecution by sustaining the prosecutor's objections to defendant's attempt to elicit information from a prosecution witness for the purpose of impeaching another prosecution witness. The impeachment questions propounded by defendant, as clearly extrinsic evidence, would be proper only if the first witness had testified in some fashion as to the second's character for truthfulness or untruthfulness and there is no instance in the record in which the first witness testified in any way concerning the second's character. N.C.G.S. § 8C-1, Rule 608(b).

Am Jur 2d, Witnesses §§ 320, 321.

22. Kidnapping and Felonious Restraint §§ 17, 21 (NCI4th)— first-degree murder and kidnapping—mother and child—evidence sufficient

The trial court did not err in a first-degree murder prosecution by submitting the underlying felony of kidnapping to the jury where the evidence tends to show that, during a ride to Richmond, defendant began to hit his companion, Alice, in the face so severely that her glasses fell out of the car window; she pulled the car over to get the glasses from the highway, and as she walked back to the car, she heard her three year old son Christopher scream; defendant hit, cursed and threatened to kill Christopher every time the child tried to get his drink out of the cooler; defendant threw a beer can at the child; Alice heard Christopher grunt when it hit him; once in Richmond, defendant kicked Alice in the face and took the car keys so she could not escape; defendant then made her drive to a house where he claimed he had friends who would kill her and the child; defendant continued his physical and verbal assaults against Alice on the return trip from Richmond while the baby screamed and cried; finally, when Alice could no longer see to drive, she pulled up to a welcome center and defendant took over the driving; and to keep Alice conscious, defendant continually struck her in the chest. Defendant's claim that Alice consented to being in the car

with defendant because she did not take her three-year-old child and run away on foot in Richmond is totally without merit, as is his contention that an almost unconscious Alice consented to being in the car with defendant because she did not ask for help when they stopped at the welcome center.

Am Jur 2d, Jury § 31.

23. Homicide § 393 (NCI4th)— first-degree murder—intoxication—instruction denied—evidence insufficient

The trial court did not err in a first-degree murder prosecution by denying defendant's request for an instruction on voluntary intoxication where, although defendant contends that the testimony at trial demonstrated that he was drinking the day before the murder, the day of the murder and the day after the murder, that his cursing the victims is evidence of his intoxication, and that he told a witness that he could not move his car because he was drunk, the evidence shows defendant is an alcoholic and his alcohol tolerance would be much higher than one who does not drink every day; defendant ignores evidence showing that he was quick-witted enough to invent a lie when he told a witness about an old dog, rather than a baby, being in the river; defendant successfully drove a car from a welcome center to the river and then to his brother's house; and defendant makes no claim he cannot remember his actions the day of the murder. Defendant failed to carry his burden to 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.

Am Jur 2d, Homicide § 447.

24. Homicide § 553 (NCI4th)— first-degree murder—second-degree not submitted—no error

A defendant in a first-degree murder prosecution was not entitled to an instruction on second-degree murder where each element of first-degree murder, including premeditation and deliberation, was positively supported by the evidence and, because evidence of defendant's intoxication was insufficient to support an instruction on voluntary intoxication, there was no evidence to negate the elements of first-degree murder other than defendant's denial that he committed the crime.

Am Jur 2d, Homicide §§ 45, 425 et seq.

25. Criminal Law §§ 427, 432 (NCI4th)— first-degree murder—prosecutor's argument—defendant's silence—appeal to jurors' sympathies

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to censure the State's closing argument where defendant contends that on two occasions the prosecutor impermissibly alluded to defendant's election not to testify on his own behalf. The first statement was simply one part of the prosecutor's anticipatory rebuttal of various issues, either legal or factual, that might be raised by the defendant during his closing argument and the second states a fact in evidence. Moreover, a portion of the argument which defendant contends improperly appealed to the sympathy of the jury was firmly rooted in the evidence and was proper.

Am Jur 2d, Trial §§ 291 et seq.

26. Criminal Law § 1309 (NCI4th)— first-degree murder—capital sentencing—introduction of evidence

Under *Lockett v. Ohio*, 438 U.S. 586, while the jury in a capital case must not be precluded from considering as a mitigating factor any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death, under *State v. Pinch*, 306 N.C. 1, 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. *Lockett* notes that nothing in that opinion limits the traditional authority of a court to exclude as irrelevant evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

Am Jur 2d, Trial §§ 595-600.

27. Criminal Law § 1311 (NCI4th)— first-degree murder—capital sentencing—residual doubt—not admissible as mitigating evidence

Proposed evidence that a three-year-old murder victim fell into a river, rather than being thrown by defendant, was not admissible as mitigating evidence in the sentencing phase where a witness came forward after the guilty verdict but before the sentencing phase began; defendant proffered the testimony during

the sentencing phase; and the testimony was that the victim's mother, whom defendant also tried to drown, had said that the child had fallen into the river. The only relevance of the proposed evidence is whether defendant was guilty of the murder of the child, but such a question is reserved for the guilt-innocence phase, and no motion was made for a mistrial. Residual doubt testimony is not admissible during the sentencing proceeding of a capital case.

Am Jur 2d, Trial §§ 595-600.

28. Criminal Law § 1311 (NCI4th)— first-degree murder—capital sentencing—evidence that death accidental—not admissible to impeach aggravating circumstances

Evidence from a witness who came forward after the guilt-innocence phase of a first-degree murder prosecution that the three-year-old victim was not thrown by defendant but fell into a river was not admissible in the capital sentencing phase for the purpose of impeaching the aggravating circumstances. Even assuming that the testimony was credible, and bearing in mind the evidentiary flexibility encouraged in capital cases, the proposed testimony does not impeach the testimony of the victim's mother with regard to any of the three aggravating circumstances submitted to and found by the jury. The question of whether the victim "fell" into the river has relevance only to whether a murder was committed in the first place, not as to how it was committed.

Am Jur 2d, Trial §§ 595-600.

29. Criminal Law § 1311 (NCI4th)— first-degree murder—capital sentencing—evidence that defendant was not guilty—not admissible

Evidence in a capital sentencing proceeding that defendant was not guilty was not admissible under *Green v. Georgia*, 442 U.S. 95, which held that the hearsay testimony of a State's witness in a prior, separate trial of a codefendant regarding defendant's private confession was relevant at the sentencing phase and that its exclusion violated Due Process. The State in this case never relied upon the testimony and this case is fundamentally different factually from *Green*.

Am Jur 2d, Trial §§ 595-600.

30. Criminal Law § 1355 (NCI4th)— first-degree murder—mitigating circumstances—lack of prior criminal activity—no error in submitting

The trial court did not err in the sentencing phase of a first-degree murder prosecution by submitting the statutory mitigating circumstance of no significant history of prior criminal activity where defendant had convictions for driving while impaired, assault, communicating threats, escape, nonfelonious breaking and entering, receiving stolen goods, possessing a stolen vehicle, and possessing stolen credit cards. What is of import in determining whether a rational juror could reasonably find this mitigating circumstance to exist is the nature and age of the prior criminal activities rather than the mere number, and the submission of this circumstance has been upheld based upon criminal activities equal to or greater than the defendant's in this particular case.

Am Jur 2d, Trial §§ 595-600.

31. Criminal Law § 1355 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—no prior criminal activity—no error in submitting

There was no error in a first-degree murder sentencing hearing in the submission of the mitigating circumstance of no significant previous criminal activity over defendant's objection where defendant elected to present through his psychiatrist evidence concerning defendant's previous criminal activities and a rational juror could find that those activities were not significant. The trial court had no discretion in submitting the circumstance. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Trial §§ 595-600.

32. Constitutional Law § 315 (NCI4th)— first-degree murder—capital sentencing—concession that mitigating circumstance did not exist—not a denial of effective assistance of counsel

A first-degree murder defendant was not denied effective assistance of counsel during a capital sentencing hearing when his counsel argued to the jury that he was not going to contend that they find the mitigating circumstance of no significant history of criminal activity where defense counsel had objected to the submission of the circumstance but defendant first placed the

evidence before the jury. This was not tantamount to admitting defendant's guilt before a jury against defendant's wishes and did not violate defendant's Sixth Amendment right to effective assistance of counsel. Further, it does not follow that because no juror found any of the submitted mitigating circumstances to exist the jurors used the no significant previous criminal activity mitigator as a *de facto* aggravator.

Am Jur 2d, Criminal Law §§ 598-600, 752.

33. Criminal Law § 1349 (NCI4th)— first-degree murder—capital sentencing—mitigating circumstances not submitted or combined—no error

There was no error in a first-degree murder capital sentencing hearing where defendant contended that the Eighth and Fourteenth Amendment requirements that the trial court submit for the jury's consideration any circumstance requested by defendant which is supported by the evidence and is capable of being understood as mitigating by a reasonable juror was violated by the trial court either refusing to submit or combining the mitigating circumstances defendant requested. It is not error for the trial court to refuse to submit a mitigating circumstance proffered by defendant when that circumstance is subsumed into another mitigating circumstance which is submitted to the jury. No credible evidence supported the proposed circumstance that defendant had been abused physically and emotionally as a child.

Am Jur 2d, Criminal Law §§ 598, 599.

34. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing prosecutor's argument—not biblically based

There was no error in a first-degree murder capital sentencing hearing where defendant contended that the State's closing arguments urged the jury to find defendant guilty based on fear and unreasoned prejudice rather than upon the evidence presented. Although defendant contended that the bulk of the closing argument was a sermon telling the jury that the capital punishment statute was a statute of punishment enacted by a government ordained by God, the prosecutor's argument clearly informed the jury that it was to make its sentencing decision based upon N.C.G.S. § 15A-2000, not the Bible.

Am Jur 2d, Trial §§ 554, 567 et seq.

35. Criminal Law § 446 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—community pressure

Although a defendant in a first-degree murder sentencing hearing interprets a portion of the prosecutor's argument as informing the jury that it should respond to community pressure and impose the death penalty, the arguments were proper and merely informed the jury that its verdict would send a message to the people of the county that this murder was deserving of the death penalty, the highest penalty available.

Am Jur 2d, Trial §§ 567-569.

36. Criminal Law § 448 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—characteristics of victim

A defendant in a first-degree murder sentencing hearing did not object at trial to the prosecutor's argument that the jury should return a sentence of death because of the characteristics of the victim and the feelings of his family and the argument does not rise to the level of gross impropriety requiring that the court act *ex mero motu*.

Am Jur 2d, Trial §§ 664 et seq.

37. Criminal Law § 454 (NCI4th)— first-degree murder—prosecutor's argument—four minute silence—time required for victim to die

The portion of a first-degree murder sentencing hearing closing argument during which the prosecutor remained silent for four minutes to illustrate the time the victim lay on the river bottom was proper.

Am Jur 2d, Trial § 554.

38. Criminal Law § 441 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—defense psychiatrist paid

A reference in the prosecutor's closing argument in a first-degree murder sentencing hearing to defendant's expert witness as a "paid psychiatrist" was not objected to at trial and did not translate into an argument that the witness would testify to anything for money, but simply stated the fact that the witness was paid.

Am Jur 2d, Trial § 695.

39. Criminal Law § 432 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—characterizations of defendant

References in a prosecutor's closing argument in a first degree murder sentencing hearing to defendant as "Jason," "Freddie Kruger," and "that devil" were not improper.

Am Jur 2d, Trial § 566.

40. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument

The prosecutor in a first-degree murder sentencing hearing did not improperly suggest to the jury in his closing argument that defendant was not entitled to constitutional protections when the prosecutor noted that the victim and his mother (who was assaulted) had no lawyer, no jury, no bailiff, no judge, and no legal rights. The prosecutor merely argued that defendant, as judge, jury, and executioner, single-handedly sealed the victim's fate. Moreover, the prosecutor did not attack defendant's right to counsel when he mentioned that defendant conferred with his attorneys and his psychiatrist before relating his version of events on the day of the murder, but merely argued from the psychiatrist's report that defendant was reluctant to talk about the murder until he was reassured by his counsel and psychiatrist and asked rhetorically why defendant was nervous.

Am Jur 2d, Trial §§ 664-666.

41. Criminal Law § 456 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—personal responsibility

The jury in a first-degree murder sentencing hearing could not have understood the prosecutor's argument that "we're the masters of our destiny and we are responsible for the consequences of our actions" to relieve the jury of the responsibility to recommend a sentence, especially when the argument contained no reference to the defendant's right to appeal the jury's sentencing recommendation.

Am Jur 2d, Trial §§ 572, 574.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities. 5 ALR3d 974.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by

jury is subject to review or correction by other authorities. 10 ALR5th 700.

42. Evidence and Witnesses § 2750.1 (NCI4th)— first-degree murder—sentencing hearing—cross-examination—door opened on direct

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the prosecutor elicited improper character evidence regarding defendant through defendant's brother, but the door had been opened on direct examination through questions regarding specific instances of misconduct toward defendant's wives. Although the court sustained defendant's objections to many of the questions and the prosecutor persisted in some lines of improper questioning, it cannot be said that there is a reasonable possibility that the outcome of the trial would have been different had the questions not been propounded.

Am Jur 2d, Witnesses §§ 717, 718.

43. Criminal Law § 1316 (NCI4th)— first-degree murder—sentencing hearing—cross-examination of defense expert—defendant's criminal activity and drug abuse

There was no abuse of discretion in a first-degree murder prosecution where defendant contended that there was prosecutorial misconduct in the cross-examination of his psychiatrist. The prosecutor was placed in the position of having to rebut the existence of the no significant history of criminal activity mitigator and the cross-examination questions were relevant.

Am Jur 2d, Expert and Opinion Evidence §§ 88, 89.

44. Criminal Law § 1329 (NCI4th)— first-degree murder—sentencing—issues three and four—yes or no answers

The trial court did not err in a first-degree murder sentencing hearing by refusing to allow defendant to argue that the unanimity requirement extends only to a recommendation of death and not life. Defendant is incorrect in arguing that when the State fails to convince all twelve jurors that the answers to Issues Three and Four are "yes," then the jury must automatically answer those issues "no." The unanimity requirement extends to both "yes" and "no" answers to Issues Three and Four. Should the jurors be unable to reach the required unanimity through deliberations after a reasonable time, jurors must so report to the presiding

trial judge, who will impose a mandatory sentence of life. It remains the law that the jury is not to be informed that its failure to reach a sentencing recommendation results in mandatory imposition of life imprisonment.

Am Jur 2d, Trial § 572.

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

The trial court instruction in a first-degree murder sentencing hearing with respect to nonstatutory mitigating circumstances did not offend the Eighth and Fourteenth Amendments by allowing the jury to refuse to consider mitigating evidence.

Am Jur 2d, Trial § 1165.

46. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—instructions—value of mitigating circumstances

The trial court did not err in a first-degree murder capital sentencing hearing by not intervening *ex mero motu* to prevent the prosecutor from arguing that the jurors could consider a particular mitigator, both statutory and nonstatutory, if the evidence supported it and the jurors deemed it to have mitigating value. The prosecutor here was referring only to nonstatutory mitigating circumstances and not to all mitigating circumstances and the argument was proper as to nonstatutory mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599.

47. Criminal Law § 1347 (NCI4th)— first-degree murder—capital sentencing—aggravating circumstance—course of conduct—evidence sufficient

The evidence was sufficient in a first-degree murder capital sentencing hearing to warrant the submission of the course of conduct aggravating circumstance to the jury where the evidence showed that defendant undertook a violent course of conduct over a narrow period of two days in which he physically battered the three-year-old victim's mother, threatened to kill her and ultimately tried to drown her on the very day he succeeded in drowning the victim, and, as he held the mother's head under water, he asked if she could see the child and told her that she would join him.

Am Jur 2d, Criminal Law §§ 598, 599.

48. Criminal Law § 1343 (NCI4th)— first-degree murder—capital sentencing—especially heinous atrocious or cruel aggravating circumstance—instructions not unconstitutionally vague

The trial court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance in a first-degree murder capital sentencing hearing were not unconstitutionally vague.

Am Jur 2d, Criminal Law §§ 598, 599.

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

A sentence of death was not disproportionate in a first-degree murder prosecution where the aggravating circumstances found by the jury were supported by the evidence and the jury did not sentence defendant while under the influence of passion, prejudice, or any other arbitrary factor. This case involves the murder of a young child; the aggravating circumstances found by the jury included the especially heinous, atrocious, or cruel and the course of conduct aggravating circumstances; defendant was found guilty of first-degree murder based upon the theories of premeditation and deliberation and the felony murder rule; the jury found each of the three aggravating circumstances to exist; and, although the court submitted four statutory mitigating circumstances, five nonstatutory mitigating circumstances and the catchall circumstance, no juror found any of these mitigating circumstances to exist. The victim was vulnerable; his injuries were painful and he endured a period of panic; and he remained conscious and aware for several minutes before his death. Based upon the characteristics of this defendant and the crime he committed, the sentence of death was neither excessive nor disproportionate.

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 by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Brown (Frank R.), J., at the 11 January 1993 Criminal Session of Superior Court, Northampton County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his assault with a deadly weapon with intent to kill inflicting serious injury conviction was allowed by this Court on 6 July 1994. Heard in the Supreme Court 13 March 1995.

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

North Carolina Resource Center, Office of the Appellate Defender, by Henderson Hill, Director, and Gretchen Engel, Staff Attorney, for defendant-appellant.

LAKE, Justice.

Defendant was indicted on 20 July 1992 for the offenses of assault with a deadly weapon with intent to kill inflicting serious injury and the first-degree murder of three-year-old James Christopher Bainbridge. Defendant was tried capitally, and the jury returned verdicts of guilty of assault with a deadly weapon with intent to kill inflicting serious injury and guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death. Judge Brown sentenced defendant to death for the murder conviction and a consecutive term of twenty years' imprisonment for the assault conviction. For the reasons stated herein, we find no prejudicial error in the guilt/innocence and sentencing phases, and we conclude the sentence of death is not disproportionate.

Alice Bainbridge, who was separated from her husband, lived with their three-year-old son, Christopher Bainbridge, and the defendant in Roanoke Rapids. On 23 May 1992, Alice, Christopher and defendant left for Richmond, Virginia, sometime around 10:00 a.m. to visit defendant's son. Alice drove, and Christopher was buckled in his car seat in the back. During the drive, defendant began hitting Alice in the face, knocking her glasses off, and calling her foul names. The second time Alice's glasses were knocked off, they fell out of the car window and landed on the highway. Alice was forced to pull over and retrieve them. After picking the glasses up from the road, Alice returned to the car and heard Christopher scream. The physical

assault against Alice continued. Alice had put a drink for the child in a cooler, and every time Christopher tried to get the drink out of the cooler, defendant would hit and curse him. Defendant also threw an almost full beer can at Christopher and threatened to kill him. Once they reached defendant's son's house in Richmond, defendant kicked Alice in the face and took the car keys out of the ignition. He then went inside, leaving Alice and the child stranded in the car. When defendant's son's wife came outside the house and saw Alice's bloody nose and swollen lip, she threatened to call the police. Defendant made Alice drive to another house, where defendant said he had friends who would kill Alice and Christopher. No one was home. On the way back to Roanoke Rapids, defendant continued to strike Alice. Her glasses flew out of the window again, but this time defendant would not let her stop to get them. Alice drove to a welcome center, and defendant got behind the wheel because Alice could not see to drive anymore. Feeling weak, Alice slumped down in the passenger seat; defendant continually struck her on the chest to keep her awake. Alice testified the next thing she remembered was defendant parking the car at a boat landing by the Roanoke River. Defendant opened the back door of the car and got Christopher out of his car seat. Christopher let out one cry and one grunt. Defendant, holding Christopher by one hand and one foot, threw the child into the river. Alice ran to the water begging for defendant to help her. Defendant refused.

Melvin McMichael and Shirley Floyd were fishing at a spot not far from the boat ramp. They heard a splash and a cry for help. McMichael ran to investigate and saw Alice feeling around under the water. Her face was swollen, and she was bleeding from the nose and mouth. She asked McMichael to help her find her baby, but defendant told McMichael that only an old dog fell in the river and that he had his baby. Defendant then reached into the car and pulled out a puppy and began to pet it. Defendant refused McMichael's request that he move his car so McMichael could go get help. Only when McMichael drew his gun did defendant comply. McMichael and Floyd drove away and called the police. On their way back, they saw defendant quickly driving away from the boat landing, and it did not look as though Alice was in the car with him. McMichael, Floyd and Police Chief Eugene Norwood found Alice floating face-down in the river. About ten minutes after the rescue squad arrived, Christopher was discovered on the river bottom.

Alice and Christopher were transported to different hospitals. One nurse testified that Alice's face was so swollen it looked as though she had one head with a smaller head on either side of her face. She was so bruised that it was impossible to tell what race she was. Alice could not talk because she was intubated, so she mouthed to investigators that it was defendant who had attacked her and Christopher. Medical personnel pumped foul-smelling, brown water out of her lungs for several days. Alice remained in the hospital until 28 May 1992.

When Christopher arrived at the hospital, he was unresponsive and comatose. The upper part of his abdomen was red. This area increased in discoloration and swelling during the hours Christopher survived. Dr. Dale Newton testified he believed Christopher had been struck with a hard object on the upper part of his abdomen. Christopher was also hypothermic and showed signs of edema, or swelling of the brain. Christopher's condition worsened, and he was eventually declared clinically brain dead. He was maintained only on life support. Alice gave permission to discontinue life support, and the child died. In the opinion of Dr. Newton, Christopher's brain death was caused by lack of oxygen to the brain which, in turn, was caused by near-drowning.

Further evidence for the State came from Karen Tucker and Suzanne White, who testified that on 22 May 1992, the day before the murder, they, along with Alice, Christopher and defendant went to look at a trailer for rent in Gaston. Defendant had a cooler full of beer in the trunk. During the trip, defendant cursed at Alice and Christopher. On the way back from Gaston, defendant asked Alice to make a turn, and when Alice refused, he hit her on the head and jerked the steering wheel, turning the car down a road that led to a boat landing at the river. Defendant then grabbed Christopher under the arms and swung him out over the water, as the child cried. Alice noticed two fishermen in a boat watching them. One of the men said something, and defendant put Christopher down and remarked that he would do what he wanted to do later. It was at this same boat landing, the very next day, that defendant threw Christopher into the river and also tried to drown Alice.

Defendant presented no evidence during the guilt/innocence phase. During the sentencing phase, defendant presented evidence through Dr. Robert Brown, a psychiatrist, who testified that defendant had, at different times in his life, carried various diagnoses includ-

ing depression with psychosis; schizoaffective disorder; general high anxiety disorder; mixed personality disorder, some of which included antisocial features; and severe substance abuse of alcohol, cocaine and heroin. Additional facts will be discussed at later points in this opinion where pertinent.

The jury found all three aggravating circumstances submitted: (1) that this murder was committed while defendant was engaged in the commission of a kidnapping; (2) that this murder was especially heinous, atrocious, or cruel; and (3) that this murder was part of a course of conduct including the commission of other crimes of violence against other persons. The trial court submitted four statutory mitigating circumstances, five nonstatutory mitigating circumstances and the catchall circumstance. No juror found any of these mitigating circumstances to exist. The jury recommended a sentence of death, and the trial court sentenced defendant accordingly.

PRETRIAL ISSUES

Defendant begins by arguing that the trial court violated defendant's rights to effective assistance of counsel and to present a defense by denying defendant's motion for a continuance.

Just prior to the beginning of jury selection, defendant moved for a continuance. In support of his motion, defendant made numerous arguments, including that he was still in the process of obtaining certain mental health documents regarding Alice Bainbridge and that he had not been provided with allegedly exculpatory statements made by defendant to officers at the time of his arrest. Defendant argued that he was entitled to "open file" discovery from the State, and that the State was in possession of certain articles of clothing and other objects which the defendant alleged he had not been allowed to review. Defendant further argued that the State had not revealed certain investigation results concerning a hit-and-run incident apparently involving defendant, which occurred just prior to the murder. Defendant also argued that he was entitled to receive, thirty days before trial, a list of State's witnesses, and additionally, that the State must disclose the criminal histories of all its witnesses. Defendant pointed out that both attorneys for the defendant had recently completed another capital case, and that the instant case was only the second capital trial for the lead defense counsel.

In response, the State contended that defendant had previously been granted one continuance in order that pertinent documents

might be received and reviewed. The prosecutor represented to the trial court that he was only aware of one statement made by defendant, a copy of which was in defendant's possession. The State also pointed out that defense counsel had made, and kept, an appointment to review the physical evidence at the Sheriff's Department. Photographs were shown and explained to defense counsel during this meeting. Defense counsel were informed that if they wished to have any blood testing performed on the clothing, they should notify the State, but the prosecutor had heard nothing further. Regarding the hit-and-run incident, the prosecutor had given defendant the telephone number and name of the highway patrolman who investigated the incident, as well as the telephone number, name and a brief synopsis of the expected testimony of an eyewitness to the incident. The State informed the trial court that defendant had two investigators working on his case and had been given between $2,000 and $3,000 to fund an additional third investigator. The prosecutor also told the trial court that two of the investigators working on behalf of defendant had interviewed many witnesses, including Alice Bainbridge. However, during a lengthy interview with Alice, the defense investigators allegedly misrepresented themselves to Alice as working for the district attorney's office. After the interview, the investigators handed Alice their cards, and she discovered they actually worked for the defense. Defense investigators also tried to interview Karen Tucker, but Tucker refused.

Defendant now argues that because the State brought the alleged fraudulent conduct of defense investigators, in misrepresenting their identities to the State's witness, to the attention of the trial court and questioned Alice and Karen Tucker in their direct examinations during trial about the allegations, this "had the effect of rendering a substantial set of witnesses unavailable to defense counsel during the pretrial investigations." This apparently demonstrates, according to the defendant, that the trial court's denial of the motion to continue was error.

[1] Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981). When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. *Id.* Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suf-

fered prejudice as a result of the error. *State v. Branch*, 306 N.C. 101, 291 S.E.2d 263 (1982).

> It is implicit in the constitutional [guarantee] of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case.

State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977).

[2] At the outset, we simply cannot perceive how arguments to the trial court and questions posed at trial by the State during the direct examination of Alice concerning the allegations that investigators for the defense fraudulently identified themselves as working for the district attorney's office relate in any fashion to the propriety of the trial court's denial of the motion to continue. Contrary to defendant's argument, defendant was not denied access to witnesses. He was quite able, with the aid of several investigators, to interview witnesses to prepare for trial.

We conclude that defendant had adequate time to prepare his defense, and that his right to effective assistance of counsel was not violated. The record reveals that lead defense counsel was appointed to represent defendant on 26 May 1992, and co-counsel was appointed on 1 June 1992. Defendant had already been granted one continuance from the 7 December 1992 superior court term until the 11 January 1993 superior court term. Defendant had at his disposal two investigators and was granted additional funds to hire a third investigator. From the record, it is evident that defendant's counsel represented his interests vigorously. Further, the reasons defendant advanced for a second continuance were less than substantial. It appears that defendant simply wanted yet more time to prepare, and we find the trial court did not err in denying the motion to continue. This assignment of error is overruled.

[3] In his next assignment of error, defendant argues that the criminal history of the State's witnesses is exculpatory information and must be disclosed to him pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985). The trial court denied defendant's motion seeking disclosure of the criminal records of the State's witnesses, and defendant, without even alleging that witnesses for the State actually

have criminal records, now contends his rights to due process and to confront adverse witnesses were violated by the trial court's ruling.

We have previously held that "[t]he trial court is without authority to grant such a request and the failure of the court to order the disclosure of the State's witnesses' criminal records is not violative of due process." *State v. Alston*, 307 N.C. 321, 338, 298 S.E.2d 631, 643 (1983). We have also held that N.C.G.S. § 15A-903, which governs disclosure of evidence by the State, "does not grant the defendant the right to discover the names and addresses, let alone the criminal records, of the [S]tate's witnesses." *State v. Robinson*, 310 N.C. 530, 536, 313 S.E.2d 571, 575 (1984). Furthermore, we conclude that the criminal records of the State's witnesses are not material, as there is no reasonable probability that the result of the instant case would have been different had the State disclosed any criminal records of its witnesses, which may have existed, to the defendant. *See Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Because the criminal records of the State's witnesses are not material, the State was under no duty, pursuant to *Brady*, to disclose them. The trial court correctly denied defendant's motion, and this assignment of error is overruled.

Defendant contends in his next assignment of error that the trial court erred by denying defendant's motion to suppress certain statements made by him to Detective Allen Roye. Prior to jury selection, the trial court held a *voir dire* hearing on the motion. The State presented evidence through Detective Roye that on 24 May 1992, he drove to Alice Bainbridge's apartment to see defendant. When Detective Roye arrived, he found defendant, seated on a couch, handcuffed. Two officers from the Roanoke Rapids Police Department were present in the apartment. Detective Roye informed defendant that the police were investigating a serious assault, and defendant was a suspect. After escorting defendant to the patrol car, Detective Roye orally advised defendant of his *Miranda* rights. When asked if he understood each of his rights, defendant replied he did. Defendant also stated he would answer questions without a lawyer present. On the way to the Sheriff's Department in Roanoke Rapids, defendant talked about how much he enjoyed drinking. Detective Roye testified defendant wanted him to stop and get defendant a beer. Detective Roye refused. Once at the Sheriff's Department, Detective Roye took defendant to the fingerprinting room where defendant asked for, and was given, a cigarette. Detective Roye asked defendant if he remembered his rights; defendant said he did. Nevertheless, Detective Roye read defendant's *Miranda* rights again and provided him with a writ-

ten copy. Defendant once more indicated he understood his rights and executed a waiver of rights form. Detective Roye asked defendant if he was under the influence of alcoholic beverages or drugs, to which defendant responded, "Beer." Detective Roye testified that even though he believed defendant had been drinking, it was his opinion that defendant was not under the influence of alcohol.

After being told that the police were investigating the assaults of Alice and Christopher Bainbridge (Christopher was still alive at that point), defendant denied any knowledge about the assaults and signed a writing to the effect that he no longer wished to make a statement. Detective Roye began to fingerprint defendant, and when the detective took defendant's right hand, defendant exclaimed, "Ouch, take it easy." The detective noticed defendant's hand was badly swollen and cut, so Detective Roye asked, "What happened to your hand?" Defendant answered, "I hit an oak tree." The detective asked, "[What] did you hit a tree for? A tree has never hurt anybody." Defendant replied, "I should have hit her a little harder so I could really hurt my hand." Nothing further was said between the two.

Warrants were obtained for the assaults against Alice and Christopher. Detective Roye testified that when defendant was served with the warrant for assault on Alice Bainbridge, defendant stated, "This is for an assault on an oak tree." A short while later, Detective Roye learned that Christopher had died, and a warrant for first-degree murder was obtained. When this warrant was served on defendant, he said, "Well, that is good enough," and laughed.

Defendant elected to present no evidence during the *voir dire*. The trial court made findings of fact in accord with the evidence adduced at the hearing. The trial court then made the following conclusions of law: that no constitutional rights of defendant were violated; that the statements made by defendant were spontaneous and not pursuant to any kind of interrogation; that the statements were made freely, voluntarily and understandingly; and that defendant was in full understanding of his rights to remain silent and to counsel. Accordingly, the trial court overruled defendant's objection to the admission of the statements and denied defendant's motion to suppress.

Defendant's contentions under this assignment of error are threefold. First, he argues that the trial court erred when it concluded that defendant's statements on 24 May 1992 were spontaneous and not pursuant to an interrogation. Second, defendant asserts that the fail-

ure of the trial court to make a specific determination as to who reinitiated conversation after defendant indicated he no longer wished to make a statement is a fatal defect. Third, defendant argues that under the totality of the circumstances, the trial court erred in finding that, although defendant had been drinking, he was not under the influence of alcohol.

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), provides that custodial interrogation must cease when a suspect indicates he wishes to remain silent. "At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 474, 16 L. Ed. 2d at 723. The Court, however, made quite clear that the holding in *Miranda* did not affect the fact that "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Id.* at 478, 16 L. Ed. 2d at 726. The Court has defined "interrogation" as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

"The trial court's findings of fact following a *voir dire* hearing are binding on this [C]ourt when supported by competent evidence." *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). However, the trial court's conclusions of law based upon its findings are fully reviewable on appeal. *Id.* We conclude in this instance that the trial court's findings of fact are supported by the evidence, and that the conclusions of law drawn therefrom are not erroneous.

[4] Defendant contends that his statements to Detective Roye on 24 May 1992 were the result of a custodial interrogation after he had invoked his right to remain silent and that they necessarily cannot be spontaneous. While we do agree that defendant was in custody, we do not agree that after defendant invoked his Fifth Amendment right to silence, he was interrogated. The trial court's findings of fact include that after defendant signed a paper that he no longer wished to make a statement, the detective asked him nothing further at that time and began to fingerprint him. When Detective Roye took defendant's right hand, defendant exclaimed, "Ouch, take it easy." To that, Detective Roye inquired, "What happened to your hand?" And defendant replied, "I hit an oak tree." The detective asked, "[What] did you hit a tree for? A tree has never hurt anybody." Defendant replied, "I should have hit her a little harder so I could really hurt my hand."

In *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981), a police officer had an armed robbery suspect in custody. The officer's supervisor asked if he recovered a bank bag. Defendant overheard the question and said to the officer, "The bank bag is in the car." The officer responded, "What bank bag?" and defendant Porter replied, "The bag from the robbery." We held under those circumstances that the defendant's remark was a volunteered statement, and that the officer's reply did not amount to an interrogation under *Miranda*. *Id.* at 692, 281 S.E.2d at 385. In the instant case, Detective Roye had no reason to believe his questions about defendant's hand were reasonably likely to evoke an incriminating response. It was defendant who called attention to his hand, and Detective Roye simply asked what he had done to it and why defendant would want to hit an oak tree. We conclude, under these circumstances, that defendant's remarks were volunteered statements, and Detective Roye's questions did not convert the conversation into an interrogation under *Miranda*.

[5] Defendant further contends that the trial court's failure to make a specific finding of fact as to who reinitiated conversation is a fatal defect. Once a defendant invokes his right to remain silent, it must be honored scrupulously. *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313 (1975). Assuming, *arguendo*, that it was error for defendant's statements to have been admitted without an exact finding as to who reinitiated conversation, any error was harmless beyond a reasonable doubt. *See State v. Eason*, 336 N.C. 730, 445 S.E.2d 917 (1994) (because evidence of defendant's guilt was overwhelming, the trial court's failure to specifically find as fact exactly who reinitiated conversation was harmless beyond a reasonable doubt), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 661 (1995). The evidence at the *voir dire* shows that when defendant was served with a warrant for assault with a deadly weapon with intent to kill inflicting serious injury, no one spoke to him, but he nevertheless stated, "This is for an assault on an oak tree." When served with the first-degree murder warrant, defendant remarked, "Well, that is good enough." In light of these later statements, in conjunction with the eyewitness testimony of Alice and other corroborating testimony, we find any error in the admission of defendant's earlier cryptic remarks concerning an oak tree, absent the finding as to who reinitiated conversation, to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

[6] Lastly, as to pretrial issues, defendant contends the trial court erred in its finding that defendant was not under the influence of alcohol and in its conclusion of law that defendant freely, knowingly,

intelligently and voluntarily waived his rights. Detective Roye testified on *voir dire* that defendant told the detective that he was under the influence of beer. The detective stated that although he could smell beer upon defendant and believed defendant had been drinking, the detective was not of the opinion that defendant was under the influence. Further, Detective Roye testified defendant indicated he remembered the first set of *Miranda* rights given to him in the patrol car, and that he understood each of his rights. Defendant then signed a waiver of rights form. The trial court found as fact that defendant was coherent and not confused, and that although defendant had been drinking, he was not under the influence of alcohol. The trial court then concluded as a matter of law that the defendant voluntarily, knowingly and intelligently waived his rights.

According to the record, the *voir dire* hearing was held on 15 January 1993, and the trial court denied the motion to suppress on 20 January 1993. The trial court entered its order into the record on 21 January 1993, after the trial had begun. Defendant argues that in light of testimony that he had been drinking before and after the murder (from Detective Roye during *voir dire* and from others during trial before the order was entered into the record), the trial court's finding of fact that defendant was not under the influence was unsupported by the evidence, and the conclusion of law that defendant voluntarily waived his rights was error.

Upon review of the testimony, we hold that the trial court's findings of fact were based upon competent evidence and, therefore, are binding upon appeal, even in the face of conflicting evidence. "An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981). We determine whether a statement was voluntarily given based upon the totality of the circumstances. *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1987). The evidence supporting the findings of fact shows defendant was coherent and not confused. Defendant indicated he was able to understand and remember his rights. Nothing indicates defendant could not follow directions or respond appropriately to questioning. We cannot say, viewed under the totality of the circumstances, that the trial court's conclusion of law that the defendant voluntarily, knowingly and intelligently waived his rights was error. *See State v. McClure*, 280 N.C. 288, 185 S.E.2d 693 (1972) (no error in trial court's conclusion of law that defendant voluntarily made a statement when evidence showed defendant had been drinking heavily for three

weeks before the murder, and defendant could not remember either talking with police or signing a waiver of rights form).

[7] Also, under this assignment of error, in a footnote, defendant contends it was plain error for the prosecutor to elicit testimony from Detective Roye concerning defendant's invocation of his right to remain silent. Plain error is an error so basic and fundamental that justice cannot have been done. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The record reveals Detective Roye testified that defendant denied any involvement in Christopher's murder and the assault on Alice. Detective Roye testified he told defendant that he needed to get a written statement from him. At this point, the jury was taken out of the courtroom and heard no testimony concerning defendant's exercise of his right to remain silent. There is no plain error here. This assignment of error is overruled.

JURY SELECTION ISSUES

[8] Defendant contends in his next assignment of error that his right to a fair and impartial jury was violated when the trial court unreasonably restricted *voir dire* of prospective jurors regarding their ability to consider a life sentence and when the trial court excused for cause prospective jurors who allegedly could consider, but were not enthusiastic about, the death penalty.

Defendant filed a pretrial motion requesting that he be allowed to conduct a "searching and thorough *voir dire* of prospective jurors based on their ability to consider mitigating circumstances and fairly determine punishment." The trial court denied the motion. Defendant now points to prospective jurors Clayton, Burgess, Owens and Odom and argues that the trial court improperly excused each for cause since each prospective juror's answers to questions concerning the death penalty were equivocal. Defendant claims that the trial court's summary denial of his motion resulted in defense counsel refraining from questioning these jurors once the State tendered them for cause. A prospective juror may be excluded because of his views on capital punishment when those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985).

Prospective juror Clayton's *voir dire* transpired, in part, as follows:

> MR. BEARD: [A]re you saying that your feelings would substantially impair your performance of your duties as a juror in

connection with the death penalty if it got to recommending the death penalty?

MS. CLAYTON: Yes.

. . . .

THE COURT: I said if you were selected to sit on this case, are you telling us that you would be unable to follow the law of this State because of your feelings about the death penalty?

MS. CLAYTON: Yes.

Prospective juror Burgess' *voir dire* included the following:

MR. BEARD: [I]f you were satisfied beyond a reasonable doubt that the death penalty ought to be imposed, could you yourself recommend the death penalty knowing that the [c]ourt would follow your recommendation and impose the death penalty?

MS. BURGESS: I'm not really sure. I honestly don't think that I could do that.

. . . .

MR. BEARD: So regardless, based on your own personal feelings, regardless of what the circumstances would be . . . you yourself would not be able to recommend the death penalty under any circumstances?

MS. BURGESS: No, sir. I don't believe I could.

Prospective juror Owens' *voir dire* revealed the following:

MR. BEARD: Do I understand you correctly that you would not be able to recommend the death penalty based on your own personal feelings . . . ?

MS. OWENS: Yes.

MR. BEARD: Are there any circumstances because of your own personal feelings against the death penalty knowing that the [c]ourt will follow your recommendation?

M[S]. OWENS: (Nodded head from side to side.)

MR. BEARD: Can you give me a yes or no answer?

M[S]. OWENS: No.

Finally, a portion of prospective juror Odom's *voir dire* proceeded in this manner:

MR. BEARD: Again, you yourself could not recommend the death penalty based on your own personal feelings, is that right?

MS. ODOM: Yes. As far as I am concern[ed] I could not recommend the death penalty. No.

We conclude that prospective jurors Clayton, Owens and Odom were ultimately unequivocal in their responses that they could not vote to impose the death penalty. As such, these prospective jurors could not follow the law and be fair and impartial jurors. Their excusal for cause was not error. As for prospective juror Burgess, the United States Supreme Court has recognized that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.' " *Witt*, 469 U.S. at 424-25, 83 L. Ed. 2d at 852. Based on the superior vantage point of the trial court, its decision as to whether a juror's views would substantially impair the performance of his duties is to be afforded deference. *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). In light of prospective juror Burgess' *voir dire* responses that she did not believe she could vote to impose the death penalty, we cannot say the trial court abused its discretion in determining her views would substantially impair the performance of her duties as a juror.

[9] Further, defendant appears to argue that the denial of his pretrial motion to conduct a searching and thorough *voir dire* created an environment in which defendant was not permitted to rehabilitate these four prospective jurors. We fail to see how the denial of the pretrial motion impacted on defendant's desire to rehabilitate. The motion denied by the trial court regarded whether jurors could be questioned concerning mitigating evidence, not whether defendant could rehabilitate jurors. There is absolutely no evidence whatsoever in the record that defendant faced, as he contends, any sort of hostile or discourteous environment from the trial court during *voir dire* as a result of the denial of the motion, such that defendant was restrained from rehabilitating any prospective juror.

[10] We further find that the trial court did not err in denying the motion. Defendant requested he be allowed "to ask whether prospective jurors can consider as a mitigating circumstance" evidence in regard to defendant's turbulent family history and mental retardation, among others. These questions are improper, as they amount to an impermissible attempt to stake out jurors. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994) (not an abuse of discretion for the trial court to restrict defendant from asking whether a juror could "con-

sider" a specific mitigating circumstance in reaching a decision), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995). Defendant was freely permitted to ask prospective jurors whether they could follow the trial court's instructions concerning mitigating circumstances, whether they understood they could individually find mitigating circumstances to exist, and whether their support for the death penalty was so strong that they would find it difficult to follow the law and consider a sentence of life imprisonment. We conclude it was not error for the trial court to deny the motion, and that the denial did not create an environment in which defendant was unable to rehabilitate prospective jurors.

[11] Defendant further argues, under this assignment of error, that the trial court erred by refusing to excuse prospective juror Bryant for cause in that he could not fairly consider a life sentence and by restricting defendant's *voir dire* of prospective juror Bryant.

Initially, we note that our statutory law provides that in order for a defendant to seek reversal on appeal of a trial court's refusal to excuse a juror for cause, the defendant must have:

(1) Exhausted the peremptory challenges available to him;

(2) Renewed his challenge as provided in subsection (i) of this section; and

(3) Had his renewal motion denied as to the juror in question.

N.C.G.S. § 15A-1214(h) (1988). In the instant case, the record reveals defendant failed to comply with this statutory mandate. Defendant failed to object to the trial court's denial of his challenge for cause and did not seek to renew his challenge as to juror Bryant. "The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986).

Even assuming defendant properly complied with N.C.G.S. § 15A-1214(h), he would not be entitled to relief. Prospective juror Bryant indicated he believed that anyone convicted of first-degree murder should receive the death penalty. However, upon further questioning, the following transpired:

> THE COURT: The question is whether or not you can consider both penalties if we get to that stage of the trial?

MR. BRYANT: Yes, sir.

THE COURT: Are you[r] feelings so strong for the death penalty . . . that you would not consider life imprisonment for a possible sentence in the case?

MR. BRYANT: Yes, I would consider it.

MR. WARMACK: You could consider it?

MR. BRYANT: Yes, sir.

We were faced with a similar contention in *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), and held it was not error for a trial court to refuse to grant a challenge for cause, pursuant to the standard in *Witt*, against a juror who expressed during *voir dire* that every murderer should receive the death penalty, when the juror later indicated he would follow the trial court's instructions and remain open-minded regarding the appropriate sentence. *Id.* at 235, 354 S.E.2d at 450-51. Prospective juror Bryant, after initially indicating he felt first-degree murderers should receive the death penalty, stated he could consider both possible sentences and would follow the law. We follow *Quesinberry* and hold that the trial court's refusal to excuse him for cause was not error and did not violate *Witt*.

[12] Defendant also contends he was erroneously kept from asking prospective juror Bryant three questions. Even assuming it was error for the trial court to sustain objections to each of these questions, our review of the record reveals that the questions were clearly a variation of the same theme: whether prospective juror Bryant's belief in the death penalty was so strong that he could not consider life imprisonment. Defendant was allowed to make this inquiry of prospective juror Bryant, who responded he would consider a sentence of life in accordance with the law. This assignment of error is overruled.

[13] In his next assignment of error, defendant, who is white, contends the State exercised its peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . ." *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. In *Batson*, the Court overruled *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759, *reh'g denied*, 381 U.S. 921, 14 L. Ed. 2d 442 (1965), and held "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire

by relying solely on the facts concerning its selection *in his case.*" *Batson*, 476 U.S. at 95, 90 L. Ed. 2d at 87.

In *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), the Court restated the three-step process set out in *Batson* governing allegations that the State exercised its peremptory challenges in a discriminatory manner. First, defendant must make a *prima facie* showing that the State, on the basis of race, exercised its peremptory challenges. Second, if defendant makes such a showing, the burden is then upon the State to articulate race-neutral reasons for the peremptory challenges questioned. And third, the trial court must decide whether defendant has proven purposeful discrimination. *Id.* at 358-59, 114 L. Ed. 2d at 405. In this instance, we conclude the defendant has not made a *prima facie* case demonstrating that the State exercised its peremptory challenges on the basis of race.

The record reveals defendant failed to object to any of the prosecutor's peremptory challenges on the grounds they were racially based. "Defendant's failure to object to the prosecutor's challenges on this ground precludes him from raising this issue on appeal." *State v. Adams*, 335 N.C. 401, 411, 439 S.E.2d 760, 765 (1994). Even if defendant had timely objected at trial, nothing in the record before us demonstrates that the prosecutor exercised his peremptory challenges in a racially discriminatory manner. As defendant points out, it is true that the prosecutor used more peremptory challenges against blacks than whites. The prosecutor peremptorily excused ten potential jurors, seven of whom were black. During the selection of alternates, the prosecutor peremptorily excused five potential alternates, two of whom were black. Defendant argues "this numerical showing establishes a *prima facie Batson* violation." We cannot agree. We have held before that such numbers, standing alone, as they do here, are insufficient to make a *prima facie* case of racial discrimination. *See State v. Quick*, 341 N.C. 141, 459 S.E.2d 786 (1995); *State v. Beach*, 333 N.C. 733, 430 S.E.2d 248 (1993); *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (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); *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987). The jury which ultimately heard defendant's case was composed of seven blacks and five whites. We conclude, therefore, that defendant failed to carry his burden of establishing a *prima facie* case of racial discrimination in the prosecutor's exercise of peremptory challenges.

[14] Defendant further contends the prosecutor, as a matter of practice, consistently excludes blacks from jury service. Defendant cites to *State v. Spruill*, 338 N.C. 612, 452 S.E.2d 279 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 63, (1995); *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991); *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855; and *State v. Hall*, 104 N.C. App. 375, 410 S.E.2d 76 (1991), as examples of the prosecutor's alleged practice of racial discrimination in exercising peremptory strikes.[1] After carefully reviewing each case, we fail to find evidence that the prosecutor, as a matter of pattern and practice, exercised peremptory challenges in violation of the Equal Protection Clause. In *Spruill*, we held that the trial court did not err in concluding the defendant failed to establish a *prima facie* case of discriminatory use of peremptory strikes. *Spruill*, 338 N.C. at 633, 452 S.E.2d at 289. In *Smith*, we held that the defendant did establish a *prima facie* case of discriminatory use of peremptory challenges, but that the State responded with race-neutral reasons for each peremptory strike at issue. *Smith*, 328 N.C. at 126, 400 S.E.2d at 727. In *Allen*, we held that the defendant failed to make a *prima facie* showing of racial discrimination when the prosecutor accepted seven of seventeen black veniremen. *Allen*, 323 N.C. at 219, 372 S.E.2d at 862. In *Hall*, the Court of Appeals held that the trial court incorrectly considered the prosecutor's explanation for his use of peremptory strikes as relevant to whether the defendant made a *prima facie* showing of discrimination, rather than whether that showing had been rebutted. The Court of Appeals remanded for a resolution of that issue. *Hall*, 104 N.C. App. at 384, 410 S.E.2d at 81. We conclude in the instant case that defendant fails to show that the prosecutor, as a matter of practice in this case, or any other, exercised peremptory challenges on the basis of race alone. This assignment of error is overruled.

[15] In another assignment of error, defendant contends the trial court erred by denying defendant's motion to permit *voir dire* of prospective jurors concerning their attitudes on parole eligibility. We have held before that the trial court did not err by denying a defendant's motion to explore the issue of parole eligibility during jury *voir*

1. In defendant's brief on this point, defendant argues the prosecutor violated *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759 (1965), through his practice of excluding blacks from jury service. However, as we noted earlier in this opinion, *Batson* overruled *Swain*, and now a defendant may demonstrate purposeful racial discrimination in the selection of a petit jury by relying only upon the facts regarding jury selection in that individual defendant's case. *Batson*, 476 U.S. at 95, 90 L. Ed. 2d at 87.

dire. See State v. Spruill, 338 N.C. 612, 452 S.E.2d 279; *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252; *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Defendant fails to advance a convincing reason why this Court should depart from its repeated holding on this issue. This assignment of error is overruled.

[16] In his next assignment of error, defendant argues that the trial court erred in permitting the prosecutor to ask prospective jurors the following question: "[O]ne of the witnesses who may testify in this particular case . . . may be a little slow . . . would you hold that against him in any way in this case?" Defendant now claims such questions impermissibly staked out prospective jurors, and as a result, he must receive a new trial. We decline to address this assignment of error, as the record reveals defendant failed to object at any time to this line of questioning. "Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal . . . ." N.C.G.S. § 15A-1446(b) (1988); *see State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988). This assignment of error is overruled.

[17] In another assignment of error, defendant argues that it was error for the trial court to permit the prosecutor to question prospective jurors about whether they would feel sympathy toward the defendant because they would be able to see him each day of the trial, but would not be able to see the victim. Defendant contends a witness' credibility is for the jury to decide, and the question was improper, as the demeanor and mental capacity of a witness are factors the jury considers in deciding witness credibility. Defendant also argues the question was an attempt to stake out jurors.

In *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712, this Court held the trial court did not abuse its discretion by allowing the State to ask potential jurors during *voir dire* whether they would feel sympathy toward the defendant, and not toward the victim, because they would see the defendant in court each day. The Court reasoned that the questions were not designed to suggest to jurors that they should disregard any sympathy they felt for the defendant, but rather, the question was to ascertain whether any jurors would feel sympathy for the defendant based solely upon his presence in court. *Id.* at 128-29, 400 S.E.2d at 729. We conclude that *Smith* governs our decision here, and we additionally hold that in the instant case, the question posed by the State was not an attempt to "elicit in advance what the juror's

decision will be under a certain state of the evidence or upon a given state of facts." *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). Accordingly, the question did not stake out jurors. This assignment of error is overruled.

GUILT/INNOCENCE PHASE ISSUES

[18] Next, defendant argues his Sixth Amendment right to counsel was violated when the trial court failed to resolve an alleged conflict of interest in defense counsel representing both defendant and a State's witness.

Just before the State called Eugene Norwood as a witness, the prosecutor, outside the presence of the jury, informed the trial court that one of defendant's attorneys, Mr. A. Jackson Warmack, had previously represented witness Norwood concerning a charge in district court. That charge was appealed, and at the time of defendant Walls' trial, witness Norwood's case was pending in superior court. The prosecutor told the trial court that he had questioned witness Norwood about the situation. Witness Norwood indicated he thought Mr. Warmack still represented him. The prosecutor stated that he wanted to bring this matter to the attention of the trial court so that any possible ethical conflict could be resolved before witness Norwood testified.

Mr. Warmack represented to the trial court that he "believe[d] [he] made a limited appearance" on behalf of witness Norwood in district court, but that since that time, Mr. Warmack had no further contact with witness Norwood, either concerning Norwood's case or defendant Walls' case. Mr. Warmack also told the trial court that he would not preclude himself from representing witness Norwood in the future. In Mr. Warmack's opinion, he felt there was no ethical conflict because "they're not codefendants[;] [t]here's nothing that's related about their cases." Finally, Mr. Warmack informed the trial court that Mr. Thomas Harvey, defendant's other counsel, would conduct the cross-examination of witness Norwood. The trial court then allowed Norwood to be called as a witness for the State, and Mr. Harvey conducted the cross-examination.

The United States Supreme Court, in *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333 (1980), determined that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest

adversely affected his lawyer's performance." *Id.* at 348, 64 L. Ed. 2d at 346-47. The factual situation in *Cuyler* involved three criminal defendants who were represented by the same two lawyers. Each defendant was tried separately; two were acquitted, and one, who rested his defense without putting on any evidence, was found guilty. The convicted defendant alleged his retained counsel had a conflict of interest because counsel also represented the other two defendants. The Court held "that the possibility of conflict is insufficient to impugn a criminal conviction." *Id.* at 350, 64 L. Ed. 2d at 348. While there apparently have been no previous cases before this Court identical to this specific fact situation, we believe that the principles in *Cuyler*, concerning the burden to be carried by a defendant in alleging that a conflict of interest violated his rights under the Sixth Amendment, are applicable to this case.

Defendant contends, in essence, that the trial court committed error *per se* by not inquiring "into these multiple representations." However, the Court in *Cuyler* noted that defense counsel are often in the best position to recognize when dual representation presents a conflict of interest; thus, they shoulder an ethical obligation to avoid conflicting representations and to promptly inform the trial court when a conflict arises. *Id.* at 346-47, 64 L. Ed. 2d at 345-46. "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347, 64 L. Ed. 2d at 346. In the present case, the record reveals it was the prosecutor, not defense counsel, who alerted the trial court to the possibility of a conflict of interest. The trial court did inquire of Mr. Warmack as to the nature of his professional relationship with witness Norwood. Mr. Warmack told the trial court he thought he made only a limited appearance on behalf of witness Norwood and had no further contact with him after that point. Based on these circumstances, we find that the trial court did conduct an adequate inquiry into the alleged conflict of interest. "Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* at 346-47, 64 L. Ed. 2d at 345-46. We do not perceive, based on the record before us, any special circumstances requiring the trial court to conduct any more extensive inquiry than the one it did conduct.

Even assuming, *arguendo*, that defense counsel did actively represent conflicting interests, defendant has not shown this Court that the alleged dual representation actually affected the adequacy of his

representation. In fact, our review of the record reveals that defendant received a quite vigorous and spirited defense. We note that co-counsel, Mr. Harvey, rather than Mr. Warmack conducted the cross-examination of witness Norwood. This fact, while not dispositive in and of itself, is significant when considered with the quality of the representation overall and the cross-examination, considering in particular whether opportunities for impeachment were ignored. The record shows that defense counsel objected to several lines of questioning during the course of witness Norwood's direct examination. Witness Norwood was then subjected to a detailed and thorough cross-examination, consuming some twenty-three pages in the transcript; witness Norwood was also recross-examined. He was questioned about the accuracy of certain photographs, his knowledge of the water levels near the boat landing and what witness McMichael had told him that McMichael had observed. Witness Norwood was also questioned about a man he encountered when he reached the boat landing, whether witness Norwood had asked the man's name and if the man had heard or seen anything relevant to the crime. Witness Norwood was not asked on cross-examination about the charges pending against him in superior court; however, we note that this area, including the exact nature of the charge and its status, was explored at the beginning of his direct examination. No ground was left for the defense to cover on this point. We cannot, from the facts before us, say that defendant's representation was affected by the alleged dual representation. Thus, we conclude that defendant has failed to carry his burden of showing that an actual conflict of interest adversely affected his lawyers' performance. This assignment of error is overruled.

[19] In his next assignment of error, defendant contends that the trial court's curtailment of the cross-examination of important prosecution witnesses deprived defendant of his right to confront the witnesses against him and his right to due process.

During the cross-examination of prosecution witness Karen Tucker, the defendant asked, "You weren't there on the day the child fell in the river, were you?" The State objected to "fell in the river," and the trial court sustained the objection. Defendant proposes that by sustaining the objection, the trial court violated its absolute duty of not commenting upon the evidence. The alleged comment upon the evidence, according to defendant, intimated to the jury that the defendant's theory that Christopher fell into the river, and was not thrown, was not valid.

A trial court "must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). However, a trial court's ruling on an objection falls far short of impermissible conduct or improper comment upon the evidence. Defendant's argument, that by simply sustaining an objection the trial court forced the jury to accept the State's theory of the case, is wholly without merit. We note that immediately before the question at issue, defendant asked Karen Tucker, "[A]ll of this that you're talking about happened on the day before the child fell in the river, right?" Tucker replied, "Yes, sir." We conclude that the trial court's singular act of sustaining an objection did not, in any perceptible or even minute way, amount to an improper comment upon the evidence.

[20] Defendant also argues the trial court placed "severe restrictions" upon defendant's cross-examination of Alice Bainbridge by sustaining objections to the following questions: "And because he [Christopher] wouldn't get near the water you didn't have to watch him as close as you might have to watch some kids when they get close to the water, right?" and, "Now, you told me that you don't remember telling Sheriff Woods on May the 30th that Buddy bought a 12-pack at Be Lo, do you remember saying . . . ?" Defendant contends that in light of the defense's theory of the case, the trial court's sustaining of the objections to these questions prevented defendant from adequately confronting the most important witness against him.

"[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); *see* N.C.G.S. § 8C-1, Rule 611 (1992). With regard to the first question defendant contends was improperly disallowed, according to the record, in a series of questions immediately prior to the question at issue, defendant elicited testimony from Alice that she could trust Christopher around the water because she knew the child was scared of the water and would not get near it. Thus, an answer to the excluded question would have been merely cumulative. With regard to the second question, defendant contends the objection was "incredibly sustained" on the grounds it was leading. We are, of course, aware that it is proper for counsel to lead a witness during cross-examination. N.C.G.S. § 8C-1, Rule 611(c). However, in propounding his question, defense counsel sought to testify himself. Once the question was properly phrased, defendant was allowed to

continue his cross-examination. We cannot say the trial court abused its discretion in sustaining objections as to these two questions.

[21] Next, defendant argues that the trial court improperly sustained the prosecutor's objections to defendant's attempt to elicit information from prosecution witness Eugene Norwood for the purpose of impeaching prosecution witness Melvin McMichael. Eugene Norwood was the police chief of Gaston, and Melvin McMichael had been a police officer in Gaston. Defendant contends it was error to sustain the objections to the following questions:

> Q. You also are aware or involved in Mr. McMichael being part of the Scotland Neck town police department, is that correct?
>
> MR. BEARD: Objection.
>
> THE COURT: Sustained.
>
> Q. [Y]ou also had several other serious complaints about Mr. McMichael's police work while he worked for the Town of Gaston before he was fired?
>
> MR. BEARD: Objection.
>
> THE COURT: Sustained.
>
> Q. During the course of Mr. McMichael's employment, a situation arose including the certification by the State agency that gave you and the Town Board reasons to not be able to depend on Mr. McMichael['s] truthfulness and honesty, did you [sic]?
>
> MR. BEARD: Objection.
>
> THE COURT: Sustained.

Upon reviewing the questions posited by defendant, we conclude the trial court properly sustained the objections. As a general rule of evidence, the character of a witness cannot be proven by specific acts. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 97 (4th ed. 1993). N.C.G.S. § 8C-1, Rule 608(b) provides that specific instances of the conduct of a witness may not be proved by extrinsic evidence. However, in the discretion of the trial court, such instances of conduct may be inquired into on cross-examination when the specific instances of conduct relate to "the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." N.C.G.S. § 8C-1, Rule 608(b). In other words, the impeachment questions propounded

by defendant, as clearly extrinsic evidence, would be proper only if Norwood had testified, in some fashion, as to McMichael's character for truthfulness or untruthfulness. We have reviewed the record and find no instance in which Norwood testified, in any way, concerning McMichael's character. Accordingly, the questions were impermissible, and the trial court correctly sustained the State's objections. The trial court did not abuse its discretion in disallowing these improper impeachment questions. This assignment of error is without merit and is overruled.

[22] Defendant argues in his next assignment of error that the trial court erred by submitting kidnapping as a charge to the jury. Defendant contends there was insufficient evidence to prove that Alice and Christopher Bainbridge were unlawfully removed or confined so that defendant could inflict serious bodily injury upon them.

N.C.G.S. § 14-39 provides that kidnapping occurs when any person unlawfully confines, restrains or removes from one place to another a person under the age of sixteen, absent parental consent, for the purpose of committing serious bodily harm or terrorizing such person. N.C.G.S. § 14-39(a)(3) (1993). Defendant proposes that a kidnapping charge should not have been submitted to the jury, as there was insufficient evidence to show defendant "confined" Christopher because Alice allegedly consented to both of them being in the car with defendant.

It is well settled that a defendant who, by force or threat of violence, takes a person against his will and carries him away is guilty of kidnapping. *State v. Penley*, 277 N.C. 704, 178 S.E.2d 490 (1971). "[K]idnapping is frequently committed by threats and intimidation . . . sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will . . . ." *State v. Bruce*, 268 N.C. 174, 182, 150 S.E.2d 216, 223 (1966). A motion to dismiss should be denied when the State presents substantial evidence of each element of the crime charged. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). "Substantial evidence" means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). In evaluating a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Benson*, 331 N.C. 537,

417 S.E.2d 756 (1992). We conclude the trial court did not err in submitting the underlying felony of kidnapping to the jury.

Taken in the light most favorable to the State, the evidence in the present case tends to show that during the ride to Richmond, defendant began to hit Alice in the face so severely that her glasses fell out of the car window. She pulled the car over to get the glasses from the highway, and as she walked back to the car, she heard Christopher scream out. Defendant hit, cursed and threatened to kill Christopher every time the child tried to get his drink out of the cooler. Defendant threw a beer can at the child. Alice heard Christopher grunt when it hit him. Once in Richmond, defendant kicked Alice in the face and took the car keys so she could not escape. He then made her drive to a house where he claimed he had friends who would kill her and the child. Defendant continued his physical and verbal assaults against Alice on the return trip from Richmond while the baby screamed and cried. Finally, when Alice could no longer see to drive, she pulled up to a welcome center, and defendant took over the driving. To keep Alice conscious, defendant continually struck her in the chest.

Defendant's claim that Alice consented to being in the car with defendant because she did not take her three-year-old child and run away, on foot, from defendant in Richmond is totally without merit. Equally unconvincing is his contention that an almost unconscious Alice consented to being in the car with defendant because she did not ask for help when they stopped at the welcome center. The determination of defendant's guilt or innocence of kidnapping was a proper question for the jury. It was not error for the trial court to submit the charge to the jury. This assignment of error is overruled.

In another assignment of error, defendant argues the trial court committed prejudicial error by denying defendant's request for jury instructions on second-degree murder and voluntary intoxication. Defendant contends that because he was intoxicated, he could not formulate the specific intent to kill, and he could not premeditate or deliberate. Thus, defendant argues it was error for the trial court to refuse to submit second-degree murder. Defendant relies upon *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, *reh'g denied*, 501 U.S. 1277, 115 L. Ed. 2d 1109 (1991) and *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980), in support of his argument that not having the option of second-degree murder placed the jury in the untenable position of making a "Hobson's choice" between an outright acquittal and a guilty verdict.

[23] We first address the propriety of the trial court's denial of defendant's request for a jury instruction on voluntary intoxication.

> 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 [S]tate, 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). At the time of the murder, the evidence must show defendant's "mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Shelton*, 164 N.C. 513, 518, 79 S.E. 883, 885 (1913), *overruled on other grounds by State v. Oakes*, 249 N.C. 282, 106 S.E.2d 206 (1958). Defendant contends that testimony at trial demonstrated he was drinking the day before the murder, the day of the murder and the day after the murder. Defendant claims his cursing Alice and Christopher is evidence of his intoxication. Further, defendant told McMichael he could not move his car because he was drunk. However, the evidence shows defendant is an alcoholic, and his alcohol tolerance would be much higher than one who does not drink every day. Defendant ignores evidence showing that he was quick-witted enough to invent a lie when he told McMichael about an old dog, rather than a baby, being in the river. Defendant also successfully drove a car from the welcome center to the river and then to the defendant's brother's house. Defendant makes no claim he cannot remember his actions the day of the murder. Viewing this evidence in the light most favorable to defendant, as we must, we cannot say that defendant's "mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Id.* We conclude from the evidence that defendant has failed to carry his burden to "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." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. It was not error for the trial court to refuse to instruct the jury on voluntary intoxication.

[24] We turn now to defendant's contention that he was entitled to a jury instruction on second-degree murder.

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Leroux, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990). "Neither *Beck v. Alabama* nor *Schad v. Arizona* stands for the proposition that the lesser included offense should be more freely given in capital cases." *State v. Skipper*, 337 N.C. at 26, 446 S.E.2d at 265. First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991). Second-degree murder is the unlawful killing of another with malice, but without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979).

In this case, we conclude that each element of first-degree murder, including premeditation and deliberation, was positively supported by the evidence, and that there was no conflicting evidence. The day before Christopher was killed, defendant forced Alice to drive to the boat landing. Once there, defendant grabbed a crying Christopher and swung him out over the water. Only when two fishermen spotted defendant did he put Christopher down, remarking that he would finish what he wanted to do later. The day of the murder, defendant threatened to kill both Alice and Christopher while he physically assaulted them. Defendant drove back to the same boat landing and threw Christopher into the water. Alice pleaded for defendant to help her find the child, but he refused. Then defendant attacked Alice, telling her she was going to join Christopher. Afterward, defendant drove away from the scene to his brother's house. Because evidence of defendant's intoxication was insufficient to support an instruction on voluntary intoxication, we find that other than defendant's denial that he committed the crime, there was no evidence to negate the elements of first-degree murder. *See State v. Lambert*, 341 N.C. 36, 460 S.E.2d 123 (1995). We conclude, then, in light of the positive evidence proving each element of first-degree murder, it was not error for the trial court to deny defendant's request for an instruction on second-degree murder and to deny submission of this issue to the jury. This assignment of error is overruled.

[25] In another assignment of error, defendant argues that the trial court committed reversible error in failing to intervene *ex mero motu* and censure the State's closing argument. Defendant alleges that the State's "grossly improper closing argument" infringed upon his rights to a fair trial, due process and freedom from cruel and unusual punishment.

Defendant contends that on two occasions the prosecutor impermissibly alluded to defendant's election not to testify on his own behalf by arguing, "the defendant may try to hide behind that legal conflict of reasonable doubt," and, "Was he going back down there to rescue Chris? Naw. No. The person who could tell what happened down there, you know, he went down there to finish what he'd started. He went down there to finish what he'd started which was to kill both of them."

As a general rule, "[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). "[T]he facts in evidence and all reasonable inferences to be drawn therefrom," *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985), may be properly argued to the jury by counsel for each side. A prosecutor may not, however, refer to a defendant's election not to testify. *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993). We note that defendant failed to object to either statement. In the absence of an objection, "the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). In the instant case, we conclude the prosecutor's statements do not constitute references to defendant's constitutional right to remain silent. Thus, the arguments were not so grossly improper that the trial court was required to intervene *ex mero motu*.

The State argues, and we agree, that the first statement was simply one part of the prosecutor's anticipatory rebuttal of various issues, either legal or factual, that might be raised by the defendant during his closing argument. Indeed, as a preface to this anticipatory rebuttal, the prosecutor argued, "I can only predict what some of the things [are] that I believe they will try to do. One of the things I think they will try to say is that there's some reasonable doubt." We find that the prosecutor's argument pertaining to defendant's probable

reliance upon reasonable doubt does not, in any way, refer to the defendant's failure to testify.

As for the second comment, we find it, too, did not reference defendant's election not to testify. When viewed in the context of the entire closing argument, it is clear the comment states a fact in evidence: that defendant was present at the boat landing and was the one person alive, apart from Alice, who knew what happened that afternoon. This argument, grounded in the evidence, was not improper.

Defendant also contends the following portion of the prosecutor's closing argument improperly appealed to the sympathy of the jury:

> What does he do? Throws the boy in the water, sits there while the mama was screaming. You know, there's no love more than a mama's love for her child, for the mama sit [sic] there screaming for help—-
>
> MR. HARVEY: Objection.
>
> THE COURT: Overruled.
>
> —-for help and he sits there holding that puppy, rubbing the puppy, and smiling. Just as mean as he can be. There's nothing to be said about that. It speaks for itself.

We conclude that this argument did not appeal to the jurors for their sympathy. Rather, the argument was firmly rooted in the evidence and was simply a description, as revealed by the evidence, of defendant's and Alice's actions at the river. As such, the argument was proper. This assignment of error is overruled.

SENTENCING PHASE ISSUES

In his next assignment of error, defendant argues that his constitutional rights were violated when the trial court, during the sentencing proceeding, refused to admit allegedly relevant mitigating evidence indicating defendant did not murder Christopher Bainbridge.

The record shows that after the jury had returned its verdict of guilty, but before sentencing commenced, Elton Gillikin, Jr., contacted both the district attorney and defense counsel regarding this case. Thereafter, during the middle of the sentencing proceeding, after presenting a number of witnesses, defendant proffered the hearsay testimony of Elton Gillikin, to which the State objected. On

voir dire, Gillikin testified that in October of 1992, Alice Bainbridge came to his house with his sister-in-law, Linda Hinkle, to borrow kerosene for Alice's oil drum. Linda apparently was staying with Alice at that time. Linda introduced Alice as "the woman whose child drowned in the river." Gillikin asked Alice what had happened. According to Gillikin, Alice told him she and defendant were fighting at the boat landing when the child, who was playing by the river, fell in. While Alice was in the river looking for the child, defendant came up from behind Alice and tried to drown her. Gillikin further testified on *voir dire* that once Alice learned he was a security guard, she changed her story and told him that the defendant "thr[ew] me and my son in the river." Gillikin stated he did not come forward with his testimony earlier because he had been out of town "from sunup to sundown" for the past four and a half weeks, did not take the paper and had only learned of the trial the day before his testimony. Gillikin stated he had only met Alice that one time at his house.

The State offered the testimony of nine witnesses in rebuttal of Gillikin's testimony. The first rebuttal witness was Alice Bainbridge, who testified that she had met Elton Gillikin more than once. Gillikin and his wife had come to Alice's house to ask Linda Hinkle to baby-sit the Gillikin children. Alice also agreed, during that meeting, to drive Bonnie Gillikin to work and to pick up Bonnie's children. Later, Alice and Linda went to the Gillikins' home to get money Alice was owed. It was at this meeting that Linda referred to Alice as the woman who was thrown into the river. Alice further testified that when Linda said Alice's child was pushed into the river, Alice corrected her and said the child was thrown into the river. Linda Hinkle testified that she was dating Alice's son, and that Alice never told Linda that her child fell into the river.

Next, the State called Gillikin's wife, Bonnie, who, after being reminded numerous times she was under oath and bound to tell the truth, testified her husband was prone to bragging and "adding things." While it is clear Bonnie Gillikin did not want to embarrass her husband, she testified she had not heard Alice say that Christopher had fallen into the river. Bonnie Gillikin also testified that when Linda said the child had fallen into the river, Alice corrected her and said the child was thrown into the river. Later in her testimony, Bonnie Gillikin claimed to remember that Alice had told her the child had fallen into the river. Bonnie Gillikin told her husband she did not want to be involved in the present situation. Mrs. Gillikin testified her husband was at home during the day and worked at night. She admitted

that her husband had bought five newspapers in the past several weeks and that she had been keeping up with the trial through the newspapers.

Thereafter, the State offered the testimony of a State Bureau of Investigation agent who corroborated Mrs. Gillikin's testimony and the testimony of four others who knew Elton Gillikin as a braggart, an untruthful person and one with a tendency to exaggerate to make himself look good.

At the close of the *voir dire*, although the State withdrew its objection to the testimony, the trial court ruled that the proffered testimony of Elton Gillikin was inadmissible.

Defendant takes the position that Gillikin's testimony should have been admitted in the sentencing proceeding on essentially two grounds: first, that it was mitigating evidence relevant to sentencing, and second, that it was evidence of a prior inconsistent statement of the State's primary witness and thus admissible for the purpose of impeachment with respect to the aggravating circumstances. Defendant contends the exclusion of this testimony deprived him of his constitutional right to present evidence and to "a fair trial during his sentencing proceeding," thus entitling him to a new trial.

[26] Regarding defendant's first contention, in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), the United States Supreme Court concluded that the Eighth and Fourteenth Amendments dictate that a jury in a capital case must "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990; *accord* N.C.G.S. § 15A-2000(a)(3) (Supp. 1994); *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. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). "[H]owever, 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." *Pinch*, 306 N.C. at 19, 292 S.E.2d at 219. Specifically in this regard, *Lockett* notes that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior

record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12.

[27] Defendant first contends that the exclusion of Gillikin's testimony was error entitling defendant to a new trial on the ground it was mitigating evidence relevant to sentencing. Defendant argues (1) that evidence a person "is not even guilty of murder" is relevant to whether the State is permitted to execute that person, and (2) that this testimony was relevant as to one of the "circumstances of the offense." It is clear from this premise that defendant's thrust is that the question of guilt should be retried within the structure of the sentencing proceeding. Specifically, defendant argues in support that this Court has recognized "the potential value of residual doubt in the penalty phase of a capital trial." In fact, this Court has held the opposite, that residual doubt has no place in the sentencing phase. *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). Further, defendant's premise rides on the horns of a rather obvious dilemma when he contends on the one hand that he "is not even guilty of murder" and thus there is no offense, and on the other hand that the testimony is relevant as to one of the "circumstances of the offense."

At the outset, we agree with defendant that testimony indicating the victim "fell" into the river is relevant to whether defendant committed murder. In fact, the only relevance this proposed evidence has is whether defendant is guilty of the murder of Christopher Bainbridge. However, such a question is reserved for and properly resolved in the guilt/innocence phase, and had Gillikin elected to present himself earlier in the proceedings, his testimony would have been admissible during the guilt/innocence phase. Of course, if Gillikin's testimony had been allowed, it, as well as Gillikin's credibility, would have been subject to the challenge of the State's examination and rebuttal. In this regard, we note that once Gillikin did see fit to surface with his information, defense counsel apparently did not consider it of sufficient import to move for a mistrial, opting instead to offer this testimony at the end of defendant's sentencing evidence. When the trial court did not allow its admission at that point, no motion was made for a mistrial.

Once the jury determines at trial, as it did here, that defendant is guilty of murder in the first degree, the sole remaining consideration, at the "separate sentencing proceeding," N.C.G.S. § 15A-2000(a)(1), is

the appropriate punishment, focusing on the defendant's character or record and any of the circumstances of the offense. As stated, we do not agree that residual doubt testimony is admissible during the sentencing proceeding of a capital case. In *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765, this Court recognized that "[l]ingering or residual doubt as to the defendant's guilt does not involve the defendant's character or record, or the circumstances of the offense," *id.* at 415, 417 S.E.2d at 779, and "is not a relevant circumstance to be submitted in a capital sentencing proceeding." *Id.* Furthermore, the United States Supreme Court has stated:

> At the outset, we note that this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation. . . .
>
> . . . *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982) . . . in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin v. Lynaugh, 487 U.S. 164, 172-74, 101 L. Ed. 2d 155, 165-66, *reh'g denied*, 487 U.S. 1263, 101 L. Ed. 2d 976 (1988).

In the present case, had the trial court allowed Gillikin's testimony indicating that Christopher "fell" into the river, jurors could only have used the testimony to revisit the question of defendant's guilt. Such reconsideration of any residual doubt a juror might have privately harbored as to defendant's guilt is irrelevant in determining defendant's appropriate sentence, as it does not bear upon an aspect of defendant's character, record or the circumstances of the offense. Accordingly, we conclude Gillikin's proposed testimony, assuming it was credible, was not relevant and admissible under the auspices of allowing jurors to reconsider any guilt phase residual doubts.

[28] Defendant further proposes Gillikin's testimony was admissible during sentencing for the purpose of impeaching the aggravating circumstances. Defendant's premise for this argument appears to be that the State's eyewitness to the murder, Alice Bainbridge, gave "wildly divergent" testimony concerning the events at the boat landing.

A review of the record reveals Alice testified upon direct examination that Christopher gave out one cry and one grunt when defendant pulled him from the car. According to Alice, she begged defendant to stop and tried to scream but could not until after defendant hurled the child into the river. This is not "wildly divergent" from McMichael's and Floyd's testimony that they were unaware things had gone awry until they, fishing at the bottom of the hill, heard a splash. We also note that both Alice and Christopher's teacher testified that the child was terrified of water and would not go near it. Further, there remains uncontradicted testimony from Alice, McMichael and Floyd that as Alice begged McMichael and Floyd to help her find her baby, defendant steadfastly told them only an old dog, and not a baby, was in the river. Defendant then smiled, pulled a puppy out of the car, and began to pet it. When McMichael asked defendant to move his car so he and Floyd could go get help, defendant refused, complying only when McMichael pulled out his gun. Also, the evidence showed defendant threatened to kill Christopher and Alice numerous times, and only the day before the murder, at the same site, defendant was seen by fishermen swinging a crying Christopher out over the water. Defendant put Christopher down and remarked he would do what he wanted to do later. The testimony of Alice was corroborated by a number of other witnesses.

Even assuming Gillikin's testimony was credible, and bearing in mind that evidentiary flexibility is encouraged in capital cases, we nevertheless conclude that the proposed testimony does not impeach Alice's credibility with regard to any of the three aggravating circumstances submitted to and found by the jury. The question of whether the victim "fell" into the river has no bearing on whether the determined "capital felony" or "murder" was committed during the commission of a kidnapping; or was especially heinous, atrocious, or cruel; or was part of a course of conduct including the commission of other crimes of violence. Rather, as stated, this question has relevance only to whether a murder was committed in the first place, not as to *how* it was committed.

[29] Lastly, defendant argues that his position is similar to, and supported by, the United States Supreme Court's ruling in *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979) (per curiam). There, the Supreme Court held that the hearsay testimony of a witness for the State in a prior, separate trial of a codefendant, regarding that codefendant's private confession that he was the actual shooter, was relevant at the sentencing phase, and its exclusion violated the Due

Process Clause. In arriving at its decision, the Court placed reliance upon several circumstances concerning the confession that enhanced its reliability:

> Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

Green, 442 U.S. at 97, 60 L. Ed. 2d at 741. We find that *Green* is of no help to defendant in the case *sub judice*. First and foremost, the State never relied upon Gillikin's testimony, and this case is fundamentally different factually from *Green*. There is no codefendant or other person charged with defendant in this case. Either defendant did the actual killing, and in the manner described by witnesses, or he did not. There are no comparisons of culpability here. Further, Gillikin's proposed testimony lacks any of the indicia of reliability as found in the testimony in *Green*. Gillikin's wife, Bonnie, though an obviously reluctant witness, testified she never heard Alice say her child fell into the river. Bonnie admitted her husband was often wont to exaggerate and fabricate stories in order to make himself look good. She stated her husband had purchased five newspapers during the course of the trial, and that the two had been keeping up with the trial via the newspapers.

In light of the irrelevance of the proposed testimony, its dubious nature and the manner in which it was dealt with by defense counsel, we conclude the exclusion of this evidence was not error. This assignment of error is overruled.

[30] By another assignment of error, defendant contends the trial court erred in submitting the statutory mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1), as the evidence presented did not support the circumstance.

In ruling upon whether to submit N.C.G.S. § 15A-2000(f)(1), 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). "Once the trial court determines that the jury could reasonably find a mitigating circumstance, [N.C.G.S. § 15A-2000(b)] affords the trial court no discretion in submitting the mitigating circumstance." *State v. Lloyd*, 321 N.C. 301, 312, 364 S.E.2d 316, 323, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991). Once the mitigating circumstance is submitted to the jury, it is for the jury to decide whether the criminal activity of the particular defendant is significant or not. *Wilson*, 322 N.C. at 143, 367 S.E.2d at 604. We define "significant" within the context of N.C.G.S. § 15A-2000(f)(1) as likely to have influence or effect upon the determination by the jury of its recommended sentence. *See Wilson*, 322 N.C. at 147, 367 S.E.2d at 609 (Martin, J., concurring).

According to the record, defendant has convictions for driving while impaired, assault, communicating threats and escape, nonfelonious breaking and entering, receiving stolen goods, possessing a stolen vehicle and possessing stolen credit cards. What is of import in the trial court's determination of whether a rational juror could reasonably find this mitigating circumstance to exist is the nature and age of the prior criminal activities, rather than the mere number of criminal activities. *See State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). We have upheld the submission of this particular mitigating circumstance based upon criminal activities equal to or greater than the defendant's in the present case. *See State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991) (a reasonable juror could have found that defendant had no significant history of prior criminal activity where defendant had been convicted of the misdemeanor offenses of receiving stolen goods, larceny, worthless check and assault with a deadly weapon, and his criminal activity included possession of marijuana, theft and possession of a sawed-off shotgun); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (prejudicial error for the trial court to refuse to submit the no significant history of prior criminal activity mitigator where defendant had a prior felony conviction for second-degree kidnapping and had other criminal activity including storage of illegal drugs and participation in the theft of farm machinery). In light of our precedent and the nature of defendant's criminal activities, we cannot say the trial court erred in determining that a rational juror could rea-

sonably find defendant's prior criminal activities not to be significant. This assignment of error is overruled.

[31] In a related assignment of error, defendant argues that by submitting the no significant previous criminal activity mitigating circumstance over defendant's objection, the trial court placed an untenable burden upon defendant to prove the existence of a mitigating circumstance unsupported by the evidence. Defendant contends it thus appeared to the jury that he had "pled guilty to an element which was necessary to the imposition of the death sentence" and trivialized the remaining mitigating circumstances. Defendant further implies that the prosecutor sought the submission of this mitigating circumstance in order to surreptitiously slip a *de facto* aggravating circumstance, not contemplated by the legislature, into the sentencing proceeding.

We reiterate that the trial court has *no* discretion as to whether to submit this mitigating circumstance if evidence has been presented concerning defendant's previous criminal activity and the trial court determines a rational juror could reasonably find the previous criminal activity not significant. *See Lloyd*, 321 N.C. at 311-12, 364 S.E.2d at 323. In this case, the defendant, through his psychiatrist, elected to present evidence concerning defendant's previous criminal activities, and we have concluded that the trial court did not err in determining that a rational juror could find that those activities were not significant. Accordingly, the trial court had no discretion in submitting the mitigating circumstance in N.C.G.S. § 15A-2000(f)(1) to the jury. Once submitted, it was proper for the prosecutor to argue to the jury regarding what weight the jury should assign this mitigating circumstance. *See State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983).

[32] Defendant argues he was denied effective assistance of counsel by the submission of the mitigating circumstance in N.C.G.S. § 15A-2000(f)(1) and cites *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), as support for this proposition. However, we do not find *Harbison* applicable in this instance. First, *Harbison* applies only to the guilt/innocence phase of a trial. In *Harbison*, this Court held that in cases in which the defendant's counsel, without consent from the defendant, admits defendant's guilt to the jury, the defendant has been denied effective assistance of counsel, *per se* in violation of the Sixth Amendment. *Id.* at 180, 337 S.E.2d at 507-08. In the present case,

defendant appears to contend that because defense counsel argued to the jury with respect to this mitigating circumstance, "I'm not going to ask you to answer that 'yes' ladies and gentlemen," this equates to admitting defendant's guilt, in that jurors may have considered this mitigating circumstance as an aggravating circumstance. This argument appears to overlook the fact that defendant himself first placed the evidence of his criminal record before the jury, in the form of testimony about his prior convictions, thus establishing his prior guilt. We therefore conclude that defense counsel's statement that the jury would not be asked to find this mitigator is not tantamount to admitting defendant's guilt before a jury against defendant's wishes and did not violate defendant's Sixth Amendment right to effective assistance of counsel. Further, it does not follow, as defendant suggests, that because no juror found any of the submitted mitigating circumstances to exist, the jurors used the no significant previous criminal activity mitigator as a *de facto* aggravator. Indeed, the Issues and Recommendation form itself precludes such a result. This assignment of error is overruled.

[33] In another assignment of error, defendant contends the trial court erred by either refusing to submit or combining the mitigating circumstances defendant requested. According to defendant, this ran afoul of the Eighth and Fourteenth Amendments and violated North Carolina law which requires a trial court to submit, for the jury's consideration, any circumstance requested by defendant which is supported by the evidence and is capable of being understood as mitigating by a reasonable juror. Specifically, defendant points to twelve mitigating circumstances he requested be submitted to the jury and contends that each circumstance was so distinct that it warranted separate submission to the jury.[2]

2. Defendant argues the following mitigating circumstances should have been separately submitted to the jury: (1) defendant was suffering from a mental condition that was insufficient to constitute a defense, but significantly reduced his culpability for the offense; (2) defendant was suffering from a physical condition that was insufficient to constitute a defense, but significantly reduced his culpability for the offense; (3) defendant's mother was diagnosed with schizophrenia, catatonic type, in 1954; (4) defendant's mother was institutionalized four times during the defendant's childhood, each time for more than a year at a time; (5) defendant was unsupervised much of the time, and consequently, his school attendance was poor; (6) defendant only obtained an eighth grade education; (7) defendant began drinking alcohol when he was fifteen or sixteen years old in response to his environment and the stress he was under; (8) defendant was raised in an abusive family situation in which violence was used to discipline family members; (9) defendant did poorly in school from the first grade on, dropping out of school before the eighth grade; (10) defendant was a chronic abuser of alcohol and/or drugs on 23 May 1992 and had consumed some quantity of alcohol

This Court held "[t]he refusal of a trial judge to submit proposed circumstances separately and independently is not error." *Skipper*, 337 N.C. at 55, 446 S.E.2d at 282. It is not error for a trial court to refuse to submit a mitigating circumstance proffered by defendant when that circumstance is subsumed into another mitigating circumstance which is submitted to the jury. *See State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). Defendant argues that proposed circumstances three, four, five and twelve should have been submitted because "evidence of familial pathology is mitigating." The record reveals that the trial court did submit the following nonstatutory mitigating circumstance: defendant's mother was largely absent from the home during his childhood due to mental illness. We conclude that defendant's proposed circumstances three, four and five are subsumed within the circumstance the trial court submitted to the jury. Further, the fact that defendant's alleged mental illnesses are hereditary is not mitigating; rather, what is potentially mitigating is the fact of their existence. This mitigating aspect of defendant's character was presented to the jury through the following submitted circumstances: the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, on several occasions defendant has sought mental health-care, and the catchall circumstance.

Defendant argues that proposed circumstances five, six and nine should have been submitted because although the trial court did submit that "defendant's school attendance was poor and he obtained only an eighth grade education," this encompassed only the bare fact that defendant had poor school attendance while leaving out the mitigating evidence that it was defendant's lack of supervision which contributed to his school absences. We conclude that defendant's proposed circumstances were subsumed in the circumstance submitted to the jury. Further, the record does not reveal evidence that defendant was unsupervised most of the time. Defendant's sister testified that as children, they lived with their grandparents during school holidays, and that they "had a pretty good childhood."

Defendant further contends proposed circumstances one, two, seven, ten and eleven should have been submitted to the jury because

and/or drugs at that time; (11) defendant suffered from a personality disorder with paranoid, narcissistic and schizotypal features at the time of the commission of the crime; and (12) defendant's mental condition is a hereditary result of his mother's chronic undifferentiated schizophrenia.

these circumstances reflect the facts which explain defendant's problems with drinking and his diminished capacity. However, the trial court did submit the following circumstances: the murder was committed while defendant was under the influence of a mental or emotional disturbance, defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, defendant's problems with alcohol are longstanding and chronic, virtually all of the defendant's troubles with the law have been related to alcohol use, and defendant has sought mental-health care on several occasions. We conclude, here again, that defendant's proposed circumstances were subsumed into the circumstances actually submitted to the jury.

Finally, defendant argues that proposed circumstance eight should have been submitted, as it was supported by Dr. Brown's testimony at sentencing. According to the record, Dr. Brown testified it was his "understanding that [defendant] was abused as a child emotionally and physically." However, the record reveals that no one, including defendant's sister and brother, testified that physical violence was used to discipline family members. In light of Dr. Brown's qualified answer, and the lack of other supporting testimony from those in a position to have personal knowledge, we conclude that no credible evidence supported the submission of this proposed circumstance.

In sum, we conclude the trial court did not err in tailoring defendant's proposed mitigating circumstances to the evidence presented at the sentencing phase. This assignment of error is without merit and is overruled.

[34] In his next assignment of error, defendant argues, for a variety of reasons, that the State's closing arguments during sentencing urged the jury to find defendant guilty based on fear and unreasoned prejudice, not upon the evidence presented.

First, defendant contends that the bulk of the State's closing argument was a sermon "clearly [telling] the jury that North Carolina's capital punishment statute was a statute of judgment enacted by a government 'ordained by God.' " Defendant objected to this line of argument, and on appeal, defendant points out that this is a case of first impression because in other capital cases in which error has been assigned to biblical arguments, no timely objection was made at trial. Thus, this Court reviewed such arguments to determine whether they amounted to such gross impropriety as to require the trial court

to intervene *ex mero motu*. *See 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*, 505 U.S. 1226, 120 L. Ed. 2d 913 (1992); *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). "[T]his Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, *e.g.*, *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, and it has found biblical arguments to fall within permissible margins more often than not." *Artis*, 325 N.C. at 331, 384 S.E.2d at 500. However:

> This Court has in the past disapproved of prosecutorial arguments that made improper use of religious sentiment. *See, e.g.*, *State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20 (1984) (argument that the power of public officials is ordained by God and to resist them is to resist God disapproved); *State v. Oliver*, 309 N.C. 326, 359, 307 S.E.2d 304, 326 (1983) (indicating the impropriety in arguing that the death penalty is divinely inspired).

State v. Ingle, 336 N.C. 617, 648, 445 S.E.2d 880, 896 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995).

We have reviewed the prosecutor's argument in its entirety and note that the prosecutor argued to the jury, "We're talking about the powers of government. And I'm not saying, well, that we're trying this case by Biblical law because we're not. We are trying this [case] by man's law, North Carolina statutes." Inasmuch as the prosecutor's argument clearly informed the jury that it was to make its sentencing decision based upon N.C.G.S. § 15A-2000, and not the Bible, we conclude the argument was not improper.

[35] Second, defendant argues the prosecutor blatantly appealed to the sympathy and passion of the jurors by telling them to "send a thunderous message to anybody who would think about committing such a wicked, evil, heinous act in the borders of the county" and that this crime was a "senseless, merciless, heartless murder." This overt play to the jurors' sympathies, according to defendant, continued when the prosecutor argued, "If this [murder] is not . . . sufficiently substantial to call for the imposition of the death penalty, ladies and gentlemen, we might as well forget it and go home and never call another jury to come back up here to look at another . . . death

penalty [case] again." Defendant interprets these arguments as tantamount to informing the jury that it should respond to community pressure and impose the death penalty. We disagree with defendant's interpretation.

In *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995), this Court held that a prosecutor's argument to jurors that they "are the voice" and "the conscience of the community" was proper and did not ask jurors to render a verdict based upon public sentiment. In this instance, despite defendant's urging, we do not perceive that the prosecutor's words relayed to the jury that it should buckle under the pressure of the community and impose death. This Court has also held that it is proper during closing arguments "for the prosecutor to ask for the highest degree of conviction and the most severe punishment available." *State v. Olson*, 330 N.C. 557, 568, 411 S.E.2d 592, 598 (1992). We conclude that the prosecutor's arguments were proper and merely reminded the jury that its verdict would send a message to the people of Northampton County, and that this murder was deserving of the death penalty, the highest punishment available.

[36] Third, defendant contends the prosecutor improperly argued to the jury that it should return a sentence of death because of the characteristics of the victim and the feelings of his family. Defendant apparently finds offense in the prosecutor's reference to Christopher as a "little, bitty boy" and that Christopher "wanted to live, . . . appreciated the little things in life . . . [and] loved to play." Defendant apparently did not hear this argument in the context he would now like it to be heard since he failed to object. As this argument was rooted in the evidence, it was proper and did not require the trial court to intervene *ex mero motu*. Defendant also contends Christopher's age was used as a reason to impose the death penalty when the prosecutor quoted from the Bible that "whoso shall offend one of these little ones . . . it were better for him that a millstone were hanged around his neck, and that he were drowned in the depth of the sea." Here again, defendant failed to object at trial, and we find this argument fails to rise to the level of gross impropriety requiring the trial court to censor the argument *ex mero motu*.

[37] Defendant further contends that the prosecutor reached the "nadir of [his] blatant appeals to [the] passion and prejudice" of the jury when in arguing the existence of the especially heinous, atrocious, or cruel aggravating circumstance, the prosecutor reminded

the jury that Christopher lay on the river bottom, conscious, for four minutes, and then the prosecutor said, "I'm not going to say anything for four minutes. Just think about it. This is especially, heinous, atrocious and cruel. (Silence)." Defendant's objection, apparently only made after some two minutes of silence, was overruled by the trial court. In a strikingly similar case, this Court found an argument, during which the prosecutor clocked a four-minute long pause and asked jurors to hold their breath as long as they could to better understand manual strangulation and how long four minutes is during that context, to be neither improper nor prejudicial. *Artis*, 325 N.C. at 323-24, 384 S.E.2d at 496-97. This Court reasoned that during the sentencing phase of a capital trial, as opposed to the guilt phase, the emphasis is upon the nature of the offense and the character of the defendant. As such, the prosecutor's argument was held to be within the bounds of propriety. *Id.* In this instance, we find *Artis* controlling of this issue and conclude the prosecutor's argument, made in the context of the sentencing phase of a capital trial, was proper.

[38] Fourth, defendant contends the prosecutor improperly attacked the integrity of defendant's expert witness by referring to him as a "paid psychiatrist." We note that defendant apparently heard nothing prejudicial in this reference, as he did not object at trial. Further, we simply fail to perceive how a reference to defendant's expert witness as a "paid psychiatrist" translates, as defendant would have it, into an argument that the witness would testify to anything for money. Rather, the prosecutor simply stated the fact that the witness was paid. This is proper. *See State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994) (proper to cross-examine a witness concerning his status as a paid witness and to argue to the jury the importance of the testimony from the State's perspective), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995).

[39] Fifth, defendant contends the prosecutor denigrated defendant by referring to him as the horror movie characters "Jason" and "Freddie Kruger" and as "that devil." However, taken in the context in which it was made, the prosecutor did not call defendant "Jason" or "Freddie Kruger." Rather, the prosecutor argued to the jury that this case was "about *Friday the 13th* and Jason . . . [i]t ain't about no *Casablanca*[, it's about] Freddie Kruger and nightmares." Such an argument was not improper. As for defendant's claim that he was characterized as a "devil," again, in the context in which it was made, the prosecutor merely was emphasizing that defendant was not like the angel in the poem *Little Boy Blue*, which he had just read to the

jury. *See State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992) (prosecutor's argument that "when you try the devil, you have to go to Hell to find your witnesses" was not a characterization of the defendant as a devil).

[40] Defendant next contends that the prosecutor improperly suggested to the jury that defendant was not entitled to constitutional protections when the prosecutor noted that Alice and Christopher had no lawyer, no jury, no bailiff, no judge and no legal rights. We do not read into the prosecutor's argument that it was an attack on defendant's exercise of his constitutional rights. The prosecutor merely argued to the jury that defendant, as judge, jury and executioner, single-handedly decided Christopher's fate.

Defendant also proposes that the prosecutor improperly attacked defendant's right to counsel when he mentioned that defendant conferred with his attorneys and his psychiatrist before defendant related his version of the incidents the day of the murder. Again, when taken in context, we conclude the argument failed to impinge upon defendant's right to counsel. Rather, the prosecutor merely argued from Dr. Brown's report that defendant was reluctant to talk about the murder until he was reassured by his counsel and psychiatrist. The prosecutor then rhetorically asked jurors, "Why was [defendant] nervous? Why was he paranoid?"

[41] Finally, defendant contends that when the prosecutor argued to the jury that "by signing that issue sheet, you are not signing [defendant's] death warrant," the prosecutor violated *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), in which the United States Supreme Court held that a prosecutor's argument that the jury need not worry about making mistakes in imposing the death penalty because an appellate court would review its decision violated the Eighth Amendment by diminishing the jury's sense of responsibility and contributing to an unreliable death sentence. In the present case, according to the record, the comment to which defendant assigns error was made during an argument that "[we]'re the master of our destiny [and] we are responsible for the consequences of our actions." The thrust of the prosecutor's argument was not that the jury's decision was not final, but rather, that it was the defendant, who by choosing his course of actions, signed his own death warrant. We also note that the prosecutor argued to the jury, "As you already know, whatever you recommend will be what the defendant gets." The jury could not have understood the prosecutor's argument to

mean it was relieved of the responsibility to recommend a sentence in this case, especially when the argument contained no reference to the defendant's right to appeal the jury's sentencing recommendation. There is no *Caldwell* error here. *See State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994) (prosecutor's argument that defendant gave himself the death penalty did not impermissibly diminish the jury's responsibility to recommend a sentence), *reconsideration denied*, 339 N.C. 618, 453 S.E.2d 188, *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873, *reh'g denied*, —— U.S. ——, 132 L. Ed. 2d 913 (1995).

In sum, after careful review, we conclude that each of defendant's arguments under this assignment of error is without merit and is hereby overruled.

[42] By his next assignment of error, defendant asserts that without "judicial clearance," the prosecutor elicited improper character evidence regarding defendant through defendant's brother, Ronald Walls, and that the prosecutor badgered the witness and asked questions designed to put incompetent and prejudicial information before the jury.

In his brief, defendant claims that despite the fact that Ronald Walls was never asked about defendant's reputation for nonviolence, peaceableness, veracity or any other character trait, the prosecution was improperly allowed to elicit such information. However, the record reveals that during direct examination, in response to a question concerning whether Ronald had observed that defendant's behavior had changed in the past years as his alcohol consumption increased, Ronald made the following reply: "Well, Buddy [defendant] is basically a good human being; . . . he's not . . . real violent; . . . he's not really a trouble[-]maker either." Further, in response to defense counsel's question concerning whether defendant's drinking affected his life during the past few years, Ronald volunteered, "I've never drunk or sober ever saw him mistreat a child in any way. No way whatsoever . . . I've never known him to spank one of his own children or—-I know his mother-in-law was having to do it because he didn't believe in hurting a child, spanking one."

Here, we agree with the State that the door was opened through Ronald Walls' direct examination to questions on cross-examination regarding specific instances of misconduct toward defendant's wives, Alice, and Christopher. *See, e.g., State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994). Defendant further

argues that some of these questions on cross-examination rose to the level of prosecutorial misconduct requiring a new trial.

A defendant is entitled to a new trial when improper prosecutorial conduct prejudices the defendant, affecting his right to a fair trial. *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954) (persistent and flagrant violations of the rules governing cross-examination required reversal when prosecutor's questions assumed the unproven insinuations in them to be facts). However, where there is no reasonable possibility that the misconduct affected the outcome of the trial, there is no need for a reversal. *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983) (improper question regarding defendant's criminal history did not warrant new trial where, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that had the question not been asked, a different result would have been reached at trial).

We note that the trial court promptly sustained the defendant's objections to many of the questions presently at issue. While it appears the prosecutor did persist in some lines of improper questioning, we cannot say there is a reasonable possibility the outcome of the trial would have been different had the questions not been propounded. N.C.G.S. § 15A-1443(a).

[43] Under this assignment of error, defendant also argues that the prosecutorial misconduct continued with the cross-examination of Dr. Brown. Defendant cites *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994), as support for his propositions that the cross-examination was not relevant to rebut the no significant history of prior criminal activity mitigating circumstance, and that the cross-examination was not relevant to confront the basis of Dr. Brown's expert opinion under Rule of Evidence 705.

We find, however, that defendant interprets *Coffey* much broader than its actual holdings. The defendant in *Coffey* was charged in 1986 with the first-degree murder of a ten-year-old girl. The murder occurred in July 1979. At the capital sentencing proceeding, defendant presented the opinions of two mental health expert witnesses. Both experts testified that in their expert opinion, defendant suffered from pedophilia. On cross-examination, it was revealed that each doctor based his diagnosis of pedophilia, in part, upon defendant's convictions in 1974 and 1986 of indecent liberties involving children. This Court rejected the State's argument that the cross-examination concerning defendant's pedophilia conviction *in 1986* was relevant

to rebut the no significant history of criminal activity mitigating circumstance. By taking into consideration the language of the mitigator and its relation to the sentencing proceeding, this Court specifically held "that the history of prior criminal activity refers to defendant's criminal activity prior to the murder for which he is being sentenced, not prior to sentencing." *Coffey*, 336 N.C. at 417, 444 S.E.2d at 434. Because defendant's 1986 conviction did not occur prior to the murder, it was not relevant to rebut the no significant prior criminal activity mitigating circumstance. *Id.*

Turning to the instant case, defendant presents us with no argument that all, or even a portion, of his prior criminal activity occurred between the murder and sentencing. Accordingly, *Coffey* has no application to the case at bar. Earlier in this opinion, we held that based upon the nature of the offense, a rational juror could have found defendant's prior criminal activity as not significant. The prosecutor was, therefore, placed in the position of having to rebut, if possible, the existence of this mitigator. During his direct examination, Dr. Brown testified about defendant's criminal activity and drug abuse. We conclude that the cross-examination questions presently at issue were relevant to rebut the mitigator, and that, accordingly, the trial court did not abuse its sound discretion in denying defendant's motion for a mistrial based upon the cross-examinations of Ronald Walls and Dr. Brown. This assignment of error is overruled.

[44] In his next assignment of error, defendant argues in his brief that the trial court precluded him from arguing during closing arguments that if the jury failed to unanimously agree that the answer to Issue Three or Issue Four on the "Issues and Recommendation as to Punishment" form was "yes," the jury must answer those issues "no" and a life sentence would be imposed. The trial court responded that the jury had to unanimously recommend death or unanimously recommend life. However, although not succinctly stated, defendant's argument at trial as to this assignment of error actually appears to be that the unanimity requirement is limited only to a recommendation of death, and not life, and the trial court's alleged misunderstanding of the law on this point kept defendant "from making a potentially powerful argument to the jury."

We note that the transcript on this point is, at best, confusing. However, even if defendant's arguments at trial spoke more toward the issue of unanimity regarding Issues Three and Four rather than the final sentencing recommendation, he would, nonetheless, not be

entitled to relief. This Court recently addressed the issue of unanimity as to Issues Three and Four, as well as Issue One, in *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995). In *McCarver*, this Court concluded that any issue which is outcome determinative of a capitally tried defendant's sentence must be answered unanimously by the jury. This Court classified Issues Three and Four as outcome determinative. *Id.* at 390, 462 S.E.2d at 39. Thus, in the present case, defendant is incorrect in his argument that when the State fails to convince all twelve jurors that the answers to Issues Three and Four are "yes," then the jury must automatically answer those issues "no." Instead, the unanimity requirement extends to both "yes" and "no" answers to Issues Three and Four.

Further, we reasoned in *McCarver* that "[a]llowing 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.' " *Id.* at 392, 462 S.E.2d at 41 (quoting N.C.G.S. § 15A-2000(b)). Should jurors be unable to reach the required unanimity through deliberations after a reasonable time, jurors must so report to the presiding trial judge, who, according to N.C.G.S. § 15A-2000(b), will impose a mandatory sentence of life. It remains the law that the jury is not to be informed that its failure to reach a sentencing recommendation results in mandatory imposition of life imprisonment. *See McCarver*, 341 N.C. at 394, 462 S.E.2d at 42. Accordingly, we conclude that the trial court did not err by refusing to allow defendant to argue that the unanimity requirement extends only to a recommendation of death and not life. This assignment of error is overruled.

[45] By another assignment of error, defendant contends that the trial court's instruction with respect to nonstatutory mitigating circumstances offends the Eighth and Fourteenth Amendments because it allows the jury to refuse to consider mitigating evidence. This Court has consistently rejected this claim. *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252; *State v. Green*, 336 N.C. 142, 443 S.E.2d 14.

[46] Under this assignment of error, defendant additionally argues that the trial court was bound to intervene *ex mero motu* to prevent the prosecutor from arguing that with respect to all the mitigating circumstances, both statutory and nonstatutory, jurors could consider the particular mitigator if the evidence supported it and if jurors deemed it to have mitigating value. We have reviewed the context of

the prosecutor's argument and conclude that the prosecutor was not referring to all mitigating circumstances; rather, the prosecutor was referring only to the nonstatutory mitigating circumstances. We have held before that with respect to nonstatutory mitigating circumstances, jurors' first task is to determine whether a circumstance exists factually. Should they so find, jurors next determine whether the nonstatutory circumstance should be afforded any mitigating weight. This process leaves jurors free to find a nonstatutory mitigating circumstance exists in fact, but ultimately assign the circumstance no mitigating value. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14. Thus, the prosecutor's argument was proper as to nonstatutory mitigating circumstances, and the trial court had no duty to intervene *ex mero motu*. This assignment of error is overruled.

[47] By another assignment of error, defendant argues that the evidence was insufficient to support the trial court's submission of the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), and that such error deprived defendant of his rights to a fair sentencing hearing, due process of the law and freedom from cruel and unusual punishment.

Submission of the course of conduct aggravating circumstance is proper as long as there is evidence that the victim's murder and other violent crimes were part of a pattern of intentional acts establishing that in defendant's mind, there existed a plan, scheme or design involving the murder of the victim and the other crimes of violence. *See State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992). In making a determination as to whether to submit the course of conduct aggravating circumstance, the trial court considers "a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888, *on remand*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224, *reh'g denied*, — U.S. —, 131 L. Ed. 2d 879 (1995).

The evidence in this case was sufficient to warrant the submission of the course of conduct aggravating circumstance to the jury. The evidence showed that defendant undertook a violent course of

conduct, over a narrow period of two days, in which he physically battered Alice, threatened to kill her and ultimately tried to drown her—the very day he succeeded in drowning Christopher. Indeed, as defendant held Alice's head under the water, he asked if she could see Christopher and told Alice she would join the child. This assignment of error is overruled.

PRESERVATION ISSUE

[48] Defendant brings forward one assignment of error which should have been treated as a preservation issue. Defendant argues the trial court's instructions for the especially heinous, atrocious, or cruel aggravating circumstance were unconstitutionally vague. We have consistently rejected this claim, and defendant presents us with no reason upon which to reverse our earlier decisions. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994). This assignment of error is overruled.

PROPORTIONALITY

[49] Having found no error in either the guilt/innocence or sentencing phases, 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 three aggravating circumstances to the jury: that this murder was committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5); that this murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that this murder 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, N.C.G.S. § 15A-2000(e)(11). The jury found all three 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 turn now 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. 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 *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542, as those 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). 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; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

However, we find the instant case is distinguishable from each of these seven cases. We note that none of the cases in which the death penalty has been held disproportionate has involved the murder of a small child. Further, multiple aggravating circumstances were found to exist in only one of the disproportionate cases. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181.

This Court found it important, in determining the death penalty was disproportionate in *Young*, that the jury failed to find either the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), or the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11). *Young*, 312 N.C. at 691, 325 S.E.2d at 194. By contrast, in the present case, both the especially heinous, atrocious, or cruel and the course of conduct aggravating circumstances were found to exist by the jury.

Further, in only two of the cases where this Court has held the death penalty to be disproportionate was the especially heinous, atrocious, or cruel circumstance found by the jury. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. However, the present case is not similar to either *Stokes* or *Bondurant*. In the instant case, defendant grabbed a three-year-old child by a hand and a foot and hurled the child into the river. The defendant then stood on dry land, while he smiled and petted a puppy, and refused to help rescue the child. Further, evidence shows that the child would have remained conscious, underwater, for a period of approximately four minutes, during which time panic and struggle would ensue.

Finally, only one case involved the course of conduct aggravating circumstance, *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713. The instant case is distinguishable, as the jury in *Rogers* found only one aggravating circumstance—course of conduct.

In the present case, defendant was found guilty of first-degree murder based upon the theories of premeditation and deliberation and the felony murder rule. The jury found each of the three aggravating circumstances to exist. Although the trial court submitted four statutory mitigating circumstances, five nonstatutory mitigating circumstances and the catchall circumstance, no juror found any of these mitigating circumstances to exist.

We note that the death penalty has been upheld as proportionate in many cases in which the heinous, atrocious, or cruel aggravating circumstance has been found to exist by the jury. *Artis*, 325 N.C. at 341, 384 S.E.2d at 506. While this fact is certainly not dispositive, it does serve as an indication that the sentence of death in the present case is not disproportionate. We also consider it most important that this case involves the murder of a very young child. This Court weighs such a factor heavily against this adult defendant, as we have stated before that murders of small children, as well as teenagers, "particularly [shock] the conscience." *Artis*, 325 N.C. at 344, 384 S.E.2d at 508.[3] Indeed, we agree with the State that this murder exhibits a degree of depravity not commonly seen before this Court.

We feel it appropriate to compare this case, in terms of the prolonged terror and panic suffered by the victim, to those cases currently within the pool in which the victim was murdered by strangulation.

3. We are aware *Artis* is, at this time, no longer in the proportionality pool. However, the principle remains the same.

In *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412, we upheld the death penalty where the defendant sexually assaulted, raped, beat, stabbed and strangled the victim, a small woman, until she was dead. Testimony showed it could have taken several minutes for the victim to die from strangulation. *Id.* at 63, 449 S.E.2d at 449. The jury found the existence of six aggravating circumstances, two of which were found by the jury in the present case: that the murder was especially heinous, atrocious, or cruel, and that the murder was part of a course of conduct in which defendant engaged in the commission of crimes of violence against other persons.

In *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994), the victim was strangled to death after defendant raped and sexually assaulted her. This victim would also have taken several minutes to die from strangulation. *Id.* at 373, 444 S.E.2d at 909. The jury found three aggravating circumstances to exist: that the murder was committed while defendant was engaged in the commission of a first-degree rape, first-degree sexual offense, first-degree kidnapping and common-law robbery; that the murder was especially heinous, atrocious, or cruel; and that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

We conclude that this case is similar to the murders in *Moseley* and *Sexton*. The victims were vulnerable, whether by age, size or other circumstances; their injuries were either painful, or the victims endured a period of panic; and for several minutes before their deaths, the victims remained conscious and aware. Thus, based upon the characteristics of this defendant and the crime he committed, we are convinced the sentence of death was neither excessive nor disproportionate.

We conclude, therefore, that defendant received a fair trial, free from prejudicial error. Further, after comparing this case to similar cases in which the death penalty was imposed, 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.

Justice WHICHARD concurring in the result in part.

I do not agree with the statement in the opinion for the Court that

defendant is incorrect in his argument that when the State fails to convince all twelve jurors that the answers to Issues Three and

Four are "yes," then the jury must automatically answer those issues "no." Instead, the unanimity requirement extends to both "yes" and "no" answers to Issues Three and Four.

State v. Walls, 342 N.C. 1, 68, 463 S.E.2d 738, 774 (1995). For the reasons stated in Justice Frye's dissenting-in-part opinion in *State v. McCarver*, the case upon which the opinion for the Court relies, I would hold the defendant's proffered argument correct. *See State v. McCarver*, 341 N.C. 364, 409-16, 462 S.E.2d 25, 51-55 (1995) (Frye, J., concurring in part and dissenting in part).

In the total context presented, however, I do not believe there is any serious possibility that the trial court's refusal to allow defendant to make the argument in question had any 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. MARCUS REYMOND ROBINSON

No. 411A94

(Filed 3 November 1995)

1. Homicide § 555 (NCI4th)— first-degree murder—statement that codefendant shot victim—insufficiency to negate premeditation and deliberation—instruction on second-degree murder not required

Defendant's statement to the police that he handed a sawed-off shotgun to a codefendant just before the killing and did not pull the trigger himself, which the State introduced in his first-degree murder trial, was insufficient to constitute affirmative evidence tending to negate premeditation and deliberation and require the trial court to submit second-degree murder to the jury when considered in light of evidence that defendant carried the shotgun to the scene of the killing; defendant had stated on three occasions before the murder that "he was going to burn him a whitey"; he told a friend the day after the murder that he had robbed a man the night before and shot him in the head; and defendant admitted in his statement that the victim "kept begging

and pleading for us not to hurt him, because he didn't have any money." In any event, defendant was not prejudiced by the trial court's failure to instruct on second-degree murder where the jury found defendant guilty of first-degree murder on the felony murder theory in addition to the theory of premeditation and deliberation.

Am Jur 2d, Homicide §§ 41-53, 482-502.

2. Homicide § 497 (NCI4th)— felony murder—redundant instructions—harmless error

To the extent that the trial court's instructions on the elements of felony murder may have required redundant findings by the jury before it rendered a guilty verdict when the trial court instructed that the State must prove that defendant killed the victim with a deadly weapon while committing or attempting to commit robbery with a firearm and that defendant's act was a proximate cause of the victim's death, they amounted to error favorable to defendant or, at worst, harmless error.

Am Jur 2d, Trial §§ 1080-1084.

3. Homicide § 727 (NCI4th)— first-degree murder—premeditation and deliberation and felony murder—no merger of felony

Where defendant was convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony did not merge with the murder conviction, and the trial court did not err by failing to arrest judgment on the underlying felony.

Am Jur 2d, Homicide §§ 46, 72.

4. Constitutional Law § 189 (NCI4th)— armed robbery and larceny—separate takings—sentences not double jeopardy

The armed robbery of a murder victim and larceny of the victim's automobile were separate takings rather than a continuous taking, and defendant's right against double jeopardy was not violated by sentences for both armed robbery and larceny, where defendant took the victim's wallet after the victim was shot; defendant and a codefendant left the murder scene and went to a park where they divided the money and other contents of the wallet; after throwing the wallet away, they walked around the neigh-

borhood; and they then returned to the victim's automobile and drove it around.

Am Jur 2d, Criminal Law § 279; Robbery § 2.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

5. Criminal Law § 793 (NCI4th)— acting in concert—premeditated and deliberate murder—instruction omitting specific intent—no plain error

In a prosecution for first-degree murder on theories of premeditation and deliberation and felony murder, any error in the trial court's instruction on acting in concert which allegedly permitted the jury to convict defendant of premeditated and deliberate murder without finding that he possessed the specific intent to commit the crime if the jury found that defendant and his codefendant acted with a common purpose to commit robbery and the victim was killed did not amount to plain error in light of the court's other instructions.

Am Jur 2d, Homicide §§ 482-486, 498-501; Trial § 723.

6. Criminal Law § 1339 (NCI4th)— aggravating circumstances—engaged in kidnapping and robbery—no improper double counting

Defendant was not the victim of improper "double counting" by the trial court's submission as aggravating circumstances that the capital felony was committed while defendant was engaged in a robbery and also while defendant was engaged in a kidnapping where the State was not required to rely on precisely the same evidence to establish these two aggravating circumstances. Further, since defendant was convicted of first-degree murder upon both the theory of premeditation and deliberation and the theory of felony murder, submission of the underlying felony as an aggravating circumstance was proper.

Am Jur 2d, Criminal Law § 598; Homicide § 554.

7. Criminal Law § 413 (NCI4th)— capital sentencing—opening and closing arguments

The trial court did not err by refusing to allow defense counsel to open and close final jury arguments in a capital sentencing proceeding since N.C.G.S. § 15A-2000(a)(4) gives a capital

defendant the right to make only the final argument in the penalty phase.

Am Jur 2d, Trial §§ 495, 496, 514, 549.

8. Criminal Law § 1344 (NCI4th)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—sufficiency of evidence

The evidence in a capital sentencing proceeding was sufficient to show that the murder was physically agonizing or otherwise dehumanizing to the victim so as to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury where defendant admitted in his statement to the police that the victim "kept begging and pleading for us not to hurt him," and defendant did not show remorse after the murder but instead robbed the victim of his wallet. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598, 599.

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

9. Criminal Law § 1318 (NCI4th); Homicide § 697 (NCI4th)— capital sentencing—Enmund issue—applicability only to felony murder

The rule in *Enmund v. Florida*, 458 U.S. 782 (1982), applies only in cases in which defendant was convicted of first-degree murder on the felony murder theory. Therefore, the trial court did not err by failing to require the jury in a capital sentencing proceeding to make a factual determination of defendant's state of mind concerning the murder where the jury convicted defendant of first-degree murder upon the theory of premeditation and deliberation in addition to the felony murder theory.

Am Jur 2d, Homicide §§ 552 et seq.; Trial § 1441.

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.

10. 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 was convicted under theories of premeditation and deliberation and felony murder; the jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that it was committed while defendant was engaged in the commission of or an attempt to commit armed robbery and first-degree kidnapping; defendant was twenty-one years old at the time of the murder; defendant indicated in his statement to the police that he intended to rob someone the night of the murder; defendant also stated on three occasions prior to the murder that "he was going to burn him a whitey"; and defendant made no effort to assist the victim but took the victim's wallet and car immediately after the victim was shot.

Am Jur 2d, Homicide § 556.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Johnson (E. Lynn), J., on 5 August 1994, in Superior Court, Cumberland County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 11 September 1995.

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

James R. Parish for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was tried capitally upon an indictment charging him with the first-degree murder of Erik Tornblom, first-degree kidnapping, robbery with a dangerous weapon, felonious larceny, possession of a weapon of mass destruction, and possession of a stolen vehicle. Defendant pled guilty to all of the charges but the charge of first-degree murder. Prayer for judgment was continued as to the charges to which defendant had pled guilty, and defendant was tried for first-degree murder. The jury returned a verdict finding defendant guilty of first-degree murder on both the theory of felony murder and the theory of premeditation and deliberation. Following a separate

capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The trial court, as required by law in light of the jury's recommendation, sentenced defendant to death for the first-degree murder. At the conclusion of a sentencing hearing held pursuant to the Fair Sentencing Act, the trial court arrested judgment for the offense of possession of a stolen vehicle and entered judgments sentencing defendant to consecutive terms of imprisonment for the remaining offenses to which he had pled guilty.

Defendant appeals to this Court as a matter of right from the judgment and sentence of death imposed for first-degree murder. We allowed his motion to bypass the Court of Appeals on his appeal of the judgments entered for the other offenses. For the reasons set forth in this opinion, we conclude defendant received a fair trial, free of prejudicial error, and that the sentence of death for first-degree murder is not disproportionate in this case.

The State presented evidence at trial tending to show that on the morning of 21 July 1991, Erik Tornblom did not return home from Chi Chi's restaurant, where he was employed. Tornblom was discovered dead later that day, having died from a gunshot wound to his face. A witness testified at trial that he observed a black male drive Tornblom's gray four-door Honda to the location where it was later recovered, get out of the vehicle and wipe off the steering wheel and door handle. The black male, whom the witness identified as Roderick Williams, was thereafter arrested and named defendant as the person involved with him in the murder of Tornblom.

After initially denying any involvement in the murder, defendant admitted to police that he and Williams had watched Erik Tornblom enter a store. While Tornblom was inside, defendant pulled out a sawed-off shotgun he had concealed in his clothes and handed it to Williams. After Tornblom returned, Williams asked for a ride. As soon as defendant and Williams entered the car, Williams put the gun to the back of Tornblom's neck and forced him to drive in the direction that defendant and Williams demanded. In his statement to police, defendant stated that "[t]he boy kept begging and pleading for us not to hurt him, because he didn't have any money." Williams and defendant directed the victim to a side street, where he was told to lie down. Williams then shot Tornblom in the face. Before leaving the scene, defendant took Tornblom's wallet and split the twenty-seven dollars therein with Williams.

The State also presented evidence at trial that defendant told his aunt two days prior to the murder that "he was going to burn him a whitey." Defendant repeated this statement three times. Another witness testified that the day after the murder, defendant told the witness that he had robbed a white man the night before and had shot him in the head.

Additional evidence is discussed at other points in this opinion where it is helpful to an understanding of the issues presented.

[1] By an assignment of error, defendant argues that the trial court committed error in refusing to instruct the jury on second-degree murder. Although defendant concedes the State presented sufficient evidence for the trial court to instruct the jury on first-degree murder, he argues that sufficient evidence was introduced tending to negate premeditation and deliberation to require the submission of second-degree murder as a lesser included offense.

Whether the trial court must instruct on second-degree murder when defendant is tried for the greater felony of first-degree murder on the theory of premeditation and deliberation is to be determined by a review of all of the evidence presented at trial. If the evidence is sufficient to fully satisfy the State's burden of proof as to each element of first-degree murder, including premeditation and deliberation, and "there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder." *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). In other words, defendant must present some affirmative evidence to support a verdict of second-degree murder before the trial court is required to instruct the jury on that lesser included offense. *State v. Hickey*, 317 N.C. 457, 470, 346 S.E.2d 646, 655 (1986).

In the statement he gave to police, defendant maintained that Williams shot Tornblom. Defendant argues that his statement, which the State introduced at trial, sufficiently negated premeditation and deliberation to constitute evidence from which the jury could find him guilty of second-degree murder. We disagree.

The evidence presented at trial did not tend to negate premeditation and deliberation. It tended to show that defendant carried to the scene of the killing the sawed-off shotgun used to murder Tornblom.

Defendant had stated on three occasions before the murder that "he was going to burn him a whitey." He told a friend the day after the murder that he had robbed a man the night before and shot him in the head. In addition, defendant admitted in his statement that Tornblom "kept begging and pleading for us not to hurt him, because he didn't have any money." When considered in light of such evidence, defendant's statement that he handed the gun to Williams just before the killing and did not pull the trigger himself is wholly insufficient to constitute affirmative evidence tending to negate premeditation and deliberation.

Even assuming *arguendo* that defendant did present evidence tending to negate premeditation and deliberation, defendant was not prejudiced by the trial court's failure to instruct on second-degree murder. The jury found defendant guilty of first-degree murder on the felony murder theory in addition to the theory of premeditation and deliberation. Therefore, any error the trial court may have committed in failing to instruct the jury on second-degree murder does not entitle defendant to a new trial. *State v. Phipps*, 331 N.C. 427, 459, 418 S.E.2d 178, 195 (1992). Defendant's assignment of error is without merit.

[2] In his next assignment of error, defendant argues that the trial court erroneously instructed the jury on the elements of felony murder. The trial court read the instruction that defendant contends is error verbatim from the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 206.14 (1994). Defendant concedes that he did not object to the instruction at trial. Therefore, our review is limited to a review for plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). To constitute plain error, an error in the trial court's instruction must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Defendant specifically complains that in its instructions concerning felony murder, the trial court instructed in pertinent part as follows:

> I further charge that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove three things beyond a reasonable doubt.

> First, that the defendant committed or attempted to commit robbery with a firearm.
>
> . . . .
>
> Second, that while committing or attempting to commit robbery with a firearm the defendant killed the victim with a deadly weapon.
>
> And third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Defendant argues in his brief before this Court that the trial court's instructions were erroneous because they

> essentially merged the second and third instructions so that they were almost a redundancy. In the second element the jury was asked to find that while committing or attempting to commit the crime of robbery the defendant killed the victim with a deadly weapon. The third element instructed the jury to find that the killing of the victim was the proximate cause of his death. This merger of the essential elements created a redundancy that actually lessened the State's burden of proof.

We do not find defendant's reasoning persuasive in this regard. Instead, we conclude that to the extent the instructions may have erroneously required redundant findings by the jury before it rendered a guilty verdict, they amounted to error favorable to defendant or, at worst, harmless error. Certainly, requiring the jury to find the same fact twice before convicting defendant did not amount to plain error. This assignment of error is without merit.

[3] Defendant also assigns as error the trial court's failure to arrest judgment for either robbery with a dangerous weapon or for first-degree kidnapping. Defendant argues that the crimes here were so "interwoven" that "the robbery with a dangerous weapon became the underlying felony for murder and murder became an elemental crime of kidnapping." Defendant's argument fails, however, because the jury returned a verdict finding him guilty of first-degree murder based on both premeditation and deliberation and the felony murder theory. As we have held on numerous occasions, "where defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence

thereon." *State v. Bell*, 338 N.C. 363, 394, 450 S.E.2d 710, 727 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 861 (1995); *see also State v. Rannels*, 333 N.C. 644, 664-65, 430 S.E.2d 254, 265 (1993); *State v. Artis*, 325 N.C. 278, 322-23, 384 S.E.2d 470, 495 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). This assignment of error is without merit.

[4] By another assignment of error, defendant contends the trial court violated his right against double jeopardy by sentencing him for both robbery with a dangerous weapon and felonious larceny. Defendant pled guilty to the armed robbery of Erik Tornblom, by taking his wallet and the contents therein, and to the felonious larceny of Tornblom's automobile. Defendant argues that these events constituted a continuous taking, or a single offense, immediately after the homicide. From this premise, defendant argues that the continuous taking cannot support sentences to both offenses without violating his constitutional right to be free from double jeopardy under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. *See State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988) (holding that larceny is a lesser included offense of armed robbery).

We recently addressed this subject in *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994), a case with facts similar to the facts presented in the case *sub judice*. In *Barton*, the defendant and his accomplices shot and killed the victim, took his wallet, fled the murder scene in his automobile and subsequently took a firearm from the glove compartment of the car. Defendant was convicted and sentenced for both robbery with a dangerous weapon and larceny of a firearm. Holding that principles of double jeopardy were not violated, we stated that "the armed robbery of the victim—resulting in the taking of his wallet and automobile—and the subsequent larceny of the victim's firearm from his automobile constituted separate takings for double jeopardy purposes." *Id.* at 746, 441 S.E.2d at 309. Defendant argues *Barton* is not dispositive, however, because in that case the taking of the wallet and the automobile formed the basis for the robbery charge, while the larceny charge was supported by the taking of the firearm from the glove compartment.

Even assuming *arguendo* that *Barton* is distinguishable, the larceny of the automobile in the case *sub judice* was a separate, distinct taking from the armed robbery of the victim. In his statement to

police, defendant admitted that after Williams shot the victim, defendant took the victim's wallet. Subsequently, they left the murder scene and went to a park where they divided the money and other contents of the wallet. Defendant stated that after throwing the victim's wallet away, he and Williams saw some girls and walked around the neighborhood. After these intervening events, they returned to the automobile and drove it around. The sequence of these events as described by defendant establishes that the larceny of the automobile and the armed robbery were separate takings. The trial court did not violate double jeopardy principles by sentencing defendant for both crimes. This assignment of error is without merit.

[5] Defendant also assigns as error the trial court's instruction on acting in concert. As defendant concedes, however, he did not object to the instruction given by the trial court or request additional instructions. Therefore, our review is limited to a review for plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378. We find no such error here.

In the instant case, the trial court first instructed the jury on the elements of first-degree murder on the theory of premeditation and deliberation. The trial court then gave instructions on the elements of first-degree murder on the theory of felony murder. Immediately thereafter, the trial court instructed as follows:

> Ladies and gentlemen 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 two or more persons act together with a common purpose to commit robbery with a firearm and are actually or constructively present at the time the crime is committed, each of them is held responsible for the acts of the others done in the commission of robbery with a firearm.

Defendant argues that if the jury found defendant and Williams acted with the common purpose to commit robbery and the victim was killed, this instruction erroneously permitted it to convict defendant of premeditated and deliberate murder without finding that he possessed the specific intent to commit the crime. As recently as *State v. Barton*, we analyzed this very argument concerning the same instruction on acting in concert and declined to find "plain error" as we have defined that term. *Barton*, 335 N.C. at 747, 441 S.E.2d at 310. Defendant cites no new authority that gives us reason to revisit our decision in *Barton*. Therefore, we reaffirm our conclusion in *Barton* that any error in the portions of the trial court's instruction on acting

in concert complained of did not amount to plain error. This assignment of error is without merit.

[6] Defendant next contends that his "right to be free from double counting" was violated during his capital sentencing proceeding by the trial court's having submitted as aggravating circumstances both (1) that the capital felony was committed while defendant was engaged in a robbery and (2) that the capital felony was committed while defendant was engaged in a kidnapping. N.C.G.S. § 15A-2000(e)(5) (Supp. 1994). First, we note that the State was not required to rely on precisely the same evidence to establish these two aggravating circumstances. *See State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 452 (1987). Further, we have held that when a defendant is convicted of first-degree murder upon both the theory of premeditation and deliberation and the theory of felony murder, as in the present case, submission of the underlying felony as an aggravating circumstance is proper. *State v. Gregory*, 340 N.C. 365, 412, 459 S.E.2d 638, 665 (1995); *State v. Jennings*, 333 N.C. 579, 626, 430 S.E.2d 188, 213, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993); *State v. Goodman*, 298 N.C. 1, 15, 257 S.E.2d 569, 579 (1979). Defendant simply has failed to demonstrate that he has been the victim of any improper "double counting." This assignment of error is without merit.

[7] In another assignment of error, defendant argues that the trial court erred by refusing to allow defense counsel to open and close final jury arguments in the capital sentencing proceeding. Although the trial court did allow defense counsel to give the last closing argument, defendant contends N.C.G.S. § 84-14 read in conjunction with N.C.G.S. § 15A-2000(a)(4) grants him the option of arguing first and last during closing arguments of his capital sentencing proceeding. This Court considered and rejected the same argument in *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985), and more recently in *State v. Jones*, 339 N.C. 114, 162, 451 S.E.2d 826, 852 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 873 (1995). This assignment of error is overruled.

[8] By another assignment of error, defendant argues the evidence presented at trial was insufficient to warrant the submission of the statutory aggravating circumstance that "the capital felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). It is well settled that the trial court must consider the evidence in the light most favorable to the State when determining the sufficiency of the

evidence to support this aggravating circumstance. *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). The State is entitled to every reasonable inference to be drawn from the evidence; contradictions and discrepancies are for the jury to resolve; and all evidence admitted that is favorable to the State is to be considered. *State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 355-56 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). We recently discussed several of the numerous types of murders which this Court has concluded warrant the submission of the (e)(9) aggravating circumstance. *State v. Lynch*, 340 N.C. 435, 473, 459 S.E.2d 679, 698 (1995). It suffices to note here that among the types of murders which support this aggravating circumstance are murders that are physically agonizing or otherwise dehumanizing to the victim. *Id.*

The evidence presented in the instant case, when considered in the light most favorable to the State, is sufficient to warrant the submission of the "especially heinous, atrocious, or cruel" aggravating circumstance. *See State v. Brown*, 315 N.C. 40, 67, 337 S.E.2d 808, 827-28 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 333 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Oliver*, 309 N.C. 326, 347, 307 S.E.2d 304, 319 (1983). In his statement to police, defendant admitted that "[t]he boy kept begging and pleading for us not to hurt him, because he didn't have any money." Further, defendant stated that just before the murder,

> Rod[erick Williams] told the boy to lay [sic] down. And I was fixing to go in his pockets to get his wallet. Rod told me to hold up. The white boy was looking up at Rod, because Rod was standing over him. Rod cocked the gun and pulled the trigger, shooting the boy in the face. The white boy jerked when Rod shot him, and the gun fell out of his hand.
>
> Rod was getting ready to jump in the car to leave, and I told him to hold up and got the wallet from the boy's back right-hand pocket.

In *State v. Oliver*, we concluded that the victim's imploring "please don't shoot me," and the defendant's lack of remorse in the execution of the murder were sufficient to support the submission of the (e)(9) circumstance. *Oliver*, 309 N.C. at 347, 307 S.E.2d at 319. Like the victim in *Oliver* who pleaded for his life, the victim in the instant case "kept begging and pleading for us not to hurt him." Defendant did not show remorse after the murder; instead, he robbed

the victim of his wallet. Further, in *State v. Brown*, the defendant kidnapped the victim and drove her at gunpoint to an isolated area. We noted that the victim's anxiety increased as defendant drove to the secluded site of her murder. *Brown*, 315 N.C. at 67, 337 S.E.2d at 827. Like evidence in *Brown* which gave rise to the inference that the murder was physically agonizing or otherwise dehumanizing to the victim, the evidence here gives rise to a similar inference. Thus, as in *Oliver* and *Brown*, we conclude that the evidence was sufficient to warrant the submission of the (e)(9) circumstance in the present case. This assignment of error is without merit.

[9] By another assignment of error, defendant contends the trial court violated *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), by failing to require the jury to make a factual determination of defendant's state of mind concerning the murder. In *Enmund*, the Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Id.* at 797, 73 L. Ed. 2d at 1151. Thus, an *Enmund* issue only arises when the State proceeds on a felony murder theory.

This Court applied *Enmund* for the first time in *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983). In reversing the trial court for its failure to submit an *Enmund* issue, we found no indication as to the theory upon which defendant was convicted of first-degree murder. *Id.* at 651, 304 S.E.2d at 195. We recognized, however, that *Enmund* applies only in cases in which the defendant was convicted of first-degree murder on the felony murder theory. In a footnote in *Stokes*, we speculated by *obiter dictum* as follows:

> Judicial economy requires that when first-degree murder is submitted to the jury on more than one theory at the guilt-innocence phase of the trial, the trial judge should submit the issues so as to require the jury to indicate the theory upon which [its] verdict is returned. *See State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). This requirement would, in many instances, obviate the necessity of considering the *Enmund* holding at the sentencing phase of a trial. For instance, if accused is convicted of first-degree murder on the theory of premeditated and deliberated murder, the *Enmund* holding would have no application.

Stokes, 308 N.C. at 651 n.1, 304 S.E.2d at 195 n.1. Faced with the issue here, we conclude that our theoretical speculation in the footnote to *Stokes* is consistent with *Enmund* and its progeny. Thus, because the jury convicted defendant of first-degree murder upon the theory of premeditation and deliberation in addition to the felony murder theory, no *Enmund* issue arose during defendant's separate capital sentencing proceeding. This assignment of error is without merit.

Defendant raises six additional issues that he concedes have been decided contrary to his position previously by this Court. He raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review of this case. We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

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. 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 defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining 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 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.

[10] In the present case, defendant was convicted of first-degree murder under theories of premeditation and deliberation and of felony murder. The jury found the aggravating circumstances that the murder was committed while defendant was engaged in the commission of or attempting to commit robbery with a firearm and first-degree kidnapping, 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 as mitigating circumstances that (1) defendant had

no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (2) the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7); (3) defendant at age three was a victim of Battered Child Syndrome; (4) defendant at age three sustained a head injury; (5) defendant at age three was subjected to substantial physical abuse by his natural father; (6) defendant at approximately age three was subjected to substantial mental abuse by his father; and (7) defendant suffers from one or more behavioral problems and/or mental problems.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994). 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 five of the seven cases in which this Court has found the death penalty disproportionate, the jury did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *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. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Because the jury in the present case found this statutory aggravating circumstance to exist, this case is easily distinguishable from those cases.

In the other two cases in which we have found the death penalty disproportionate, the jury did find that the murders were especially heinous, atrocious, or cruel. *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). While those cases are similar to the present case in this regard, however, both are distinguishable from the present case on other grounds.

In *State v. Stokes*, the defendant was only seventeen years old at the time of the crime and acted with an older co-felon. The evidence did not clearly establish whether defendant or his partner, who received a life sentence, acted as the ringleader. By contrast, defendant here was twenty-one at the time of the murder. In his statement to

police, he indicated that he intended to rob someone the night of the murder. The evidence also tended to show that defendant stated on at least three occasions prior to the murder that "he was going to burn him a whitey." Finally, this case is distinguishable from *Stokes* because the jury in the present case found an additional aggravating circumstance—that defendant committed the murder while engaged in the commission of or attempting to commit robbery with a dangerous weapon and kidnapping.

In *State v. Bondurant*, the defendant shot the victim but then immediately directed the driver to proceed to the emergency room of the hospital. In concluding that the death penalty was disproportionate, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the evidence in the present case tended to show that defendant made no efforts to assist the victim. In fact, in his statement to police, defendant admitted taking the victim's wallet and automobile immediately after the victim was shot. Further, the jury in the present case found as an aggravating circumstance that defendant committed the murder while engaged in the commission of or attempting to commit robbery with a firearm and kidnapping. This aggravating circumstance was not found in *Bondurant*.

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.

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 have repeatedly stated that we review all of the cases in the pool when engaging in this statutory duty, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude 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 *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), for example, the defendant kidnapped the victim at gunpoint, forced her to drive to a concealed

area, took her money, raped her, and then killed her. As in *Smith*, the jury here found that the murder was especially heinous, atrocious, or cruel and that it was committed while defendant was engaged in the commission of kidnapping. Additionally, the jury here, as in *Smith*, found defendant guilty on two theories of murder. After considering *Smith* and other similar cases in which we have found sentences of death not to be disproportionate, we conclude that this case is more similar to those cases than to the cases in which we have found the sentence of death to be disproportionate. Further, a review of our prior cases convinces us that juries have not consistently returned recommendations of life imprisonment in cases similar to the present case. *See 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). Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we hold that the defendant received a fair trial, free of prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. GEORGE McCALL RICK

No. 226PA94

(Filed 3 November 1995)

1. Criminal Law § 59 (NCI4th)— challenge to jurisdiction— State's burden of proof

When jurisdiction in a criminal prosecution is challenged, the State is required to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina.

Am Jur 2d, Criminal Law §§ 343 et seq.

Comment Note.—Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 ALR3d 988.

2. Criminal Law § 59 (NCI4th)— jurisdiction—murder in this state—sufficient evidence for jury

The evidence in a second-degree murder prosecution amounted to a *prima facie* showing of jurisdiction sufficient to carry the case to the jury and permit the jury to infer that the murder took place in this state, although the victim's body was found in a stream in South Carolina, where it tended to show that shortly after leaving work at 11:00 p.m., the victim went to her home in Mount Holly, two doors from where defendant lived, and changed from her work clothes into a dress; a few hours later, defendant was seen in the vicinity alone driving the victim's car; a breaking and entering occurred at the victim's home; acts of violence took place in the home as reflected by broken glass, dishes on the floor and the bedroom in disarray; a cement block and a rock used by the killer to sink the victim's body in the stream some fourteen miles away were taken from the victim's yard; on the morning following the killing, defendant left on his former sister-in-law's car a Bible in which he had written that he was going to kill himself; that afternoon defendant told a friend that he had done something for which the police were going to kill him; and when defendant was arrested, he told the police that the warrant would be worthless if he could prove he "killed that woman in South Carolina."

Am Jur 2d, Criminal Law §§ 343 et seq.; Evidence §§ 1125 et seq.

3. Criminal Law § 60 (NCI4th)— challenge to jurisdiction—instructions—State's failure of proof—not guilty verdict—special verdict

When jurisdiction is challenged and the trial court makes a preliminary determination that sufficient evidence exists upon which the jury could conclude beyond a reasonable doubt that the murder occurred in North Carolina, the trial court must instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the murder occurred in North Carolina, it should return a verdict of not guilty and a special verdict indicating a lack of jurisdiction.

Am Jur 2d, Criminal Law §§ 343 et seq.; Trial §§ 1077-1079.

4. Criminal Law § 60 (NCI4th)— challenge to jurisdiction—instructions—burden of proof—special verdict

In this murder prosecution in which defendant challenged the facts of jurisdiction, the trial court erred by failing to instruct the jury that the State bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating.

Am Jur 2d, Criminal Law §§ 343 et seq.; Trial §§ 1077-1079, 1835-1841.

5. Burglary and Unlawful Breakings § 74 (NCI4th)— second-degree burglary—absence of evidence of nighttime

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime.

Am Jur 2d, Burglary §§ 22, 23, 51; Evidence §§ 1464-1469.

Sufficiency of showing that burglary was committed at night. 82 ALR2d 643.

6. Rape and Allied Offenses § 122 (NCI4th)— attempted second-degree rape—insufficiency of evidence

The evidence was insufficient to support defendant's conviction of attempted second-degree rape where the sole evidence regarding a sexual act was that defendant could not be ruled out as a partial contributor to a semen stain found on a murder victim's jeans, but there was no evidence that defendant had the intent to have vaginal intercourse with the victim by force and against her will.

Am Jur 2d, Rape §§ 88 et seq.

What constitutes penetration in prosecution for rape or statutory rape. 76 ALR3d 163.

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.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished, unanimous decision of the Court of Appeals, 114 N.C.

App. 820, 444 S.E.2d 495 (1994), vacating judgment entered upon defendant's conviction of second-degree murder and reversing judgments entered upon defendant's convictions of second-degree burglary and attempted second-degree rape by Sitton, J., at the 15 March 1993 Criminal Session of Superior Court, Gaston County. Heard in the Supreme Court 11 May 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellee.

LAKE, Justice.

Defendant was indicted on 14 September 1992 for the first-degree murder and second-degree rape of Erma Carol Rose and second-degree burglary. Before trial, the State reduced the first-degree murder charge to second-degree murder, and after the State rested its case, the trial court granted defendant's motion to dismiss the charge of second-degree rape but denied defendant's motion to dismiss the lesser-included offense of attempted second-degree rape. The jury returned verdicts of guilty of second-degree murder, second-degree burglary and attempted second-degree rape. The trial court sentenced defendant to life imprisonment for the murder, forty years for the burglary and ten years for the attempted rape, all sentences to run consecutively.

Defendant appealed to the Court of Appeals, which, in a unanimous, unpublished opinion, vacated defendant's conviction for second-degree murder for lack of jurisdiction on the basis of insufficient evidence that the murder occurred in North Carolina and reversed defendant's convictions of second-degree burglary and attempted second-degree rape on the basis of insufficient evidence of either crime. This Court allowed the State's petition for writ of supersedeas and petition for discretionary review on 28 July 1994. For the reasons discussed herein, we affirm in part, reverse in part and remand for a new trial as to the charge of second-degree murder.

On 27 April 1992, an unidentified female body was found floating in Mill Creek located in York County, South Carolina, approximately two miles from the North Carolina border. The body was clothed in a tan or white dress, underpants and one white, high-heeled shoe. A

cement block and a rock, with a total weight of thirty-nine pounds, were tied to the body with a pair of red pantyhose. The York County Coroner's Office recovered the body and transported it to Rock Hill, South Carolina, and from there to Charleston to the Medical University of South Carolina. An autopsy on the remains of "Jane Doe" was performed at the Medical University by Sandra Conradi, a forensic pathologist. During the visual examination, Dr. Conradi noted that the body was moderately decomposed and covered with mud. There was no evidence of trauma, but Dr. Conradi testified that as a result of the decomposition of the body, any signs of trauma evidenced through discoloration of the skin could have been missed during examination because decomposition itself causes discoloration of the skin. From the autopsy, no cause of death was determined, but in Dr. Conradi's opinion, it was not the result of natural causes, especially in light of the cement block and rock tied around the waist of the body. Homicide was believed to be the manner of death. Based upon the appearance of the body, Dr. Conradi concluded that it had been submerged in water for several days. Dr. Conradi explained that in a decomposed body, it is often difficult to determine if the cause of death was drowning; thus, she could not rule out drowning as the cause of death in this case. Neither could she rule out strangulation as a cause of death since strangulation can result in little to no injury to the neck. On 28 April 1992, "Jane Doe" was identified, through the use of dental records, as Erma Carol Rose.

The victim's sister, Wanda White, last saw the victim on Easter Sunday when the two had Easter dinner together at White's home in Vale, North Carolina. The victim's second-shift supervisor testified the last day the victim reported to the textile mill where she was employed as a supply person was on 20 April 1992. She worked from 3:00 p.m. until 11:00 p.m. On 26 April 1992, the victim's mother, Etta Hicks, became worried about her daughter because she was not returning her telephone calls. She and another of the victim's sisters drove to the victim's yellow-framed, two-bedroom house in Mount Holly, North Carolina. The victim's house is located approximately fourteen miles from the Mill Creek Bridge, where her body was found. Mrs. Hicks noticed the victim's car, a blue Mustang, was gone. As she approached the backdoor, she saw the screen was cut, and the glass in the door was broken. Alarmed, Mrs. Hicks yelled for her other daughter, and the two entered the house looking for the victim. They saw glass all over the floor in the kitchen. There were dishes thrown on the floor as though someone had eaten food and thrown the dishes

down. The kitchen faucet was dripping slowly, and the sink was nearly overflowing. In the victim's bedroom, clothes were pulled out of the drawers, and her shoes and socks were scattered throughout the room. Mrs. Hicks stated that her daughter, the victim, was a very neat housekeeper and a very clean person. They called the police to report what they had seen, and Mrs. Hicks filed a missing person's report.

Investigators conducted a walk-through of the house and noted that the ends of the screen door where it had been cut were clean and shiny. The bedcovers on the victim's bed were missing. There was an electric clock propped up on a chair in the living room, and behind a pillow on the couch was a partially empty Mountain Dew bottle. A crushed styrofoam cup was discovered in a hallway. The house was processed for latent fingerprints, and fabric impressions were found on the backdoor and the styrofoam cup. Police photographs depicted an air conditioning unit at the back of the house and a portion of the cement block on which it rested. Along the house's foundation line, an area of dirt containing a fresh impression of an object, such as a cement block, was photographed. Another impression in the ground of an object, like a rock, was photographed along the fence in the victim's yard.

Joyce Rick, the defendant's ex-sister-in-law, was at her trailer, alone, on the morning of 21 April 1992, when a blue Mustang pulled up in her driveway.[1] The Mustang was muddy. The defendant got out of the car and came to her front door. He repeatedly knocked on her door, saying, "I know you're in there," and that he needed to talk with her because she was the only friend he had. Joyce Rick did not answer the door, but she watched defendant from the other side of the door. As defendant walked back to the car, he placed something on the hood of Joyce Rick's car and drove away through the only entrance and exit to the trailer park, in the blue Mustang. Joyce went

1. We note that during the pretrial hearing, Joyce Rick consistently testified that defendant came to her trailer the morning of 21 April 1992. This date was also corroborated through the testimony of the highway patrolman who was called to the scene of the wrecked Mustang on 21 April 1992. The trooper stated that Joyce Rick related to him that defendant had been at her trailer in that car a few hours earlier. However, during trial, Joyce Rick's testimony suggested she saw defendant driving a blue Mustang on 20 April 1992. It appears that this discrepancy resulted from an inadvertent mistake made by the State in asking Rick if she had seen the defendant at her trailer on the morning of 20 April, rather than 21 April. This is further borne out by the fact that when Joyce Rick was recalled as a witness, she testified she received a letter from defendant after he came to her trailer on 21 April.

outside to retrieve the item and found it was a small Bible. Inside, the defendant had inscribed, "I'm going to kill myself tonight." Some thirty minutes later, defendant came back to Joyce Rick's trailer and knocked on the door again. He was not in a car this time. She did not answer the door, and defendant left, on foot.

Later that day, around 3:00 p.m., as Joyce Rick left the trailer park, she saw a blue Mustang parked on the side of the road. A highway patrolman was directing traffic around the Mustang. Joyce Rick informed the trooper that the car had been driven by the defendant to her trailer a few hours earlier that day. The car was later identified by investigators as belonging to the victim. The inside of the car was muddy, and glass and a pair of white pantyhose were discovered inside the car.

The victim had been dating John Springs since she separated from her husband, Benny Rose. Springs last saw the victim on 15 April 1992. Springs participated in the investigation by giving blood samples for analysis purposes. The victim had expressed to Springs her fears of her husband, Benny Rose, and a man he worked with, a Johnny Oates or Cates, and had put up blinds in her kitchen window as a result of her fears. The victim also expressed that "she was afraid of the rapist up the street that kept walking past her house and watching her." Defendant lived with his father, two houses away from the victim. The "rapist" had walked past the victim's house and watched her on 18 April 1992, just before her disappearance.

Special Agent Brenda Bissette tested several items taken from the victim's house for the presence of blood and semen. No blood was found on any of the items, but semen was found on a pair of the victim's jeans. A DNA analysis was performed on the jeans and compared with known blood samples from John Springs and defendant. The analysis revealed that the stain on the jeans consisted of a combined DNA from more than one individual. The stain could not have come from John Springs. One of the types detected, however, was consistent with having been partially contributed by defendant. Thus, defendant could not be excluded as a contributor to the stain.

Donna Branch knew both Joyce Rick and the defendant. Branch had noticed a blue Mustang on the road in front of Joyce Rick's trailer park. The next day, defendant came to Branch's house, on foot, looking for Joyce. He asked Branch to please get in touch with Joyce for him. He left Branch's house, and a short while later, on her way to pick up her son from school, Branch saw defendant walking on the

road carrying his shoes. Branch picked defendant up and drove him to Mount Holly. Defendant began to cry in the car and told Branch he had to get out of town because he "did something and somebody's going to kill me." Branch asked what he had done, and defendant replied, "The police are going to kill me." He refused to elaborate further. When defendant was arrested, he remarked, "Say, if I can prove I killed that woman in South Carolina then that warrant you['ve] got in your hand ain't worth a s—-."

Defendant presented no evidence.

The State first argues that the Court of Appeals erred in holding that the State of North Carolina was without jurisdiction to try defendant for the second-degree murder of Erma Carol Rose. We agree.

Defendant filed a pretrial motion to dismiss the murder charge against him for lack of jurisdiction on the basis there was insufficient evidence from which a jury could find that the death of Erma Carol Rose occurred in North Carolina or that any crime was committed in North Carolina that caused the death of Erma Carol Rose. A hearing was held; Judge Donald Stephens presided. After the hearing, during which defendant elected to present no evidence, Judge Stephens concluded that the evidence presented was sufficient to establish that North Carolina had jurisdiction to proceed to trial on the charge of murder against defendant. Accordingly, Judge Stephens denied defendant's motion to dismiss for lack of jurisdiction.

After his conviction at trial, defendant appealed to the Court of Appeals, arguing that the trial court erred by denying defendant's motion to dismiss for lack of jurisdiction. The Court of Appeals agreed with defendant and vacated defendant's second-degree murder conviction. In so doing, the Court of Appeals reasoned that although evidence tended to show that defendant was seen driving a blue Mustang and that the victim drove a similar car, because there was no evidence indicating how, when or where the defendant committed the alleged second-degree murder, the evidence was insufficient to permit a jury to find beyond a reasonable doubt that the murder occurred in North Carolina. We do not concur with the Court of Appeals in this regard.

[1] "Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992).

This Court has had few occasions in which to address the issue of jurisdiction as it arises in the present situation. However, some general rules are clear. "Under the law of determining jurisdiction as between states, jurisdiction lies in this state if any of the essential acts forming the crime take place in this state." *State v. Vines*, 317 N.C. 242, 250-51, 345 S.E.2d 169, 174 (1986); *see* N.C.G.S. § 15A-134 (1988). Historically, North Carolina was among a minority of states regarding a challenge to jurisdiction as an affirmative defense with the burden of persuasion resting upon the defendant. *See State v. Golden*, 203 N.C. 440, 166 S.E. 311 (1932). In *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), however, this Court rejected that precedent and adopted instead the majority rule requiring the State, when jurisdiction is challenged, to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina. *Id.* at 494, 238 S.E.2d at 502-03; *see State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

In addressing this issue, we note that the evidence in this case is circumstantial. However, this factor alone does not mean that the evidence is deficient in any respect. "[C]ircumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may be reasonably deduced or inferred." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 80 (4th ed. 1993). We believe the circumstantial evidence presented in this case, together with the reasonable inferences which could be properly drawn therefrom, is sufficient for the jury's consideration and determination.

[2] Our review of the record reveals substantial evidence tending to show that defendant killed the victim and that he did so in North Carolina. The evidence tends to show that defendant lived two doors away from the victim. Shortly before her disappearance, the victim expressed fears of the "rapist up the street" who kept watching her. While the victim was also afraid of her estranged husband, he was eliminated by police as a suspect, as was her boyfriend. On 20 April 1992, the victim last worked at her place of employment on the second-shift and was last seen leaving work at approximately 11:00 p.m. The next morning, 21 April 1992, defendant went to Joyce Rick's trailer. He was driving a blue Mustang. After unsuccessfully begging her to let him inside so they might talk, defendant put a small Bible on Joyce Rick's car with the words, "I'm going to kill myself tonight," inscribed inside. He drove away from the trailer park in the blue Mustang, only to return, on foot, a short while later. That afternoon,

Joyce Rick drove out of the trailer park and close to the entrance saw a blue Mustang, just like the one defendant had been driving, parked on the side of the road. Joyce Rick informed the highway patrolman directing traffic around the car that defendant had driven the car to her trailer earlier that day. The car was later identified as the victim's.

From the totality of the evidence, we conclude that a jury could reasonably infer and find as fact: that the victim was killed shortly after leaving work in the morning hours of 21 April 1992; that she was killed in her home in Mount Holly, two doors from where defendant lived; and that defendant was the perpetrator. The evidence tends to show that after the victim was last seen alive, leaving work at 11:00 p.m. on 20 April 1992, she went to her home and there changed from her work clothes into social attire, including a dress and white, high-heeled shoes. A few hours later, defendant was seen in the vicinity driving the victim's car, alone. The evidence further tends to show that there was a breaking and entering at the victim's home; that acts of violence took place there, reflected by the broken glass, dishes on the floor and the bedroom in disarray; and that the cement block and rock used by the killer to sink the victim's body in Mill Creek some fourteen miles away were taken from the victim's yard. A reasonable inference from this evidence is that the victim was dead when the cement block and rock were taken from her yard and placed in her car with her body for use in its disposal. Some of the strongest evidence of defendant's guilt, aside from his proximal possession of the victim's car, comes from his own hand and mouth. He indicates some pangs of conscience with the words written inside the Bible and the comment that he had to get out of town because he had done something for which the police would kill him. His quip to police about proving he killed the victim in South Carolina to defeat the warrant for his arrest infers the motivation for attempting to hide the body two miles over the North Carolina border. We thus conclude that the evidence as a whole amounts to a *prima facie* showing of jurisdiction sufficient to carry the case to the jury and to permit the jury to infer that the murder took place in this state. Accordingly, we reverse the Court of Appeals' decision to vacate defendant's second-degree murder conviction for lack of jurisdiction.

[3] However, as the defendant points out, in *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497, this Court held that when jurisdiction is challenged, as it is here, and the trial court makes a preliminary determination that sufficient evidence exists upon which a jury could conclude beyond a reasonable doubt that the murder occurred in North

Carolina, the trial court must also instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the murder occurred in North Carolina, a verdict of not guilty should be returned. *See Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503; *see also State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (when the *locus* of the principal offense is not challenged, no instruction on the burden of proof with regard to jurisdiction is required), *cert. denied*, 457 U.S. 1138, 73 L. Ed. 2d 1356 (1982). Further, the trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction. *See Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503.

[4] In the present case, the record reveals that although the defendant challenged the facts of jurisdiction, the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating. We thus find it necessary upon this basis to remand this case for a new trial on the charge of second-degree murder.

[5] The State additionally argues that the Court of Appeals erred in holding that the trial court incorrectly denied defendant's motion to dismiss the second-degree burglary charge against him. We disagree.

"The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *State v. Barts*, 316 N.C. 666, 689, 343 S.E.2d 828, 843 (1986).

We have set forth the law governing motions to dismiss on the basis of insufficient evidence many times. In such instances, the question for the trial court to determine is whether there is substantial evidence of each element of the crime charged. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). "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, 383 (1988). Further, the evidence must be viewed in the light most favorable to the State, and the State is to receive every rea-

sonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Contradictions or discrepancies in the evidence are properly left for the jury to resolve and do not warrant dismissal. *Id.* at 99, 261 S.E.2d at 117.

The Court of Appeals noted that no evidence demonstrated the break-in occurred in the nighttime and held that the trial court erred by denying defendant's motion to dismiss. We concur.

"The law considers it to be nighttime when it is so dark that a person's face cannot be identified except by artificial light or moonlight." *State v. Lyszaj*, 314 N.C. 256, 266, 333 S.E.2d 288, 295 (1985). Our review of the evidence tends to show that the last day the victim was seen alive was 20 April 1992 when she worked on the second-shift, from 3:00 p.m. until 11:00 p.m. On 26 April 1992, the victim's mother discovered the backdoor screen had been cut, and the backdoor window had been broken. This is evidence that a break-in occurred at the victim's house. However, even drawing all inferences in favor of the State, no evidence showed defendant broke into the victim's home during the nighttime. In light of the fact that no substantial evidence exists as to the essential element that defendant perfected his breaking and entering during the nighttime, we are constrained to affirm the Court of Appeals' decision to reverse the defendant's conviction for second-degree burglary. This assignment of error is overruled.

[6] The State also argues the Court of Appeals erred in reversing defendant's conviction of attempted second-degree rape on the basis of insufficient evidence. In this instance, we disagree.

A defendant is guilty of rape in the second degree if he engages in vaginal intercourse with another person by force and against the will of the other person. N.C.G.S. § 14-27.3(a)(1) (1993). In order to prove an attempt to commit an offense, the State must show defendant intended to commit the offense and made an overt act, going beyond mere preparation, for that purpose, but falling short of the completed offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Thus, to be guilty of attempted second-degree rape, defendant must have intended to have vaginal intercourse with the victim, by force and against her will, and defendant must have taken an overt step, amounting to more than mere preparation, for this purpose, but fallen short of the completed offense.

Drawing all inferences in favor of the State, we agree with the Court of Appeals that there is no evidence, circumstantial or direct,

that defendant intended to rape the victim. There is nothing from the physical evidence gathered in this case which suggests defendant attempted to rape the victim. The sole evidence regarding a sexual act is that defendant could not be ruled out as a partial contributor to the semen stain on the victim's jeans. This evidence, standing alone as it does here, is not enough, even drawing all inferences in favor of the State, to show defendant had the intent to have vaginal intercourse with the victim by force and against her will. Thus, based upon the lack of evidence tending to show defendant attempted to rape the victim, we agree with the Court of Appeals that it was error for the trial court to submit the charge of attempted second-degree rape to the jury, and we affirm the Court of Appeals in this regard. This assignment of error is overruled.

For the foregoing reasons, the decision of the Court of Appeals is affirmed with respect to the second-degree burglary conviction and is affirmed with respect to the attempted second-degree rape conviction. The decision of the Court of Appeals is reversed with respect to jurisdiction, and the case is remanded to that court for further remand to the Superior Court, Gaston County, for a new trial on the charge of second-degree murder.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DEBORAH ROBERTSON MICKLES, INDIVIDUALLY, AND AS THE ADMINISTRATRIX OF THE ESTATE OF FRED DAVID MICKLES v. DUKE POWER COMPANY, KLEIN TOOLS, INC., AND BUCKINGHAM MANUFACTURING, INC.

No. 433PA94

(Filed 3 November 1995)

Workers' Compensation § 62 (NCI4th)— fall by power company linemen—roll-out—Woodson claim—insufficient forecast of evidence

Plaintiff's forecast of evidence was insufficient under the *Woodson* exception to the exclusive remedy provisions of the Workers' Compensation Act to overcome defendant power company's motion for summary judgment in an action to recover for the death of a lineman who fell from an electric transmission tower when one of the safety snap hooks on a pole strap disengaged from a D-ring on his body belt, a phenomenon known as

"roll-out," where it tended to show that two employees of defendant had previously been injured or killed because of roll-out in 1975 and 1990; defendant had never been cited for an OSHA violation regarding roll-out; roll-out had occurred in testing only when the pole strap became twisted, slack was introduced into the strap, and then pressure was brought to bear upon the snap hook and D-ring connections; decedent and other employees received training in guarding against roll-out and were instructed to check the snap hooks and D-rings for proper alignment before putting weight on the equipment; the equipment defendant provided complied with OSHA regulations and was equipment provided throughout the United States for fall protection; following the 1990 accident, the manufacturer of the safety straps issued a recall of straps made between 1982 and 1984, but the strap used by decedent was manufactured in 1986; although defendant did not examine its remaining inventory for incompatible equipment following the recall, no such examination was statutorily required; between the 1975 and 1990 accidents, defendant's employees worked over eleven million man-hours aloft without a single incident of roll-out; fall-arrest systems were on the market at the time of decedent's death, but evidence was presented that none of the available models was compatible with defendant's employees' equipment; OSHA standards at the time of decedent's death neither required a fall-arrest system nor addressed equipment compatibility; and an expert's opinion that defendant knew that decedent's equipment was absolutely certain to fail using standard work procedures was inherently incredible. The forecast of evidence thus indicates only that defendant was aware of the somewhat remote possibility that decedent's strap would become twisted, slack would be introduced into the strap, and decedent would fail to check the connecting straps and D-rings before leaning against those connections, which falls short of establishing that defendant knew this was substantially certain to occur. Language in Court of Appeals opinions suggesting that the Restatement (Second) of Torts § 8A illus. 1 illustrates the type of conduct required to satisfy the *Woodson* "substantial certainty" test is disavowed.

Am Jur 2d, Workers' Compensation §§ 80, 593.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 624, 446 S.E.2d

369 (1994), reversing an order of summary judgment for defendant entered 31 May 1993 by Ross, J., in Superior Court, Forsyth County, and remanding for further proceedings. Heard in the Supreme Court 11 September 1995.

Robinson Maready Lawing & Comerford, L.L.P., by William F. Maready and Clifford Britt, for plaintiff-appellee.

Duke Power Company, by W. Edward Poe, Jr., and Jeff D. Griffith, III; and Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts, W. Winburne King III, and Edward L. Bleynat, Jr., for defendant-appellant Duke Power Co.

WHICHARD, Justice.

On 6 March 1992, plaintiff Deborah Mickles ("plaintiff"), individually and as the administratrix of the estate of her husband, Fred David Mickles ("Mickles"), filed suit against defendant Duke Power Company ("defendant") seeking to recover damages for the on-the-job death of Mickles. Plaintiff has voluntarily dismissed her action against the other two defendants. The complaint alleged that defendant was wilfully and wantonly negligent in: (1) failing to warn and instruct Mickles about the possibility of an equipment failure commonly known as "roll-out"; (2) failing to provide Mickles with back-up safety equipment in the event of such a failure; (3) placing its employees in an ultra-hazardous and dangerous position where an accident resulting in injury or death was substantially certain to occur; and (4) providing equipment to Mickles which defendant knew was substantially certain to fail, thereby causing death or serious injury.

On 26 October 1992, defendant moved for summary judgment, which the trial court granted on 31 May 1993. On plaintiff's appeal, the Court of Appeals reversed. *Mickles v. Duke Power Co.*, 115 N.C. App. 624, 446 S.E.2d 369 (1994). On 2 November 1994, we allowed discretionary review. We now reverse and order the trial court's grant of summary judgment reinstated.

Summary judgment is an appropriate method for disposing of litigation when there is no genuine issue of material fact and the undisputed facts establish that a party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990). Defendant, as the movant, has the burden of establishing that no triable issue of fact exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). Defendant may meet this burden by show-

ing that an essential element of plaintiff's claim is nonexistent or that discovery indicates that plaintiff cannot produce evidence to support an essential element of her claim. *Id.* at 63, 414 S.E.2d at 342. For purposes of summary judgment, all inferences of fact must be drawn against the movant and in favor of the nonmovant. *Id.*

The forecast of evidence in response to defendant's motion for summary judgment showed the following. Mickles was employed as a lineman by defendant and was killed on 7 August 1991 when he fell 102 feet from an arm of a large electric transmission tower. At the time of the accident, Mickles was secured to a ladder by a body belt manufactured by Klein Tools, Inc. ("Klein"), and a pole strap, or safety strap, manufactured by Buckingham Manufacturing, Inc. ("Buckingham"). The body belt was fastened around Mickles' waist, and the pole strap was wrapped around a rung in the ladder and fastened to two D-rings on either end of the body belt. Mickles fell when one of the safety snaps on the pole strap disengaged from a D-ring on the body belt. This phenomenon is known as "roll-out."

The utility industry has known of roll-out for years, but it is a rare occurrence. On only two other occasions since 1975 have defendant's employees been killed or injured because of roll-out. The first of these incidents occurred in 1975, when Paul Hicks fell 125 feet to his death in the vicinity of Hillsborough. An Occupational Safety and Health Administration ("OSHA") investigation into Hicks' death resulted in no citation, as no OSHA standard had been violated. The second incident occurred in South Carolina on 31 July 1990, when lineman Randy Pyatt fell fifty-eight feet and was severely injured. Between the two incidents, defendant's employees worked over eleven million man-hours aloft wearing only a body belt and pole strap combination for fall protection without a single accident involving known or suspected roll-out.

At the time of his injury, Pyatt, like Mickles, was wearing a Klein body belt and a Buckingham pole strap. Pyatt's pole strap was manufactured in 1984, whereas Mickles' strap was issued in 1986. Defendant mixed straps and belts from different manufacturers because it purchased equipment from the lowest bidder on the approved standards list.

Following Hicks' accident, defendant informed its employees about roll-out, instructing them to check the snap hook and D-ring for proper alignment before placing their full weight on the equipment. Defendant also suggested that vendors of the body belts redesign

D-rings to make them less susceptible to roll-out. Finally, defendant investigated the possibility of using "double locking safety snaps," which require two distinct motions to disengage the snap, but it concluded that these snaps were more dangerous than single-locking snaps because linemen wearing rubber gloves needed both hands to unhook the snap before moving and rehooking. Although defendant made double-locking snap hooks available to linemen, few actually used them.

Following Pyatt's accident, two of defendant's employees, Dee Putnam and John Francis, inspected Pyatt's body belt and safety strap. Francis then wrote two memoranda to defendant's legal department in which he summarized his findings. Because experts would testify that safety strap snap hooks and D-rings made by different manufacturers are not always compatible, Francis suggested that two engineers of his choosing examine belts and straps for mix/match compatibility. He further suggested that defendant not pursue a fall-arrest system at that time for several reasons. According to Francis, if defendant were to adopt a fall-arrest system, this would indicate to linemen that roll-out was a "recognized hazard." In addition, suggesting the necessity of a fall-arrest system would be in direct conflict with what defendant and other electric utility companies had pleaded before the federal OSHA panel when it was formulating safety regulations. Putnam disagreed with Francis' suggestion that defendant not pursue a fall-arrest system.

In his second memorandum, Francis noted that tests on Pyatt's body belt and pole strap revealed that roll-out would not occur when the safety strap remained untwisted. When Pyatt's safety strap was tested using four other manufacturers' D-rings, roll-out did not occur whether the strap was twisted or untwisted. However, testing with Pyatt's Buckingham body belt revealed that whenever the pole strap became twisted, the snap hook would invert, the snap hook keeper would lodge against the inside of the D-ring, and the D-ring would disengage from the snap hook whenever body pressure was placed upon the connection. Later testing of Mickles' equipment provided similar results.

On 16 October 1990, Francis took Pyatt's equipment to Buckingham's Binghamton, New York, facility for testing. Buckingham issued a safety notice later that month which recalled Buckingham safety straps manufactured from 1982 through 1984. Defendant fully complied with the recall. In addition, defendant

issued a safety alert regarding roll-out; sent written and verbal reports to Mickles' crew concerning Pyatt's accident; and conducted equipment inspections of all belts and straps in January, May, and July 1991. Mickles' equipment was inspected on each occasion.

In late 1990, defendant began investigating the possibility of obtaining more effective fall protection equipment for its transmission linemen. Defendant worked with a foreign company in an effort to custom design a safety harness. At that time, the body belt and pole strap combination was the only feasible means of fall protection for transmission linemen in the country.

Defendant was not cited for OSHA violations after either Hicks' or Pyatt's accident. Following Mickles' accident, defendant inspected Mickles' equipment and found it to be in compliance with all applicable OSHA regulations. The North Carolina Department of Labor ("NCDL") nevertheless conducted an investigation. Carl Collins, the NCDL inspector, asserted in his affidavit that before Mickles' death, manufacturers of fall protection equipment recommended in their catalogs that body belts and pole straps not be used for fall protection because of the potential incompatibility of belts and straps made by different manufacturers. Collins asserted that defendant was aware of this problem but merely requested its linemen to inspect the connection while working. Defendant was also aware that additional safety devices were available, but it did not require its workers to use such devices. According to Collins, prior to Mickles' death defendant had not educated or trained its linemen on how to inspect their body belts and pole straps to determine whether roll-out was possible. However, Mickles apparently received such training before his fall, as his initials appear on a copy of the 1990 Pyatt accident report.

Following the investigation, Collins cited defendant for wilful violations of 29 C.F.R. § 1910.132(a) and (c). Administrative Law Judge Carroll Tuttle, an OSHA hearing examiner, dismissed the alleged violation of subsection .132(a). Tuttle further rejected the NCDL's charges of wilfulness regarding defendant's violation of subsection .132(c), determining that the violation had been "serious" but not wilful. In so finding, Tuttle determined that defendant did not purposely expose its employees to the hazard of roll-out. Tuttle noted that the equipment defendant provided was the equipment provided throughout the United States for fall protection.

Plaintiff's expert, Jack Larks, a member of the American National Standards Institute, stated in his affidavit that the industry has known

for a long time that one of the most critical factors causing roll-out is the relative dimension of the snap hook to the D-ring. Some snap hooks and D-rings are therefore incompatible. Larks stated the equipment provided to Mickles "was certain to fail under the conditions created using [defendant's] standard work procedures." He stated again: "Using [defendant's] standard work procedures, the equipment provided to David Mickles was absolutely certain to fail." One such procedure involved taking two steps up the ladder and then two steps down; as a result of this maneuver, slack would be introduced into the safety strap and the strap would then become twisted. Testing of Mickles' equipment following his death revealed that the snap hook and D-ring disengaged nine out of ten times when this standard procedure was followed. Larks opined that defendant knew, due to Hicks' and Pyatt's accidents, that sending its linemen up transmission towers with incompatible body belts and pole straps as their only safety equipment was a hazard certain to cause death or serious injury. Collins, the NCDL inspector, and Larks agreed that a fall from one hundred feet would result in death ninety-eight percent of the time.

The Workers' Compensation Act, N.C.G.S. §§ 97-1 to -101 (1991) ("the Act"), provides the exclusive remedy for a person injured in a workplace accident. *See* N.C.G.S. §§ 97-9, -10.1. In *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), this Court enunciated an exception in the following situation:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. This narrow exception arose from the following facts. The decedent, a sewer worker, died when a ditch caved in on him. The decedent's employer, a subcontractor, had been cited four times in the previous six-and-a-half years for violating trenching regulations. A trench box, a specific requirement of the state Occupational Safety and Health Act, was not used. Evidence indicated that decedent's employer, who had spent most of his career excavating soil, knew of the substantial certainty that the

trench would fail and nevertheless had directed that the work proceed without a trench box.

Here, the Court of Appeals determined that the forecast of evidence was sufficient under the *Woodson* exception to the exclusive remedy provisions of the Act to overcome defendant's motion for summary judgment. It found persuasive the fact that defendant, following the Buckingham recall, apparently never examined its remaining inventory for incompatible equipment. In addition, the Court of Appeals cited as evidence of intentional misconduct: (1) the report and recommendation of Carl Collins, the NCDL investigator; (2) John Francis' memo indicating defendant understood the danger of incompatible equipment; and (3) defendant's decision not to pursue additional safety equipment even though it was aware that such equipment was available. *Mickles*, 115 N.C. App. at 632-33, 446 S.E.2d at 374-75.

In so holding, the Court of Appeals suggested that the following from the Restatement (Second) of Torts illustrates misconduct which satisfies *Woodson's* "substantial certainty" test:

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Restatement (Second) of Torts § 8A illus. 1 (1965). This was also quoted as an illustration of "substantial certainty" in *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 325, 442 S.E.2d 143, 147 (1994), *aff'd*, 342 N.C. 182, 463 S.E.2d 79 (1995) (per curiam), which was quoted with apparent approval in *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 378, 448 S.E.2d 289, 297 (1994), *aff'd*, 342 N.C. 184, 463 S.E.2d 228 (1995) (per curiam). We now disavow this example. According to well-known principles of tort liability, one who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends those results for purposes of tort liability. *See Woodson*, 329 N.C. at 341, 407 S.E.2d at 229. In the above example, A is *actually* certain his act will injure or kill C. A successful claim under the *Woodson* exception does not require such actual certainty.

The forecast of evidence nevertheless failed to establish a claim under the *Woodson* exception because it did not establish that

defendant knew its conduct was substantially certain to cause serious injury or death to Mickles. Mickles and other employees received training in guarding against roll-out. Defendant had never been cited for an OSHA violation regarding roll-out, and OSHA standards at the time of Mickles' death neither required a fall-arrest system nor addressed equipment compatibility. Judge Tuttle, the OSHA hearing examiner, specifically determined that defendant did not wilfully expose its employees to the hazard of roll-out. Although the Court of Appeals noted that defendant did not examine its remaining inventory for incompatible equipment following the Buckingham recall, no such examination was statutorily required. Moreover, despite Francis' suggestion that defendant not pursue a fall-arrest system in the fall of 1990, defendant in fact did so and was field-testing a custom-designed system several months before Mickles' death. Fall-arrest systems were on the market at the time of Mickles' death, but evidence was presented showing that none of the available models was compatible with defendant's employees' equipment. Between the 1975 and 1990 falls, defendant's employees worked over eleven million man-hours aloft without a single incident of roll-out, and roll-out had occurred in testing *only* when the pole strap became twisted, slack was introduced into the strap, and then pressure was brought to bear upon the snap hook and D-ring connection.

Larks' opinion that Mickles' equipment was absolutely certain to fail using defendant's standard work procedures, and that defendant knew this, was based in significant part on testing of Mickles' equipment following his death. There is no evidence that defendant was aware, prior to Mickles' death, of a high probability that this equipment would fail. In view of the uncontroverted evidence that while roll-out occurs, it is rare, and that except for three widely scattered instances over a sixteen-year period, defendant's linemen had spent millions of man-hours aloft with no roll-out, Larks' opinion is inherently incredible. Such evidence does not suffice to create a genuine issue of material fact for purposes of determining the appropriateness of summary judgment. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 132, at 592 n.81 (3d ed. 1988) (when expert opinion, tested by facts in evidence, is inherently incredible, exclusion dictated). Under the Rules of Civil Procedure, as under the former practice,

> "[j]udges are [not] required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence [is] of such a character

> as [to] warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

Lee v. Stevens, 251 N.C. 429, 434, 111 S.E.2d 623, 627 (1959) (quoting *Byrd v. Express Co.*, 139 N.C. 273, 276, 51 S.E. 851, 852 (1905)).

The forecast of evidence thus indicates only that defendant was aware of the somewhat remote possibility that Mickles' strap would become twisted, slack would be introduced into the strap, and Mickles would then fail to check the connecting snaps and D-rings before leaning against those connections. It falls short of establishing that defendant knew this was substantially certain to occur.

This Court has applied *Woodson* on only one other occasion. In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), we upheld a judgment granting defendants' Rule 12(b)(6) motions to dismiss. Plaintiff had alleged that his employer had designed a defective machine, the machine had improper and hazardous pinch-points, the employer had not made necessary safety devices available (in violation of OSHA regulations), and the employer knowingly directed plaintiff to use the machine without safety devices. *Id.* at 236, 424 S.E.2d at 393. This Court held that the negligence plaintiff alleged did not rise to the level of wilful, wanton, and reckless negligence as defined in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). *Pendergrass*, 333 N.C. at 237-38, 424 S.E.2d at 394. Therefore, it did not rise to the higher level of negligence defined in *Woodson*, that is, negligence substantially certain to produce injury or death. *Id.* at 239-40, 424 S.E.2d at 395.

In *Pendergrass*, a knowing failure to provide adequate safety equipment in violation of OSHA regulations did not give rise to liability under the *Woodson* exception to the exclusivity rule. Here, plaintiff did not, and could not, allege or prove such a failure because OSHA had no regulations regarding roll-out at the time of Mickles' accident. The forecast of evidence here is even less indicative of employer misconduct with knowledge that it is substantially certain to cause serious injury or death than were the allegations in *Pendergrass*, where we upheld a judgment for defendants. Accordingly, it did not suffice to survive summary judgment.

The trial court correctly determined that plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the *Woodson* exception to the exclusivity provisions of the Act. The Court of Appeals thus erred in

reversing the entry of summary judgment for defendant. The decision of the Court of Appeals is reversed; the case is remanded to that court for further remand to the Superior Court, Forsyth County, for reinstatement of the order of summary judgment for defendant.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. BOBBY PAUL BURKE

No. 413A94

(Filed 3 November 1995)

1. Evidence and Witnesses § 117 (NCI4th)— evidence that third party was suspect—properly excluded

In a murder prosecution in which the major disputed issue was whether defendant was the second shooter involved in the killing, the trial court did not err by excluding testimony that a man named Prioleau was at one time a suspect in the police investigation and that his fingerprints had been submitted with other evidence to an SBI crime laboratory since this evidence neither pointed directly to the guilt of Prioleau as the second shooter nor tended to exonerate defendant.

Am Jur 2d, Evidence § 587.

2. Evidence and Witnesses § 1469 (NCI4th)— gun and ammunition found in dumpster—relevancy in murder case

A .44-caliber handgun, two boxes of .44-caliber ammunition, and three shells and a spent cartridge in the gun, which were found in a dumpster four days after a murder, were relevant because they tended to link defendant to the crime where two different shooters were involved in the killing; the evidence was contradictory as to who was carrying what kind of weapon the night of the shooting; defendant's fingerprints were found on one of the boxes of ammunition; the bullets found in the dumpster were consistent with the type of bullets recovered from the victim's body; and defendant admitted that he owned a .44-caliber handgun and that he had bought the ammunition for himself and another person. From the fact that a .44-caliber handgun was found in the dumpster with a box of .44-caliber bullets linked to

defendant through his fingerprints and his own testimony, the jury could infer that it was defendant who fired the .44-caliber handgun the night of the murder.

Am Jur 2d, Evidence §§ 1434, 1443.

3. Evidence and Witnesses § 873 (NCI4th)— statement to witnesses—not inadmissible hearsay—exclusion not prejudicial

In a murder prosecution wherein two teenage girls testified that defendant was one of the two shooters, testimony that, prior to the shooting, Corey Best had threatened to kick the girls if he found them again in the vicinity where the shooting occurred was not inadmissible hearsay because it was not offered to show that the declarant was going to hurt the girls but to explain why the girls had left the scene before the shooting and thus could not identify defendant as one of the shooters. Therefore, the trial court erred by excluding this testimony, but the error was not prejudicial where defendant was allowed to present this evidence through the testimony of other witnesses that the two girls were not at the scene during the shooting because of an argument with Corey Best.

Am Jur 2d, Appellate Review §§ 705 et seq., 749, 750; Evidence §§ 341, 357.

4. Indigent Persons § 25 (NCI4th)— noncapital murder trial—refusal to appoint second counsel

A defendant tried noncapitally for first-degree murder had neither a statutory nor a constitutional right to the appointment of a second counsel to represent him, and the trial court's refusal to appoint a second counsel did not show its bias toward the State or cause an unfair advantage for the State because there were two prosecutors where defendant's counsel had over ten years of experience, and the record does not suggest that the case was factually or legally complicated or that defense counsel was unprepared to conduct the trial alone.

Am Jur 2d, Criminal Law §§ 796-977, 984, 985.

Comment Note.—Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

5. Jury § 111 (NCI4th)— pretrial publicity—denial of individual voir dire

The trial court did not abuse its discretion in the denial of defense counsel's request for sequestration and individual *voir dire* in a murder case because of pretrial publicity in local newspaper articles linking defendant to a Jamaican drug ring and a televised report about the shooting and the ensuing search for defendant where defendant merely argued that individual *voir dire* is necessary in any case in which there has been pretrial publicity.

Am Jur 2d, Jury §§ 198, 199, 289, 291, 294.

6. Criminal Law § 374 (NCI4th)— exclusion of evidence—court's comment—expression of opinion—absence of prejudice

Assuming arguendo that the trial judge improperly expressed an opinion on the evidence in a murder trial when he commented in the presence of the jury, upon denying defense counsel's request to place a witness's excluded answer in the record, that the evidence was "completely irrelevant and immaterial," this one ruling and comment by the judge during the course of a five-day trial did not have a prejudicial effect on the result of the trial.

Am Jur 2d, Trial § 283.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Duke, J., at the 6 December 1993 Criminal Session of Superior Court, Wayne County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 September 1995.

Michael F. Easley, Attorney General, by Ronald M. Marquette, Special Deputy Attorney General, for the State.

Jean P. Hollowell and Teresa Freitas for defendant-appellant.

FRYE, Justice.

Defendant, Bobby Paul Burke, was tried noncapitally, and a jury found him guilty of the first-degree murder of Patrick Joseph Leuten. The trial judge imposed the mandatory sentence of life imprisonment. Defendant was also convicted of one count of discharging a firearm into an occupied motor vehicle, but judgment was arrested on this

conviction. On this appeal, defendant makes six assignments of error. We conclude that defendant's trial was free from prejudicial error.

The State's evidence at trial tended to show the following facts and circumstances: In the early morning hours of 26 July 1991, Patrick Joseph Leuten and John Wright drove to a section of Maple Street in Goldsboro, North Carolina, where it was common for drugs to be sold in the street to people in their vehicles. Among the drug dealers on Maple Street were a man called "Jamaican Rick" and defendant, who was known as "Jamaican Bobby." Wright, a frequent purchaser of drugs, had been to the area earlier on the evening of 25 July 1991 with a person whose wallet had been taken either by Jamaican Rick, James Prioleau ("Big Deal"), or "Chevy."

Later during the early morning hours of 26 July 1991, Leuten drove Wright back to Maple Street in a borrowed truck to get the wallet. While they were stopped on Maple Street, the wallet was given to Wright by Big Deal. Wright observed defendant standing near the truck with a dull-colored automatic handgun. As Leuten drove away, Jamaican Rick yelled that he had been ripped off. At that point, Jamaican Rick and another black male began shooting at the truck driven by Leuten.

Leuten was struck by two bullets. Wright immediately pulled the truck to the side of the road, left the truck near the scene of the shooting with the key in the ignition, and ran home. The truck was found later that morning several miles from Maple Street near the trailer park where defendant resided. Leuten was found in the truck, dead from two gunshot wounds. A lead core that could have come from a .44-caliber gun was found in the decedent's abdomen. Also, parts of two nine-millimeter bullets were found under the floorboard and behind the seat of the truck.

Four days following the shooting, the Goldsboro Police Department received an anonymous tip that evidence could be found in a dumpster near the location of the shooting. On 30 July 1991, Goldsboro police searched the dumpster and found a shoe box containing a .44-caliber handgun and two boxes of .44-caliber ammunition. The gun, which holds six rounds, had three bullet casings in it. Defendant's fingerprints were on one of the boxes of ammunition. Defendant admitted that he owned a .44-caliber handgun and had bought the ammunition for himself and Jamaican Rick.

Since it was undisputed that Jamaican Rick was one of the shooters, the major disputed issue at trial was the identity of the second shooter. The State presented testimony that defendant was the second shooter. Although defendant did admit that he was present at the scene of the murder, he presented evidence, through his own testimony as well as the testimony of others, that suggested that someone else was the second shooter.

[1] For defendant's first assignment of error, he contends that the trial court erred in refusing to allow him to present evidence that would show that Big Deal was at one time considered a suspect in the case. First, defendant argues that it was error to refuse to admit defense exhibit #3. Defense exhibit #3 consisted of a set of Big Deal's fingerprints that was taken by the Goldsboro Police Department. This set of Big Deal's fingerprints, along with one set of decedent's fingerprints and two sets of defendant's fingerprints, was given to the State fingerprint expert for use in trying to find a match with any fingerprints lifted from evidence submitted to the SBI crime laboratory. The trial court did not allow the fingerprint expert to testify that defense exhibit #3 was a set of Big Deal's fingerprints taken by the police department and did not admit the exhibit into evidence.

Defendant further contends that the court erred in not permitting Ronald Melvin, a Goldsboro police officer, to testify that he had listed Big Deal as a suspect in the case at the time he submitted various items of evidence to the SBI crime laboratory. Defendant contends that the excluded evidence, defense exhibit #3 and Officer Melvin's testimony, corroborated defense testimony that Big Deal, not defendant, was the second shooter. Defense testimony showed that the .44-caliber gun pulled from the dumpster was the same one Big Deal carried the night of the murder. Defendant argues that since the only issue at trial was the identity of the second shooter, the evidence that Big Deal was a suspect points directly to Big Deal as the second shooter. As such, the evidence is highly probative in that it implicates Big Deal while exonerating defendant. We disagree with defendant's contentions and conclude that the trial court did not err by refusing to admit this evidence.

This Court has held that a defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inad-

missible. *State v. Jenkins*, 292 N.C. 179, 188-89, 232 S.E.2d 648, 654 (1977); *State v. Shinn*, 238 N.C. 535, 537, 78 S.E.2d 388, 389 (1953); *State v. Smith*, 211 N.C. 93, 96, 189 S.E. 175, 176 (1937). "[T]he admissibility of another person's guilt now seems to be governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value." Henry Brandis, Jr., 1 *Stansbury's N.C. Evidence* § 93, at 302-03 (Brandis rev. 1973).

In the instant case, the trial court admitted evidence (1) that Big Deal was present at the scene of the crime, and (2) that Big Deal was carrying a .44-caliber handgun the night of the shooting. However, the evidence that Big Deal was a suspect is not probative of whether Big Deal committed the crime in that it does not show that Big Deal was the second shooter. Being a suspect in a police investigation does not necessarily implicate the suspect in that it is not evidence that the suspect is guilty of the crime. Accordingly, the evidence that Big Deal was at one time considered a suspect does not directly point to the guilt of Big Deal, nor does it exonerate defendant. As such, the trial judge did not err in refusing to admit the evidence.

[2] In his second assignment of error, defendant contends that the trial court erred in admitting State's exhibits #28, #29, #31, #32, #33, #34, and #35. Among the items introduced into evidence by the State were a shoe box (exhibits #29 & #31), a .44-caliber handgun (exhibit #28), two boxes of .44-caliber ammunition (exhibits #33 & #34), a spent cartridge from the gun (exhibit #35), and three bullets found in the gun (exhibit #32). All of the exhibits were found in a dumpster four days after the shooting and two days after defendant was interviewed by the Goldsboro police. Defendant contends that there was no connection between these items and the murder, and therefore, the exhibits should have been excluded. We disagree.

In order for evidence to be admissible, it must be relevant. N.C.G.S. § 8C-1, Rule 402 (1992). "The test of relevancy of evidence is whether 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.' " *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (quoting N.C.G.S. § 8C-1, Rule 401 (1986)).

Contradictory evidence as to who was carrying what type of gun was presented at trial. One witness testified that Jamaican Rick had a .44-caliber handgun similar to the one found in the dumpster and that

he was carrying that gun on the night of the shooting. However, two other witnesses testified that Jamaican Rick was carrying a nine-millimeter handgun the night of the shooting. Two other witnesses testified that Big Deal was at the scene of the crime carrying a .44-caliber handgun similar to the one found in the dumpster. Another witness testified that defendant was carrying an automatic weapon the night of the murder, but defendant admitted to police that he owned a .44-caliber handgun.

The evidence in question is relevant because it tends to link defendant to the crime, thus allowing the jury to infer that defendant was the perpetrator of the crime. From the fact that a .44-caliber handgun was found in the dumpster along with a box of .44-caliber bullets linked to defendant through both his fingerprints and his own testimony, the jury could infer that it was defendant who fired the .44-caliber handgun the night of the murder. According to the State's evidence, the bullets found in the dumpster were consistent with the type of bullets recovered from the victim's body. Because the evidence was probative on the question of defendant's guilt and could be used to connect him to the crime, the trial judge did not err in admitting this evidence.

[3] Defendant contends in his third assignment of error that the trial court committed reversible error by refusing to allow him to inquire into statements made by Corey Best. Two witnesses, Korteshia Williams and Sonita Williams, stated that defendant was one of the shooters. At trial, defendant presented testimony that Korteshia and Sonita left the scene after Korteshia had an argument with Corey Best but before the shooting occurred. To corroborate this testimony, defense counsel questioned Calvetti Johnson. During the trial, the following exchange took place between defense counsel and Calvetti Johnson:

Q: What did you see?

A: Well, it wasn't nothing but a fuss. Mr. Burke and Corey Best was fussing and Corey Best went on Edgerton and got a gun and came back and he ran, ran Korteshia and Sonita off and told them if he caught them over there again what he would do.

Q: What did he say he would do?

A: Well he said he would—

MR. FERGUSON: Objection.

THE COURT: Sustained.

MRS. ALBERTSON: Your Honor, if I could be heard.

THE COURT: Sustained. I will hear you at the bench.

DISCUSSION AT THE BENCH.

THE COURT: Objection sustained.

MRS. ALBERTSON: Your Honor, I would like his answer for the record at the appropriate time.

When the witness was permitted to answer on *voir dire*, he stated:

> He [Corey] said that, the best I can recall if he caught them back over there that he would kick, kick their little asses. He would do this and do that.

Defendant asserts that had this comment been received into evidence, the jurors could have inferred that such a threat would have motivated the teenage girls to leave, thereby corroborating testimony that they had already left the scene at the time of the shooting.

Defendant contends that the statement was admissible because it was not hearsay. It is well established that if an out-of-court statement is being offered for any purpose other than that of proving the truth of the matter asserted therein, it is not objectionable as hearsay. *State v. Griffis*, 25 N.C. 504 (1843). Statements which are offered for their own purposes, such as to explain nonverbal conduct, may be received into evidence for a nonhearsay purpose. *State v. Blake*, 317 N.C. 632, 638, 346 S.E.2d 399, 402 (1986). In the instant case, defendant was not offering the statement to show that the declarant was going to hurt the teenage girls but to explain why Korteshia and Sonita had left the scene before the shooting. Therefore, the trial court erred in excluding the testimony.

However, the error was not prejudicial. It is well settled that "no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982); *accord State v. Walden*, 311 N.C. 667, 673, 319 S.E.2d 577, 581 (1984). Several witnesses testified that Korteshia and Sonita were not at the scene during the shooting because of an argument between Korteshia and Corey Best. Calvetti Johnson testified that he witnessed Corey Best getting a gun and running Korteshia and Sonita off

the street. Defendant and another witness, Rico Lewis, also testified that they had seen Korteshia and Corey argue, after which time Korteshia and Sonita left the scene. Therefore, defendant was allowed to present this evidence through other testimony and was not prejudiced by this error.

[4] In his fourth assignment of error, defendant contends that the trial court committed reversible error by refusing to allow defense counsel's request for second counsel. One week prior to trial, defendant moved for the appointment of Shelby Duffy Albertson as additional counsel pursuant to N.C.G.S. § 7A-450. Defendant's appointed counsel, Jean P. Hollowell, had represented him for eight months, but defendant asserted that additional counsel would materially assist the preparation of the case because of the number of potential witnesses who had been listed by the State and the existence of other potential witnesses. In support of the motion, defendant argued that the case was complicated and would take over a week to try and that the State was advantaged by two assistant district attorneys being assigned to the case.

The trial court, citing Ms. Hollowell's ten years of experience, denied the motion. Thereafter, Ms. Albertson, Ms. Hollowell's law partner, gave a notice of representation and participated in the case without appointment. Defendant contends that the trial court's failure to appoint additional counsel showed its bias towards the State and caused an unfair advantage for the State. We disagree.

Indigent defendants in a capital case have a statutory right to the appointment of additional counsel. This right is not a constitutional right but is a statutory right. *State v. Locklear*, 322 N.C. 349, 357, 368 S.E.2d 377, 382 (1988). In the instant case, defendant was not tried capitally. Therefore, he had neither a statutory nor a constitutional right to the appointment of additional counsel. Whether to appoint additional counsel was within the discretion of the trial judge, and defendant has not shown that the trial judge abused his discretion by not appointing additional counsel. As the trial court noted, defendant's counsel had over ten years of experience. The record does not suggest that the case was factually or legally complicated or that defense counsel was unprepared or unable to conduct the trial alone. Accordingly, defendant's fourth assignment of error is without merit.

[5] For his fifth assignment of error, defendant contends that the trial court committed reversible error by refusing defense counsel's request for sequestration and individual *voir dire* of the jurors. One

week prior to trial, defendant moved for individual *voir dire* because of the pretrial publicity. The pretrial publicity consisted of local newspaper articles linking defendant to a Jamaican drug ring and a televised report about the shooting and the ensuing search for defendant. The court denied the motion. Defendant contends that he was unfairly prejudiced by the trial court's denial of his motion.

This Court has held that whether to allow sequestration and individual *voir dire* is a matter for the trial court's discretion. These rulings will not be disturbed unless there has been an abuse of discretion by the trial court. *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 837 (1986).

In the instant case, defendant has not argued or shown that the trial judge abused his discretion in not allowing individual *voir dire* or sequestration of the jury. He simply argues in his brief that individual *voir dire* is necessary in any case where there has been pretrial publicity. A defendant does not have a right to examine jurors individually merely because there has been pretrial publicity.

[6] Defendant contends in his sixth assignment of error that the trial court erred by exhibiting an "antidefendant" stance and by making "prejudicial judicial" comments during the trial. During the cross-examination of Ronald Melvin, the Goldsboro police officer who transmitted various items of evidence to the SBI crime laboratory for analysis, defense counsel attempted to solicit testimony that Big Deal was listed as a suspect on requests for examination of evidence. The trial court sustained the prosecution's objection to this testimony, and the following exchange took place:

> MRS. ALBERTSON: Your Honor, I would like to have my question on the record and have him answer for the purpose of preserving the record.
>
> THE COURT: Completely irrelevant and immaterial. The Court denies your request.

This exchange is the only example listed by the defendant as the basis for his sixth assignment of error. According to N.C.G.S. § 15A-1222, the trial judge may not express, during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. This section codifies the traditional North Carolina position requiring strict neutrality on the part of the trial judge. N.C.G.S. § 15A-1222 official commentary (1988). Whether the accused was deprived of a fair trial by the challenged remarks must be determined

by what is said and its probable effect upon the jury in light of all attendant circumstances. *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979). Assuming error *arguendo*, we do not believe that this one ruling and comment by the judge during the course of a five-day trial had a prejudicial effect on the result of the trial. Accordingly, we reject defendant's sixth assignment of error.

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

NO ERROR.

STATE OF NORTH CAROLINA v. MATTHEW DARAN McCRAY

No. 321A94

(Filed 3 November 1995)

1. Evidence and Witnesses § 675 (NCI4th)— untimely motion to strike

Defendant's motion to strike a witness's in-court identification of defendant was not timely, and defendant waived objection to the identification, where defendant made no objection to the prosecutor's question and no motion to strike at the time the witness identified defendant, and defendant's motion to strike was made only after the witness responded to two additional questions from the prosecutor, the State moved, again without objection or motion to strike, that the record reflect that the witness had identified defendant, and the prosecutor began to ask the witness a fourth question.

Am Jur 2d, Trial §§ 395-401, 461-472.

Necessity and sufficiency of renewal of objection to, or offer of, evidence admitted or excluded conditionally. 88 ALR2d 12.

2. Homicide § 232 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of first-degree murder on the theory of premeditation and deliberation where it tended to show that the victim was sitting in front of an apartment talking with two friends when he

was shot by defendant six times; three eyewitnesses identified defendant as the killer; there was no evidence that the victim provoked defendant, but there was evidence of ill will between defendant and the victim resulting from a previous altercation between the victim and a third person; prior to the shooting defendant told the third person that "he wanted to do it" and the third person handed him a gun; after the killing, defendant bragged about how he "did it" and asked if the victim was dead; at least one shot to the victim's head was fired with the muzzle of the gun pressed against the victim's skin; and some wounds were inflicted upon the victim while the victim was lying helpless on the ground.

Am Jur 2d, Homicide §§ 425 et seq.

3. Evidence and Witnesses § 90 (NCI4th)— exclusion of testimony—prejudice outweighing probative value

Testimony by two defense witnesses, a police officer and a poolroom owner, was properly excluded from a murder trial on the ground that the probative value thereof was substantially outweighed by the danger of unfair prejudice where the testimony would have shown that the officer was called to investigate shots fired outside a poolroom, the murder victim attempted to hide behind a truck, a .380 semiautomatic weapon was found behind the truck, and the poolroom owner told the officer he did not want the victim on his premises, since the testimony did not show that the victim did the shooting or that anyone other than defendant had a motive to kill him, and the testimony was prejudicial to the State. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 301-312, 333 et seq.

4. Evidence and Witnesses § 117 (NCI4th)— killer's description as fitting another—guilt of third party not shown—exclusion of testimony

The trial court did not err by refusing to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, where three eyewitnesses identified defendant as the man they saw shoot the victim; the witness was not present when the shooting occurred; and the excluded testimony did not directly point to the guilt of a third party.

Am Jur 2d, Evidence §§ 560-564, 587.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification. 29 ALR4th 104.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Rousseau, J., at the 14 February 1994 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 March 1995.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Assistant Attorney General, and Simone E. Frier, Attorney at Law, for the State.

Walter T. Johnson, Jr. for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 8 March 1993 for the first-degree murder of James Christopher Carelock. 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 capital sentencing hearing, Judge Rousseau sentenced the defendant to a term of life imprisonment.

At trial, the State presented evidence tending to show that James Carelock was murdered during the early morning hours of 23 August 1992 while talking with friends outside apartment 306-E at the English Village Apartments in Greensboro, North Carolina.

Dr. Brent Hall, a forensic pathologist, performed an autopsy on the victim. Dr. Hall testified that the victim received six gunshot wounds to the body and head. Of the six wounds, one was to the right side of the victim's head and two were to the back of the victim's head. The first wound to the back of the head was a contact wound, indicating that the gun was pressed against the victim's skin when fired. The second wound to the back of the head had gunpowder residue around it, which indicated that the gun was fired within three feet of the victim. Dr. Hall testified that either of these two wounds could have caused the victim's death.

Maisha Kimber testified that she and her mother, Janice Seagroves, were sitting on the stoop in front of their apartment talking to the victim when the shooting occurred. Ms. Kimber and Ms. Seagroves each testified that they saw a man wearing dark or black

pants and a dark, striped shirt walk up to the victim and shoot him in the head. Ms. Kimber stated that the man was wearing black shoes, and Ms. Seagroves indicated that the shooter was wearing army boots. Ms. Seagroves made an in-court identification of the defendant as the man who shot James Carelock.

Michael Roberson testified that on the night of the murder, he, Shirley Burgess, Lionel McCray, Wyman Lowery and the defendant went to Roberson's apartment at the English Village Apartments. Roberson testified that he told the defendant and Lionel McCray that he saw the victim sitting outside of apartment 306-E. Roberson stated that he then heard the defendant say that "he would take care of it." Shirley Burgess also testified that she heard the defendant tell Lionel McCray that "he wanted to do it." Both Roberson and Burgess testified that after making this statement, they saw the defendant change into black sweat pants, a black shirt and black army boots. Ms. Burgess further testified that Lionel McCray gave the defendant a silver gun, that the defendant then left the apartment and that when the defendant returned a few minutes later, she heard him say that he "did it."

The State's evidence further showed that Michael Roberson and Wyman Lowery left Roberson's apartment before the defendant so that they could see what the defendant was going to do. Roberson testified that he saw the defendant walk up to the victim, hold a pistol to the victim's head and then shoot the victim in the head four or five times. Roberson stated that he was approximately sixty or seventy feet away from where the victim was sitting but had no difficulty seeing the defendant. Lowery testified that he saw the defendant fire at least three shots to the victim's head. Lowery further testified that he knew it was the defendant who shot the victim and not someone else because the defendant talked about it later that evening. Both Roberson and Lowery positively identified the defendant as the person they saw shoot the victim.

I.

[1] The defendant first assigns error to the trial court's denial of his motion to strike Janice Seagroves' in-court identification.

On direct examination of Ms. Seagroves, the following exchange occurred:

> Q. Ms. Seagroves, do you see the person in the courtroom who fired the gun at Jamie Carelock?

A. Yes, I do.

Q. Would you point him out, please?

A. Right there. (Indicating.)

Q. Would you describe for the record how he's dressed here in court?

A. A light shirt, black tie.

Q. Is he sitting at the counsel table here with his lawyers?

A. Yes.

[PROSECUTOR]: Ask the record to show she identified the defendant.

[COURT]: All right.

Q. Ms. Seagroves, did you—

[DEFENSE COUNSEL]: I object to that. Move to strike, and would like to be heard.

[COURT]: All right. Come up here.

The trial court then heard arguments before denying the defendant's motion to strike. We find no error with the trial court's ruling.

It is well established that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record." N.C.G.S. § 8C-1, Rule 103(a)(1) (1992). Where the defendant seeks to challenge an in-court identification, a motion to strike an incompetent answer must be made when the answer is given. *State v. Banks*, 295 N.C. 399, 408, 245 S.E.2d 743, 749-50 (1978), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). A motion to strike will therefore be deemed untimely if the witness answers the question and the opposing party does not move to strike the response until after further questions are asked of the witness. *See State v. Lewis*, 281 N.C. 564, 569, 189 S.E.2d 216, 219, *cert. denied*, 409 U.S. 1046, 34 L. Ed. 2d 498 (1972).

In the case *sub judice*, the defendant's motion to strike Ms. Seagroves' in-court identification came well after the witness' response to the prosecutor's question. After identifying the defendant, Ms. Seagroves responded to two additional questions from the prosecutor, first describing the defendant's clothing and then indicat-

ing where the defendant was sitting in the courtroom. The State then moved, again without any objection or motion to strike by the defendant, that the record reflect Ms. Seagroves' identification of the defendant. Only after the prosecutor began to ask a fourth question did the defendant move to strike the witness' in-court identification. Clearly, the defendant's motion was not made in a timely manner. The defendant has therefore waived any objection to Ms. Seagroves' in-court identification. Accordingly, this assignment of error is overruled.

II.

[2] By his second assignment of error, the defendant contends that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Specifically, the defendant argues that the State's evidence was inconsistent and contradictory and, therefore, insufficient to sustain the charge against him. The defendant's argument misconstrues the appropriate standard for ruling on a motion to dismiss.

By presenting evidence, the defendant has waived his objection to the trial court's failure to dismiss at the close of the State's evidence. *State v. Mash*, 328 N.C. 61, 66, 399 S.E.2d 307, 311 (1991). Therefore, only defendant's motion to dismiss at the close of all the evidence is before this Court.

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 and substantial evidence that the defendant is the perpetrator. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). If substantial evidence of each element is presented, the motion for dismissal is properly denied. *Id.* "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). In ruling on the motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* "[C]ontradictions or discrepancies in the evidence *are for the jury to resolve and do not warrant dismissal.*" *Id.* (emphasis added).

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). Malice may be presumed from the use of a deadly weapon. *State v. Porter*, 326 N.C. 489, 505, 391 S.E.2d 144, 155, (1990). The defendant's use of a firearm, in the instant case, satisfies the malice requirement. Therefore, the only remaining element necessary for the State to prove is the existence of premeditation and deliberation. "A killing is 'premeditated' if the defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *judgment vacated on other grounds*, —— U.S. ——, 128 L. Ed. 2d 42, *on remand*, 339 N.C. 1, 452 S.E.2d 245 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995). A killing is "deliberate" if the defendant formed an intent to kill and carried out that intent in a cool state of blood, "free from any 'violent passion suddenly aroused by some lawful or just cause or legal provocation.' " *Id.* (quoting *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985)). Premeditation and deliberation are mental processes and ordinarily are not susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The circumstances generally considered probative of the existence of premeditation and deliberation are: (1) want of provocation on the part of the victim, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations made by the defendant against the victim, (4) ill will or previous difficulty between the parties, (5) the dealing of lethal blows after the victim has been felled and rendered helpless, and (6) evidence that the killing was done in a brutal manner. *See State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983); *State v. Potter*, 295 N.C. 126, 130, 244 S.E.2d 397, 401 (1978). The nature and number of the victim's wounds are also probative of the existence of premeditation and deliberation. *State v. Brown*, 306 N.C. 151, 174, 293 S.E.2d 569, 584, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that the defendant acted with premeditation and deliberation. The evidence showed that the victim was sitting in front of an apartment talking to two friends when he was shot. There was no evidence that the victim provoked the defendant in any manner. There was, however, evidence of ill will between the defend-

ant and the victim resulting from a previous altercation between the victim and Lionel McCray. Lionel McCray wanted to "get" the victim because the victim had hit him (Lionel) with a pistol. Prior to the killing, the evidence showed that the defendant and Lionel McCray carried on a conversation during which the defendant said that "he wanted to do it," and defendant was then handed a gun by Lionel McCray. Three witnesses identified the defendant as the killer. After the killing, the defendant bragged about how he "did it" and asked if the victim was dead. Furthermore, the evidence showed that the defendant shot the victim six times. Three of the wounds were to the head. Two of the three wounds to the head could have been fatal alone. At least one shot to the victim's head was fired with the muzzle of the gun pressed against the victim's skin. It is reasonable to infer that this wound, as well as many of the other wounds, was inflicted while the victim was lying helpless on the ground, thus showing a conscious decision on the part of the defendant to ensure that his victim was dead.

Each of the circumstances normally considered probative of premeditation and deliberation was present in this case. Any contradictions or discrepancies in the evidence were for the jury to resolve. Based on this evidence, we find sufficient evidence of premeditation and deliberation and conclude that the trial court did not err in denying defendant's motion to dismiss the first-degree murder charge.

III.

[3] By his third assignment of error, the defendant contends that the trial court erred by excluding the testimony of two defense witnesses, Officer J.J. Sturm and Harris Dixon, on the ground that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice under Rule 403 of the Rules of Evidence.

On *voir dire*, Officer Sturm testified that sometime during the late evening hours of 22 August 1992, he was called to investigate a report of shots being fired at the corner of Raleigh and East Market Streets. During his investigation, Officer Sturm approached James Carelock, the victim in the instant case, and saw Carelock attempt to hide behind a parked truck. Officer Sturm confronted Carelock and checked him for weapons. Officer Sturm stated that he found no weapons on Carelock, but upon checking the area behind the truck, he found a .380 semiautomatic weapon. Officer Sturm further testified that he did not personally see Carelock with a weapon, and that the complaining witness was never located to identify the shooter.

Harris Dixon, the manager of Raleigh Street Poolroom, testified on *voir dire* that during the late evening hours of 22 August 1992, he heard shots fired and walked outside the poolroom. Mr. Dixon stated that he saw James Carelock go behind a truck and that he saw something go over a nearby fence prior to Officer Sturm approaching Carelock. Mr. Dixon further testified that he did not see Carelock with a gun, and that he informed Officer Sturm that he did not want Carelock on his premises.

Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The defendant has failed to show that the trial court abused its discretion by excluding the testimony of witnesses Sturm and Dixon. The defendant argues that the testimony was relevant and should not have been excluded because it showed that Carelock had been involved in a shooting incident a few hours prior to his death, thus providing someone other than the defendant with a motive to kill him. This theory is pure conjecture. The proffered testimony did not reveal who, if anyone, was shot at; that Carelock did the shooting; or that anyone involved in the earlier incident was present at the English Village Apartments at the time of Carelock's murder. Further, there was no evidence that anyone had made threats against Carelock as a result of the shooting incident outside the poolroom. The proffered testimony was probative only of the fact that Carelock was present outside the Raleigh Street Poolroom around the time the shooting incident occurred. This information was already before the jury through another witness' testimony. The proffered testimony was, however, prejudicial to the State in that it suggested the victim was himself a violent person who attempted to elude a police officer and dispose of a weapon and who was ejected from a public establishment.

The record reveals that the trial court carefully weighed the probative value of the evidence against the possibility of unfair prejudice and specifically found that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. In light of the lack of probative value of the evidence offered by the defendant and the strong possibility of prejudice to the State, we conclude that the trial court properly exercised its discretion in excluding the testimony of witnesses Sturm and Dixon. This assignment of error is overruled.

IV.

[4] In his last assignment of error, the defendant contends that the trial court erred by sustaining the State's objection to testimony of Pauline McCray. Specifically, the defendant argues that Ms. McCray should have been allowed to testify that the description of the assailant provided by Janice Seagroves more accurately described her son, Lionel McCray, than her grandson, the defendant. We disagree.

Evidence that someone other than the defendant committed the crime charged is inadmissible unless it points directly to the guilt of the third party. *State v. Hamlette*, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981). "Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible." *Id.* In the present case, the uncontradicted evidence showed that Lionel McCray did not leave Michael Roberson's apartment until after the shooting had occurred. Further, three witnesses positively identified the defendant, not Lionel McCray, as the man they saw shoot James Carelock. Pauline McCray, on the other hand, was not present at the English Village Apartments when the shooting occurred. Ms. McCray could neither testify as to what her son or the defendant was wearing nor testify as to their whereabouts on the night of the shooting. Ms. McCray's testimony clearly did not point directly to the guilt of another person. It merely allowed an inference or conjecture as to Lionel McCray's guilt. Thus, the trial court properly excluded the testimony of Pauline McCray. Accordingly, this assignment of error is overruled.

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

NO ERROR.

CUSTOM MOLDERS, INC. v. AMERICAN YARD PRODUCTS, INC., FORMERLY KNOWN AS ROPER CORPORATION

No. 326PA94

(Filed 3 November 1995)

1. Statutes § 24 (NCI4th)— Session Laws—control over General Statutes

The statement of a legislative enactment contained in the Session Laws controls over the statement codified in the General Statutes.

Am Jur 2d, Statutes §§ 142 et seq.

2. Judgments § 651 (NCI4th)— treble damages award—postjudgment interest

Since Section 2 of the 1985 amendment of N.C.G.S. § 24-5 by Chapter 214 of the 1985 Session Laws provides that the act "shall not affect the law as it existed before the enactment of Chapter 327 of the 1981 Session Laws," and § 24-5 as it existed prior to 1981 provided that "the amount of any judgment or decree, except the costs . . . shall bear interest till paid," North Carolina law provides for postjudgment interest on judgments for money damages generally, including a judgment for treble damages, until the judgment is paid. The decision of *Love v. Keith*, 95 N.C. App. 549 (1989), is disavowed to the extent that it precludes the recovery of postjudgment interest on the full amount of the judgment under the current version of N.C.G.S. § 24-5 and as § 24-5 existed prior to 1981.

Am Jur 2d, Interest and Usury §§ 59, 60.

3. Judgments § 651 (NCI4th)— failure to pay interest on treble damages—partial payment of judgment—judgment against surety

Where the judgment provided that plaintiff shall recover trebled damages of "$747,048 . . . and interest as provided by law from the date of entry of this judgment," the clerk of court correctly designated defendant's payment of the trebled damages and interest only on the portion of the judgment designated by the jury as compensatory damages as a partial payment of the judgment, and the trial court erred by denying plaintiff's motion for judgment against the surety on defendant's supersedeas bond

for the remaining amount owed on the judgment for interest on the treble damages portion thereof.

Am Jur 2d, Interest and Usury §§ 59, 60.

4. Unfair Competition § 53 (NCI4th)— unfair practice—prevailing party—attorney fees for motion to protect judgment and appeal

Where the Supreme Court held that the Court of Appeals erred by affirming the trial court's denial of plaintiff's motion for postjudgment interest on the treble damages portion of its judgment for an unfair and deceptive practice, plaintiff is now the prevailing party, and the trial court has the discretion under N.C.G.S. § 75-16.1 to award plaintiff reasonable attorney fees with regard to pursuing its motion in the trial court and its appeal in the appellate courts.

Am Jur 2d, Appellate Review § 912.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 156, 444 S.E.2d 224 (1994), affirming an order entered 5 January 1993 by Thompson, J., in Superior Court, Durham County. Heard in the Supreme Court 11 October 1995.

Bentley & Kilzer, P.A., by Susan B. Kilzer and Charles A. Bentley, Jr., for plaintiff-appellant.

Brown & Bunch, by M. LeAnn Nease, for defendant-appellee.

Berry & Byrd, by Wade E. Byrd; and Mary Ann Tally, General Counsel, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

FRYE, Justice.

The crucial question in this case is whether a judgment for money damages in an action not based on contract bears postjudgment interest. We hold that it does.

There seems to have been no doubt regarding this question prior to the enactment of chapter 327 of the 1981 Session Laws. Prior to that time, N.C.G.S. § 24-5 provided as follows:

§24-5. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.—All sums of

> money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. *In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the Court shall be rendered according to this section.*

N.C.G.S. § 24-5 (1965) (emphasis added).

In 1981, the statute was amended to provide for prejudgment interest on compensatory damages covered by liability insurance and postverdict interest on compensatory damages not covered by liability insurance. Chapter 327, section 1 of the 1981 Session Laws provided in pertinent part:

> **AN ACT TO MANDATE THE ACCRUAL OF INTEREST ON MONEY JUDGMENTS AWARDED IN ACTIONS OTHER THAN CONTRACT FROM THE FILING OF CLAIM.**
>
> *The General Assembly of North Carolina enacts:*
>
> **Section 1.** The second sentence of G.S. 24-5 is rewritten to read:
>
> "The portion of all money judgments designated by the fact finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. Interest on an award in an action other than contract shall be at the legal rate. The portion of all money judgments designated by the fact finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly."

Act of 5 May 1981, ch. 327, sec. 1, 1981 N.C. Sess. Laws 369, 369-70. In actions other than contract, this amendment provided for prejudgment interest on damages designated by the fact finder as compen-

satory, such interest to continue until the judgment is paid and satisfied. In such cases, the compensatory damages covered by liability insurance would bear interest from the date the action was instituted, while those not covered by liability insurance would bear interest from the date of the verdict. *Id.*

Chapter 327 of the 1981 Session Laws was unsuccessfully challenged in the courts as being unconstitutionally vague, uncertain, and indefinite and as violating fundamental principles by favoring plaintiffs who recover judgments against defendants who were covered by liability insurance. *See Lowe v. Tarble*, 312 N.C. 467, 323 S.E.2d 19 (1984), *aff'd on rehearing*, 313 N.C. 460, 329 S.E.2d 648 (1985).

In 1985, N.C.G.S. § 24-5(b) was amended to remove the distinction between noncontract judgments covered by liability insurance and those not covered by liability insurance, and to clarify the law with respect to interest on judgments generally. Chapter 214 of the 1985 Session Laws provides in pertinent part:

> AN ACT TO CLARIFY INTEREST RELATING TO JUDGMENTS AND PROVIDE FOR INTEREST ON NONCONTRACT JUDGMENTS REGARDLESS OF INSURANCE COVERAGE.
>
> *The General Assembly of North Carolina enacts:*
>
> **Section 1.** G.S. 24-5 is rewritten to read:
>
> "§ 24-5. *Contracts, except penal bonds, and judgments to bear interest.*—(a) Contracts. In an action for breach of contract . . . .
>
> (b) Other actions. In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate."
>
> **Sec. 2.** This act shall become effective October 1, 1985. This act shall not affect pending litigation and shall not affect the law as it existed before the enactment of Chapter 327 of the 1981 Session Laws.

Act of 21 May 1985, ch. 214, 1985 N.C. Sess. Laws 181. The 1985 amendment thus removed the distinction between compensatory damages covered by liability insurance and those not covered by liability insurance as it relates to the beginning date for the accrual of

interest. Under the 1981 amendment, interest began to accrue on such damages on the date the action was instituted if covered by insurance, while interest began to accrue on such damages on the date the verdict was rendered if not covered by insurance. Under the 1985 amendment, the compensatory damages earn interest from the date the action is instituted whether or not such damages are covered by liability insurance.

Section 2 of the 1985 amendment provides that the act "shall not affect the law as it existed before the enactment of chapter 327 of the 1981 Session Laws." Under N.C.G.S. § 24-5 as it existed prior to the enactment of chapter 327 of the 1981 Session Laws, judgments generally, whether in contract or noncontract actions, bore interest from the date of the judgment until the judgment was paid. The distinctions between contract and noncontract actions related to the rate of interest and when prejudgment interest, if any, began to accrue. N.C.G.S. § 24-5 (1965). Thus, under the law as it existed before the enactment of chapter 327 of the 1981 Session Laws, both contract and noncontract damage awards accrued postjudgment interest until the judgment was paid.

[1] The current version of N.C.G.S. § 24-5, entitled *Contracts, except penal bonds, and judgments to bear interest*, provides in pertinent part:

> (b) Other Actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C.G.S. § 24-5(b) (1991). The codifiers of the current statute placed section 2 of chapter 214 of the 1985 Session Laws as an editor's note to the statute rather than including it as a part of the statute itself. Thus, the Court of Appeals, in the instant case and in *Love v. Keith*, 95 N.C. App. 549, 383 S.E.2d 674 (1989), gave no effect to section 2 of chapter 214 of the 1985 Session Laws. However, we have held that the statement of a legislative enactment contained in the Session Laws is controlling over the statement codified in the General Statutes. *See Schofield v. Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980); *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967). This rule is applicable to the instant case.

[2] Plaintiff argues that according to Section 2 of Chapter 214 of the 1985 Session Laws, the current language of the statute does not affect the law as it existed before the enactment of chapter 327 of the 1981 Session Laws. The statute prior to the 1981 amendment provided in pertinent part that "the amount of any judgment . . . in any kind of action . . . shall bear interest till paid." N.C.G.S. § 24-5 (1965). Therefore, plaintiff contends that North Carolina law provides for postjudgment interest on judgments for money damages generally, including a judgment for treble damages, until the judgment is paid. We agree.

To interpret N.C.G.S. § 24-5(b) as the Court of Appeals does in *Love v. Keith*, 95 N.C. App. 549, 383 S.E.2d 674, and in the instant case gives no effect to section 2 of chapter 214 of the 1985 Session Laws. Reading N.C.G.S. § 24-5(b) as a whole, and giving full effect to the provision in section 2 of chapter 214 of the 1985 Session Laws that "[t]his act . . . shall not affect the law as it existed before the enactment of Chapter 327 of the 1981 Session Laws," we hold that, as stated in N.C.G.S. § 24-5 as it existed prior to 1981, "the amount of any judgment or decree, except the costs . . . shall bear interest till paid."

We now review the procedural and substantive history of the case before this Court. On 26 May 1988, in the case of *Custom Molders, Inc. v. Roper Corporation*, Judge J. Milton Read, Jr., entered a judgment in Superior Court, Durham County, which provided in pertinent part as follows:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff Custom Molders, Inc. shall have and recover from the defendant Roper Corporation the sum of $747,048, together with reasonable attorneys' fees in the amount of $49,000 and interest as provided by law from the date of entry of this judgment.

To stay execution of the judgment pending appeal, defendant's surety, The Aetna Casualty and Surety Company, executed and filed a supersedeas bond in the amount of $1,003,020.48. On 19 February 1991, the Court of Appeals affirmed the trial court's judgment. *Custom Molders, Inc. v. Roper Corp.*, 101 N.C. App. 606, 401 S.E.2d 96 (1991). On 7 November 1991, this Court affirmed the decision of the Court of Appeals. *Custom Molders, Inc. v. Roper Corp.*, 330 N.C. 191, 410 S.E.2d 55 (1991) (per curiam).

On 14 February 1992, defendant tendered payment in the amount of $940,447.53 to the Clerk of Superior Court, Durham County, in satisfaction of the judgment. Defendant calculated this sum as follows:

Judgment of $249,016 Trebled	$747,048.00
Preappeal Attorneys' Fees	49,000.00
Postjudgment Attorneys' Fees	70,300.00
Postjudgment Interest on Compensatory Award through 2-14-92 [$54.58 per day]	74,053.53
Court Costs	46.00
TOTAL	**$940,447.53**

The Clerk of Superior Court designated defendant's payment as a partial payment of the judgment.

On 9 October 1992, plaintiff filed a motion for judgment against defendant's surety, The Aetna Casualty and Surety Company, for the remaining amount owed on plaintiff's judgment plus additional attorneys' fees pursuant to N.C.G.S. § 75-16.1 in connection with filing the motion against the surety for protecting its judgment. On 16 November 1992, the trial court held a hearing on plaintiff's motion. By order entered 5 January 1993, the trial court denied plaintiff's motion, concluding that plaintiff was not entitled to postjudgment interest on the portion of its judgment not designated by the jury as compensatory damages. The trial court accordingly denied plaintiff's request for additional attorneys' fees in connection with its motion against the surety. Plaintiff appealed the denial of its motion to the Court of Appeals.

The Court of Appeals affirmed the trial court's denial of plaintiff's motion for postjudgment interest on the portion of its judgment not designated by the jury as compensatory damages and affirmed the trial court's denial of plaintiff's request for attorneys' fees. *Custom Molders, Inc. v. American Yard Products, Inc.*, 115 N.C. App. 156, 444 S.E.2d 224 (1994). Discretionary review of the Court of Appeals' decision was allowed *ex mero motu* by this Court on 2 March 1995. *Custom Molders, Inc. v. American Yard Products, Inc.*, 339 N.C. 736, 462 S.E.2d 813 (1995).

Plaintiff contends that the Court of Appeals erred in affirming the trial court's denial of plaintiff's motion for interest on the treble damages portion of the trial court's judgment from the date of judgment until paid. Plaintiff bases its argument on an exhaustive review of the legislative history of N.C.G.S. § 24-5. The Court of Appeals "[did] not find it necessary to examine the statute in such detail because the plain language of G.S. § 24-5(b), as well as a recent decision of [that]

[c]ourt, squarely rebut[s] plaintiff's argument." *Custom Molders*, 115 N.C. App. at 158, 444 S.E.2d at 225.

The recent decision referred to by the Court of Appeals is *Love v. Keith*, 95 N.C. App. 549, 383 S.E.2d 674. In *Love*, a different panel of the Court of Appeals addressed the application of N.C.G.S. § 24-5(b) to verdicts trebled pursuant to N.C.G.S. § 75-16 and held:

> The defendants finally argue the trial judge erred in imposing interest on the portion of the judgment in excess of $3,400. We agree. Since the defendants' conduct violated N.C.G.S. Sec. 75-1.1 et seq., the trial judge properly trebled the jury's $3,400 verdict. N.C.G.S. Sec. 75-16. The trial judge then ordered interest on the full $10,200. In this the trial judge erred since N.C.G.S. Sec. 24-5(b) (1986) only provides for interest on compensatory damages as designated by the fact finder. The fact finder here, the jury, specified compensatory damages of only $3,400. The plaintiffs may receive interest only on $3,400, calculated as specified in N.C.G.S. Sec. 24-5(b).

Love, 95 N.C. App. at 557-58, 383 S.E.2d at 679. We disavow the holding in *Love* to the extent that it precludes the recovery of postjudgment interest on the full amount of the judgment under the current version of N.C.G.S. § 24-5(b) and as § 24-5 existed prior to 1981.[1]

[3] The judgment in this case provided that plaintiff "shall have and recover from the defendant . . . $747,048 . . . and interest as provided by law from the date of entry of this judgment." The Clerk of Court correctly designated defendant's payment of postjudgment interest on only a portion of the amount of the judgment as a partial payment of the judgment. Thus, the Court of Appeals erred in affirming the trial court's reversal of that designation by denying plaintiff's motion for judgment against defendant's surety. We therefore reverse the Court of Appeals on this issue.

[4] Plaintiff next contends that the Court of Appeals erred in affirming the trial court's denial of additional attorneys' fees for pursuing a motion to protect its judgment and for pursuing the present appeal.

1. The lawsuit in *Love* was instituted on 22 August 1985, before 1 October 1985, the effective date of chapter 214 of the 1985 Session Laws, but after the effective date of chapter 327 of the 1981 Session Laws. Thus, section 2 of chapter 214 of the 1985 Session Laws did not apply to this case and was not cited or referred to by the Court of Appeals in its opinion in *Love*.

Plaintiff also contends it is entitled to attorneys' fees pursuant to N.C.G.S. § 75-16.1 in connection with services performed in the present proceedings which were necessary in order to protect plaintiff's right to postjudgment interest. Plaintiff argues that because defendant refused to pay postjudgment interest on the full amount of its judgment and made only a partial payment on the judgment, plaintiff was compelled to bring forward a motion to protect its judgment.

"The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972). "Except as so provided by statute, attorneys' fees are not allowable." *Baxter v. Jones*, 283 N.C. 327, 330, 196 S.E.2d 193, 195 (1973). N.C.G.S. § 75-16.1 provides in pertinent part:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (1983).

As the Court of Appeals said in *Cotton v. Stanley*, 94 N.C. App. 367, 380 S.E.2d 419 (1989), N.C.G.S. § 75-16.1 allows attorneys' fees for services rendered at all stages of litigation, including appeals. Accordingly, since plaintiff is now the prevailing party in this case, we must reverse the Court of Appeals' holding that plaintiff is not entitled to reasonable attorneys' fees with regard to pursuing its motion and this appeal.

Whether to award or deny attorneys' fees is within the sound discretion of the trial judge. *Concrete Service Corp. v. Investors Group*,

Inc., 79 N.C. App. 678, 688, 340 S.E.2d 755, 761, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Once the trial court decides to award attorneys' fees, however, it must award a reasonable fee. *See* N.C.G.S. § 75-16.1 (1987); *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987). Therefore, the trial court on remand must determine, in its sound discretion, whether to award reasonable attorneys' fees.

For the foregoing reasons, we reverse the Court of Appeals' decision and remand the case to that court for further remand to the trial court for further proceedings and entry of judgment not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JOSHUA WAYNE GIBSON

No. 563A94

(Filed 3 November 1995)

1. Evidence and Witnesses § 1331 (NCI4th)— confession by juvenile—Miranda and statutory warnings—sufficiency of findings

The trial court did not err in the denial of a juvenile defendant's motion to suppress an inculpatory statement he made to police officers where the trial court found from uncontroverted evidence that defendant was fully advised of his *Miranda* rights and his rights under N.C.G.S. § 7A-595(a), and the court also found that defendant "freely, knowingly, intelligently and voluntarily" waived his rights and that his statement was made "freely, voluntarily and understandingly." The trial court's findings were not insufficient to support the ruling admitting defendant's confession into evidence because they did not include the precise words of N.C.G.S. § 7A-595(d) that defendant "knowingly, willingly, and understandingly" waived his rights.

Am Jur 2d, Evidence §§ 719, 749; Juvenile Courts and Delinquent and Dependent Children § 95.

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

2. Evidence and Witnesses §§ 1246, 1261 (NCI4th)— presence of parents and attorney in police station—failure to advise juvenile—admissibility of juvenile's confession

Law enforcement officials are not required to inform a juvenile that his parents or attorney are actually present in the police station before taking his voluntary confession, and their failure to do so does not render the juvenile's confession involuntary as a matter of law or otherwise inadmissible.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 95.

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

3. Evidence and Witnesses § 1320 (NCI4th)— confession of juvenile—voir dire hearing—officer's training—exclusion of testimony—no error

A juvenile's confession was not improperly admitted because the trial court sustained the State's objections to defendant's questions concerning an officer's training in taking statements from juveniles in criminal cases where such officer never conducted any interview or questioning of defendant, and his training was thus not a proper matter for consideration in determining whether defendant's confession was admissible.

Am Jur 2d, Evidence § 307.

4. Criminal Law § 107 (NCI4th)— criminal histories of State's witnesses—no right to discovery

Defendant was not entitled under N.C.G.S. § 15A-903(d) to be provided the criminal histories of the State's civilian witnesses.

Am Jur 2d, Depositions and Discovery § 253.

5. Criminal Law § 106.2 (NCI4th)— discovery—communications between victim and girlfriend—irrelevancy

Defendant was not prejudiced by the trial court's refusal to compel the State to permit him to inspect written communications between a murder victim and his girlfriend, who was a State's witness, since nothing in them was relevant to the issues raised at trial.

Am Jur 2d, Depositions and Discovery §§ 253, 254.

6. Homicide § 255 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The evidence was sufficient to support submission of an issue as to defendant's guilt of premeditated and deliberate first-degree murder where it tended to show that defendant was present while defendant's friend and the victim exchanged words; defendant leaned out of his friend's truck and shot the victim as the victim moved toward his own truck; defendant then shot the victim several times while chasing him through the woods and shot him in the head a number of times at close range while he was helpless on the ground; and the victim was discovered face-down on the ground with his arms folded up under his face and upper body.

Am Jur 2d, Homicide § 425.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Saunders, J., at the 14 April 1994 Criminal Session of Superior Court, Mecklenburg County. Heard in the Supreme Court on 13 September 1995.

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

Charles L. Morgan, Jr., for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was indicted for the first-degree murder of William Travis Runyan. He was tried non-capitally, found guilty as charged, and sentenced to a mandatory term of life imprisonment. Defendant appealed to this Court asserting four assignments of error.

Evidence presented by the State, including defendant's inculpatory statement made prior to his arrest, tended to show that Travis Runyan and Michael Hayes arranged a meeting for the afternoon of 10 February 1993 to settle a dispute over Travis's girlfriend, Jennifer Hall, who was Michael's former girlfriend. The original plan called for Travis and Michael to meet at J.H. Gunn Elementary School in Charlotte. Pursuant to Jennifer's suggestion that the meeting be in a more public place, it was changed to the Wal-Mart on Albemarle Road. Jennifer and Travis agreed that Travis would come to see her later that afternoon. After these arrangements were made, Jennifer became concerned that there might be trouble, went to the Wal-Mart,

and concealed herself so that she would not be visible to Travis or Michael.

Shortly after arriving at the Wal-Mart, Jennifer saw Travis and Michael arrive in their respective trucks. She was unable to see inside Michael's truck because he had tinted windows. She saw Travis get out of his truck, walk up to Michael's truck, and "put up his hands." Travis then got back in his truck. Both trucks then left the Wal-Mart parking lot, and Jennifer went home to wait for Travis.

Travis and Michael, who was accompanied by defendant, traveled out into Mecklenburg County and parked in the Camp Stewart Road area. While defendant stayed in Michael's truck, Michael and Travis had an exchange of words. Travis started walking around Michael's truck. Defendant leaned out the window and fired his gun in Travis's direction, shooting him in the stomach. As Travis ran into the woods, defendant followed and shot Travis once in the leg and several times in the head, killing him.

When Travis did not arrive at Jennifer's house at the appointed time, she called his home and spoke with his father, Tom Runyan, a detective with the Charlotte Police Department. After obtaining details, Mr. Runyan set out to find his son by searching areas where he thought someone might hide a body or car. After more than an hour, Mr. Runyan found Travis's abandoned truck in a new development near Camp Stewart Road. He called the police dispatcher for help and began searching the area for Travis. Mr. Runyan found Travis's body in the woods near where the truck had been found.

Dr. J. Michael Sullivan, forensic pathologist and medical examiner for Mecklenburg County, testified that the autopsy he performed on Travis revealed six gunshot wounds: one wound to the abdomen, one wound to the right leg, and four wounds to the head. Dr. Sullivan stated that the nature of the wounds to Travis's head indicated that the shots were fired by someone standing over the body. They were close or intermediate range wounds, meaning that the shots were fired from around two to three feet away.

Officer Steven Willis testified that he went to Michael Hayes's home on the morning of 11 February 1993 to discuss the killing with him. Michael told him that defendant was also present in the home and that the police might want to talk with him. Defendant, who was fifteen years old, accompanied Officers Willis and Leonard to the police station. The officers believed at that time that defendant was

an alibi witness. Upon defendant's arrival at the station, Officer David Graham and another officer told defendant that he was not under arrest, that any participation by him in any interview was voluntary, and that he was free to leave at any time.

The first portion of the interview with defendant lasted approximately one hour and a half, during which defendant denied any knowledge of Travis's death. After defendant took a break, Officer Graham again reminded him that he could end the interview at any time and advised him of his *Miranda* and juvenile rights. Defendant indicated that he wished to continue the interview and signed a written waiver of rights. Defendant also signed a "Juvenile Waiver of Rights." Officer Graham then told defendant that there was no doubt that Michael and defendant were involved in the murder but that the officers did not know the reason for the murder. While defendant previously had acted self-assured, at this point he became upset and his voice became "very low." Defendant then stated that he, Michael, and Travis had gone to the Camp Stewart Road area. Defendant said that he shot Travis several times after Travis and Michael had an argument and Travis started "acting crazy [like] he was going to turn on us, hurt us or kill us." Defendant said that the gun he had used, which belonged to defendant's father, was located at defendant's home. Defendant signed a voluntary consent to search form stating where the gun could be found in the home.

Graham reduced defendant's confession to writing, and defendant signed it. While Graham knew that defendant's parents and an attorney were at the police station during the period in which the interview took place, he did not inform defendant of their presence. Defendant did not ask to see anyone during the interview.

[1] Defendant assigns as error the trial court's denial of his motion to suppress the inculpatory statement he made to police officers. Defendant first contends in support of this assignment of error that, as he was a juvenile in custody when he made his inculpatory statement and the trial court failed to make proper findings under N.C.G.S. § 7A-595, it was error for the trial court to permit his statement to be introduced as evidence. N.C.G.S. § 7A-595 includes the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966), as well as additional warnings for juveniles who are to be interrogated while in custody.

The findings of a trial court following a *voir dire* hearing on the voluntariness of a confession are conclusive and will not be disturbed

on appeal if they are supported by competent evidence in the record. *State v. Holden*, 321 N.C. 125, 137, 362 S.E.2d 513, 523 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). A trial court's conclusions of law, however, are fully reviewable by our appellate courts. *State v. McCullers*, 341 N.C. 19, 25, 460 S.E.2d 163, 167 (1995).

In the present case, the trial court found from uncontroverted evidence that defendant was fully advised of his rights as required by N.C.G.S. § 7A-595(a) and that he signed a written acknowledgement and waiver of those rights before making his confession to the killing of Travis Runyan. The trial court did not rule expressly on the question of whether defendant was in custody at the time he made his inculpatory statement. We assume *arguendo* for purposes of this appeal that he was in custody.

N.C.G.S. § 7A-595(d) provides:

> Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

N.C.G.S. § 7A-595(d) (1989). The trial court found in this case that "defendant was in full understanding of his constitutional rights . . . and that he freely, knowingly, intelligently and voluntarily waived each of these rights and thereupon made the statements to the officers" and that "the statement was made . . . freely, voluntarily and understandingly." Defendant contends that, as the trial court's findings were in words not identical to those used in the statute, its findings are insufficient to support the ruling admitting defendant's inculpatory statement into evidence. We do not agree.

In *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), this Court noted that the "purpose of the requirement" of N.C.G.S. § 7A-595(d) "is to establish the basis for admitting the statement." *Id.* at 187, 400 S.E.2d at 419. This Court has found no error where the orders of trial courts holding confessions of juveniles to be admissible have been consistent with the purpose of the statute, but have not included the precise statutory words that the defendants "knowingly, willingly, and understandingly" waived their rights. *See, e.g., State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993) (trial court findings that juvenile defendant "voluntarily waived [her juvenile and *Miranda*] rights, and that the statement she gave thereafter to the officers was freely, voluntarily and understandingly given"), *cert. denied*, —- U.S. —-, 129 L. Ed. 2d 865 (1994). In *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776

(1994), the trial court used the same terminology used in the instant case—that the juvenile defendant "*freely, knowingly, intelligently and voluntarily waived* each of these [statutory] rights, and thereafter made the statements in question"—in its finding that the waiver comported with N.C.G.S. § 7A-595(d). *Id.* at 664, 440 S.E.2d at 786 (emphasis added). We upheld the trial court's order in *Reid*, concluding that "those facts support the conclusions of law that defendant voluntarily waived his juvenile and *Miranda* rights and that the statement that he gave thereafter was freely, voluntarily, and understandingly given." *Id.* at 665, 440 S.E.2d at 786. As we find *Reid* to be controlling here, we conclude that the trial court's findings are sufficient to comply with the requirements of the statute.

[2] Defendant also argues in support of this assignment of error that the officers' failure to inform him that his parents and attorney were present in the police station at the time he gave his incriminating statement renders his waiver of rights involuntary as a matter of law. We do not agree.

It was uncontroverted at trial that prior to defendant's confession, Officer Graham advised him of his *Miranda* rights and his rights as a juvenile under N.C.G.S. § 7A-595(a). While defendant argues that his waiver was involuntary because he was not notified that his parents and attorney were at the station during the time of the interview, notifying defendant of such facts does not come within the aegis of N.C.G.S. § 7A-595(a). That statute only provides that a juvenile in custody must be advised prior to questioning:

(1) That he has a right to remain silent; and

(2) That any statement he does make can be and may be used against him; and

(3) That he has a right to have a parent, guardian or custodian present during questioning; and

(4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

N.C.G.S. § 7A-595(a); *cf. Moran v. Burbine*, 475 U.S. 412, 422-23, 89 L. Ed. 2d 410, 421-22 (1986) (holding that the Sixth Amendment right to counsel barring any interference with defense counsel's efforts to act as a medium between the State and a defendant attaches only when a defendant has been formally charged); *State v. Reese*, 319 N.C. 110,

129-32, 353 S.E.2d 352, 363-64 (1987) (holding that events occurring outside the defendant's presence, including the arrival of defense counsel at the scene of the interrogation, have no bearing on defendant's capacity to understand and validly waive a constitutional right); *State v. Smith*, 294 N.C. 365, 374-76, 241 S.E.2d 674, 679-81 (1978) (noting that "the crucial question is whether the statement was freely and understandingly made after [defendant] had been fully advised of his constitutional rights and had specifically waived his right to remain silent and to have counsel present"). Law enforcement officials are not required to inform a juvenile that his parents or attorney are actually present before taking his voluntary confession, and their failure to do so does not render the juvenile's confession involuntary as a matter of law or otherwise inadmissible.

[3] Defendant also argues in support of this assignment of error that the trial court erred in sustaining the State's objections to questions asked of Officer Leonard and, as a result, contends that the court's denial of defendant's motion to suppress his confession was reversible error. The trial court sustained the State's objections to defendant's questions concerning Officer Leonard's training in taking statements from juveniles in criminal cases. As Leonard never conducted any interview or questioning of defendant, his training was not a proper matter for consideration in determining whether defendant's confession was admissible. For the foregoing reasons, this assignment of error is overruled.

[4] Defendant next assigns as error the trial court's denial of his motion that he be provided criminal histories of the State's civilian witnesses. Defendant asserts that he needed such information to prepare for cross-examination and that he was entitled to the information pursuant to N.C.G.S. § 15A-903(d) dealing with the discovery of documents. This statute states in relevant part:

> Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, . . . or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense.

N.C.G.S. § 15A-903(d) (1988). We held in *State v. McLaughlin* that no statutory or constitutional principle requires a trial court to order the State to make a general disclosure of criminal records of the State's witnesses. *McLaughlin*, 323 N.C. 68, 85, 372 S.E.2d 49, 61 (1988), *sen-*

tence vacated on other grounds, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991). We continue to adhere to our ruling in *McLaughlin* and conclude that this assignment of error is without merit.

[5] Defendant next requests that this Court review the substance of written communications between Jennifer Hall and Travis Runyan for any relevant material that was withheld from defendant at trial. The trial court denied defendant's motion to examine those communications and ordered them sealed and forwarded to this Court for purposes of appellate review. Defendant argues that the trial court committed reversible error by refusing to compel the State to produce those communications. We have reviewed the materials at issue in their entirety. Nothing in them is in any manner relevant to the issues raised at trial, and defendant was not prejudiced by the trial court's refusal to compel the State to permit him to inspect them.

[6] By another assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder. Defendant contends that all of the evidence tended to show that he shot the victim in the "heat of passion" and did not premeditate and deliberate.

When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). 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. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.* Where, as here, a motion to dismiss calls into question the sufficiency of the evidence, the issue for the trial court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *Id.*

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 895 (1995); *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). " 'Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.' " *Skipper*, 337 N.C. at 27, 446 S.E.2d at 265-66 (quot-

ing *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994)). " 'Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.' " *Id.* at 27, 252 S.E.2d at 266 (quoting *Conner*, 335 N.C. at 635, 440 S.E.2d at 836). Circumstances to be considered in determining whether a killing was premeditated and deliberate include: (1) a lack of provocation by the victim, (2) conduct and statements of the defendant before and after the killing, (3) threats and declarations made against the victim by defendant, (4) ill will or previous difficulty between the parties, (5) the dealing of lethal blows after the victim has been felled or rendered helpless, (6) evidence that the killing was accomplished in a brutal manner, and (7) the nature and number of the victim's wounds. *State v. Thomas*, 332 N.C. 544, 556, 423 S.E.2d 75, 82 (1992).

In the present case, the evidence tended to show that defendant was present while Michael Hayes and the victim exchanged words. Defendant shot the victim as the victim moved toward his (victim's) truck. Defendant then shot the victim several times while chasing him through the woods and shot him in the head a number of times at close range while he was helpless on the ground. The victim was discovered face-down on the ground with his arms folded up under his face and upper body. Considering the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to warrant an instruction on premeditated and deliberate first-degree murder. This assignment of error is overruled.

Defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. LARRY LAMB

No. 567A93

(Filed 3 November 1995)

1. Conspiracy § 33 (NCI4th)— conspiracy to commit armed robbery—evidence sufficient

There was sufficient evidence of conspiracy to commit robbery with a dangerous weapon where defendant met with two

other men, one of whom was armed; the three men drove to the home of the victim; and the three men then left the vehicle, entered the victim's home, robbed, and shot him.

Am Jur 2d, Conspiracy § 40; Trial § 1286.

2. Criminal Law § 794 (NCI4th)— acting in concert—armed robbery—instructions—presence of defendant

There was no error in an instruction on acting in concert where the court did not instruct the jury that it must find that defendant was actually or constructively present when the armed robbery was committed before the defendant could be convicted. It is not necessary to tell the jury it must find the defendant was present to find him guilty so long as the court explains the doctrine so that the jury can apply it, and if the jury's acceptance of the State's version of the evidence mandates finding the defendant was present. Here, if the jury had believed the defendant, he would have been found not guilty without regard to a charge on acting in concert, but the jury accepted the State's version of the incident, under which the defendant was present at the scene of the crime.

Am Jur 2d, Trial § 1255.

3. Evidence and Witnesses § 2966 (NCI4th)— armed robbery—witness afraid of accomplice—relevant

There was no plain error in a prosecution for felony-murder, armed robbery, and conspiracy in the admission of evidence that an accomplice had beaten the witness and stolen things from her and her children and that she was afraid to leave him because there would be trouble when he found her. This testimony was relevant to prove that the witness's fear of the accomplice was the reason she waited as long as she did before coming forward to tell of the robbery-murder.

Am Jur 2d, Evidence §§ 340, 341.

4. Evidence and Witnesses § 728 (NCI4th)— murder and robbery—cross-examination of defendant—use of sawed-off shotgun as drug dealer

There was no plain error in a prosecution for murder, robbery, and conspiracy where defendant was asked on cross-examination whether a sawed-off shotgun found during a raid on his home was used in his drug dealings. Defendant had admitted that

he was a drug dealer and it was in evidence that a sawed-off shotgun had been found in his home. The question could not have had much impact on the jury, was peripheral to the issues being tried, and did not rise to the level of plain error.

Am Jur 2d, Trial § 814, 834, 836.

5. Evidence and Witnesses § 873 (NCI4th)— murder, robbery, conspiracy—statement by accomplice—offered to explain witness's delay in reporting—not hearsay

The trial court did not err in a prosecution for murder, robbery, and conspiracy by admitting testimony that an accomplice had told the witness the morning after the murder and robbery that he thought the victim had more money than they had found, that she should say she did not know anything about the shooting if anyone asked, and that she would go to jail and lose her children if she did not do so. The testimony was not introduced for the truth of the statement but to again explain why the witness did not report the offense in a more timely manner. The testimony that the victim had less money than expected could not have been too prejudicial because it added little to the testimony of this witness and did not rise to the level of a fundamental error affecting the basic fairness of the trial. N.C.G.S. § 8C-1, Rule 801(c).

Am Jur 2d, Evidence § 661.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Grant, J., at the 17 August 1993 Criminal Session of Superior Court, Duplin County, upon a jury verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to a conviction of conspiracy to commit robbery with a dangerous weapon was allowed 25 July 1994. Heard in the Supreme Court 11 May 1995.

Early in the morning hours of 28 February 1987, the body of Leamon Grady was found in his home in Duplin County. Grady, who had a reputation of dealing in liquor, had died as the result of a single gunshot wound to the chest.

On 31 August 1990, Lovely Lorden contacted the Sheriff's Department and indicated that she had information pertaining to the Grady case. Ms. Lorden stated that she had remained silent because she feared Levon Junior ("Bo") Jones, with whom she had been living at the time of Grady's murder. Ms. Lorden testified at trial that she

accompanied Jones and Ernest Matthews on the evening of 27 February 1987. They went to an ABC store and a bar during the course of the evening before picking up the defendant at Carolina Turkeys. The group returned to the bar, where the three males in the group exited the car. They walked behind the building and stayed for approximately ten to twenty minutes. They returned to the car and drove directly to the victim's home. No one in the car spoke during this drive. At Grady's home, the three men left the vehicle and approached the house. Jones, armed with a pistol, entered first, followed by Matthews and the defendant. Ms. Lorden heard two gunshots inside the house. The three men returned to the car with Jones carrying a case of beer. Jones then drove them to a bridge, where he stopped and threw a pistol into the river. The group consumed the beers. At Ms. Lorden's insistence, Jones took her home. He gave her over $200 in cash, which she testified he had not possessed earlier in the evening. Jones reminded her of how many children she had and that she too could go to jail for the events of the evening. Ms. Lorden perceived this as a threat.

Ms. Lorden admitted that she continued to live with Jones after the murder. She contemplated leaving on several occasions but was afraid she would lose her children. She eventually informed police about Jones's participation in an assault on a Hispanic male. Jones was convicted of the assault and was scheduled to be released from prison at approximately the time Ms. Lorden came forward with the information in this case.

The defendant testified in his own behalf. He testified that he left work at 12:06 a.m. on 28 February 1987 and walked home with no intervening stops. He slept until 8:00 a.m. and then returned to work. Lamb testified that he did not learn of the murder until after he left work the following afternoon. The defendant opined that his name had been brought into this case as the result of a recent business decision on his part. The defendant admitted that he was a drug dealer and recently had elected to change suppliers. He denied any involvement with the crime in question.

The jury found the defendant guilty of first-degree murder based on felony murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The State did not seek the death penalty, and the court sentenced the defendant to life in prison for the first-degree murder conviction and ten years for the conviction of conspiracy to commit robbery with a dangerous

weapon. Judgment was arrested on the conviction of robbery with a dangerous weapon. The defendant appealed.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] In his first assignment of error, the defendant argues that his motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon should have been allowed for insufficiency of the evidence. He says that Lovely Lorden provided the only eyewitness testimony to the occurrence and that her testimony showed there was no discussion of the crime by any of the men. It is possible that the men discussed the crime when they were behind Herman's Place, says the defendant, but this is only speculation. The defendant contends we can just as easily infer that the three men went to Mr. Grady's home without a shared plan to rob him and that Bo Jones turned a visit to buy alcohol into a robbery. The defendant, relying on *United States v. Giunta*, 925 F.2d 758 (4th Cir. 1991), says the "mere fact that several people participated in criminal activity does not prove [a] joint plan to do so."

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975). We said in *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933):

> Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

Id. at 713, 169 S.E. at 712.

We hold that the evidence that defendant met with two other men, one of whom was armed; that the three men drove to the home of the victim; and that the three men then left the vehicle and entered

the victim's home, robbed the victim, and shot him is substantial evidence from which the jury could find the robbery was carried out pursuant to a common plan to rob the victim. This supports the finding of guilty of conspiracy to commit robbery with a dangerous weapon. *See State v. Abernathy*, 295 N.C. 147, 244 S.E.2d 373 (1978).

This assignment of error is overruled.

[2] The defendant next assigns error to the charge. The court in its charge on acting in concert did not instruct the jury that before the defendant could be convicted by proving he was acting in concert, the jury must find that he was actually or constructively present when the crime was committed. The defendant says this was error.

In order to convict a defendant for acting in concert, the State must prove he was actually or constructively present. If all the State's evidence shows, however, that the defendant was at the scene of the crime, it is not necessary that the court charge the jury that the defendant had to be present. *State v. Hunt*, 339 N.C. 622, 649, 457 S.E.2d 276, 292-93 (1994), *reconsideration denied*, 339 N.C. 741, 457 S.E.2d 304 (1995); *State v. Gilmore*, 330 N.C. 167, 171, 409 S.E.2d 888, 890 (1991); *State v. Williams*, 299 N.C. 652, 658, 263 S.E.2d 774, 778 (1980).

The defendant, while conceding that presence is not an element of robbery with a dangerous weapon, says it is an element of the State's case when the State is relying on acting in concert to convict. He contends that by not submitting presence to the jury, the court in effect directed a verdict of guilty and denied him the right to a unanimous jury verdict in violation of his rights under the Constitutions of the United States and North Carolina. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982).

Acting in concert is a doctrine developed to make persons who participate in crimes responsible for criminal activity although they do not do all the acts necessary to constitute the crimes. In charging on acting in concert, the court must explain it adequately for the jury to be able to understand it and apply it to the evidence in the case. If all the State's evidence shows that the defendant was present when the crime was committed, it is not necessary to explain to the jury that the defendant must be present in order for it to understand and apply the doctrine of acting in concert.

We have said in some of our cases that presence is an element of acting in concert. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988); *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980). This does not mean it is an element of the crime that must be proved. So long as the court explains the doctrine so that the jury can apply it, and if the jury's acceptance of the State's version of the evidence mandates finding the defendant was present, it is not necessary to tell the jury it must find the defendant was present to find him guilty.

The defendant contends that his presence at the crime scene was disputed because he testified that he knew nothing of the crimes and was asleep in his bed when the crimes were committed. If the jury had believed the defendant, he would have been found not guilty without regard to a charge on acting in concert. The jury accepted the State's version of the incident. Under this version, the defendant was present at the scene of the crime.

This assignment of error is overruled.

[3] The defendant's next three assignments of error deal with testimony elicited by the State. No objection was made to this testimony, but the defendant asks us to consider the questions he has raised under the plain error rule. Rule 10(b)(1) of the Rules of Appellate Procedure provides that an assignment of error may be made to the admission of testimony only if exception was taken to its admission at trial. We have said that it places an impossible burden on the trial judge for a party as a matter of trial strategy to allow otherwise incompetent evidence to be admitted and then assign error to it. A trial judge should not have to determine the soundness of a party's trial strategy and make an objection for him. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983). We shall consider these assignments of error under the plain error rule.

Lovely Lorden testified on direct examination that Bo Jones had beaten her and had stolen things from her and her children. She said she was afraid to leave him because there would be trouble when he found her. The defendant says this testimony was irrelevant to any issue in this case and served only to "smear" Bo Jones and, by association, the defendant.

This testimony was relevant to prove that Ms. Lorden's fear of Bo Jones was the reason she waited as long as she did before coming forward to tell of the incident. We said in *State v. Larrimore*, 340 N.C.

119, 456 S.E.2d 789 (1995), "Where, as here, the witness has been the subject of past acts of violence and thereby has reason to fear another individual, those past acts are relevant to the issue of the witness' character for truthfulness or untruthfulness." *Id.* at 152, 456 S.E.2d at 807. It was not error and certainly not plain error to admit the testimony.

This assignment of error is overruled.

[4] The defendant contends in his next assignment of error that certain questions put to him on cross-examination were improper. The defendant testified on direct examination that in 1991 he was arrested for dealing in marijuana. He said that when the officers came to his home with a search warrant, he showed them the marijuana because he did not want the officers "messing up my house" in a search. On cross-examination, the State elicited testimony that the officers found several weapons, including a sawed-off shotgun, during the raid. The defendant was asked on cross-examination whether he had the gun because he was a drug dealer, and he denied that this was the case.

The defendant says the only reason the prosecutor asked him the question about his using the shotgun in his drug business was to portray him as a "violent thug" who would be inclined to participate in a crime such as the one involved in this case. The question was peripheral to the issues being tried. The defendant had admitted he was a drug dealer, and it was in evidence that a sawed-off shotgun had been found in his home. It could not have had much impact on the jury for the prosecuting attorney to ask whether the shotgun was used in the defendant's drug dealings, which the defendant denied. The question asked the defendant certainly did not rise to the level of plain error.

This assignment of error is overruled.

[5] In his last assignment of error, the defendant contends hearsay testimony was used against him. He bases this argument on the testimony of Lovely Lorden that on the morning after the murder and robbery, Bo Jones told her that he thought the victim had more money than the three men were able to find. She also testified that he told her that if anyone asked about the shooting, she should say that she did not know anything about it and that if she did not do so, she would go to jail and lose her children.

The testimony in regard to the threat against Ms. Lorden was not introduced for the truth of the statement. It again explained why she

did not report the offense in a more timely manner. It was not hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992); *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990).

In regard to Ms. Lorden's testimony that Bo Jones had told her that he thought the victim had more money than the three men were able to find, it could not have been too prejudicial to the defendant. Ms. Lorden had testified that she drove with three men, including the defendant, to the victim's home; that the three men went inside with a gun; that she heard two shots; that the three men returned to the automobile; and that thereafter Bo Jones gave her money. The statement by Bo Jones in regard to the amount of money they were able to find added little to the testimony of Ms. Lorden. It did not rise to the level of a fundamental error affecting the basic fairness of the trial. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

This assignment of error is overruled.

NO ERROR.

RAINTREE HOMEOWNERS ASSOCIATION, INC. v. KARL R. BLEIMANN AND WIFE, RENA BLEIMANN

No. 572PA94

(Filed 3 November 1995)

1. Deeds § 87 (NCI4th)— restrictive covenant—plan approval by architectural review committee—enforceability

A restrictive covenant making an architectural review committee the sole arbiter of plans for any construction in a subdivision and providing that the committee can withhold approval for any reason, including purely aesthetic ones, is enforceable according to its terms, at least in the absence of evidence that the committee acted arbitrarily or in bad faith in the exercise of its powers.

Am Jur 2d, Covenants, Conditions and Restrictions § 233.

2. Deeds § 87 (NCI4th)— architectural review committee—denial of use of vinyl siding—failure to show bad faith

The evidence was insufficient to show that the architectural review committee of plaintiff homeowners association acted arbi-

trarily or in bad faith when reviewing and denying defendants' request for approval of plans to replace wood clapboard siding on their home with vinyl siding, and the trial court should have directed a verdict for plaintiff in its action to enjoin defendants from placing vinyl siding on their home and to require defendants to restore their home to its original condition, where defendants presented evidence tending to show only that the vinyl siding looked like wood, was of a good quality, and was not objected to by neighbors; the uncontradicted evidence showed that the committee on three occasions considered defendants' application for vinyl siding despite the fact it had previously found the materials unacceptable, that members of the committee visited defendants' home and looked at the vinyl siding before making a decision, that the committee conducted a study and found that vinyl siding was not appropriate for the subdivision, and that previous applications had been rejected for that reason; and the evidence showed that the committee consistently found that vinyl siding was not appropriate for the subdivision because the general theme of the community was a natural, contemporary style, whereas vinyl siding conveyed a colonial or traditional style.

Am Jur 2d, Covenants, Conditions and Restrictions § 233.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 116 N.C. App. 561, 449 S.E.2d 13 (1994), finding no error in a trial that resulted in a judgment for the defendants entered by Webb, J., on 31 March 1993 in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 September 1995.

Weaver, Bennett & Bland, P.A., by John R. Lynch, Jr., and Michael David Bland, for plaintiff-appellant.

Donald S. Gillespie, Jr., for defendant-appellees.

FRYE, Justice.

Plaintiff, Raintree Homeowners Association, Inc. (Raintree), makes four arguments on this appeal. In its first argument, plaintiff contends that the trial court erred in denying its motion for directed verdict and motion for judgment notwithstanding the verdict. We agree and hold that defendants' evidence was insufficient as a matter of law to take the case to the jury.

The following facts were undisputed at trial:

Defendants Karl R. Bleimann and Rena Bleimann own a home within North Raintree, a section of a planned unit development known as Raintree. The property is subject to recorded covenants. Plaintiff Raintree owns property within Raintree and has the authority and duty to enforce, through its Architectural Review Committee (ARC), the terms of those covenants.

On or about 23 March 1990, defendants began to replace wood clapboard siding on their home with vinyl siding. On 26 March 1990, the Chairman of the ARC advised defendants to stop the installation because it had to be approved by the ARC pursuant to the Declaration of Covenants, Conditions and Restrictions (Declaration) signed by defendants when they purchased their home. These covenants require prior written approval by the ARC of the location, plans and specifications of alterations to any building within Raintree and, in order "to provide architectural value to the subdivision," require that, before any structural changes are made, a "site plan, final plans and specifications" must be submitted to and approved in writing by the ARC "as to harmony of exterior design and general quality with the existing standards of the neighborhood and as to location in relation to surrounding structures and topography."

On 26 March 1990, after being reminded of the requirements in the Declaration for approval of the construction on their home, defendants applied to the ARC for approval. Defendants attended an ARC meeting on the same evening and presented evidence in support of their application. The ARC denied defendants' application. Defendants sent a letter requesting that the ARC reconsider their application. The ARC discussed the application again at its meeting on 23 April 1990 and unanimously reaffirmed its prior decision. Defendants attended another ARC meeting on 21 May 1990 and again presented evidence in support of their application and suggested a compromise by which their home would be deemed a "test case" for vinyl siding. The ARC again denied the application.

While their requests for approval were being considered, defendants continued to install vinyl siding on their home. After the ARC's final determination to deny the application, plaintiff sued defendants seeking to enjoin them from placing the vinyl siding on their home and seeking to require them to permanently remove the vinyl siding and restore the house to its original condition. Defendants answered, praying that, among other things, plaintiff's prayers for relief be

denied and that defendants be permitted to finish installing the vinyl siding.

At trial, plaintiff's motion for summary judgment was denied, and the case was tried before a jury. The issue presented to the jury was whether plaintiff, through its ARC, acted reasonably and in good faith when it denied defendants' application for approval of installation of vinyl siding on defendants' home.

Plaintiff presented evidence that the ARC had made an extensive study of the use of vinyl siding in the subdivision because of a prior application. As a result of this study, the ARC concluded that vinyl siding was not appropriate because the area was "California Contemporary," a rustic style conveyed with houses made of either wood siding or stone. Vinyl siding was different in texture and would neither blend as well with the woody surroundings of North Raintree nor age in the same manner as the wood siding. The ARC concluded that houses with vinyl siding would stay shiny and would stand out, while wood siding would age and blend better with the foliage in the neighborhood. Members of the ARC also visited defendants' house before determining that the vinyl siding was not harmonious with the rest of the neighborhood.

Defendants' evidence consisted of photographs of the house before and after the vinyl siding was installed. They also presented the testimony of several neighbors who stated that the vinyl siding looked just like the wood siding and that they were not unhappy with defendants' house. The contractor also testified that because of defendants' desire to have vinyl siding that closely resembled wood siding, he installed a high-quality siding.

After the close of the evidence, the trial court denied plaintiff's motion for directed verdict. The jury found that plaintiff had not acted reasonably and in good faith when it denied the application. Thereafter, plaintiff moved for judgment notwithstanding the verdict or for a new trial. The trial court denied both motions. Based on the jury's verdict, the trial court entered judgment on 31 March 1993 (1) denying plaintiff's requests for injunctive relief and for an order directing defendants to remove the vinyl siding and restore the home to its original condition, and (2) enjoining plaintiff from preventing defendants from completing the installation of vinyl siding on their home. On appeal, a unanimous panel of the Court of Appeals found no error in the trial. We granted plaintiff's petition for discretionary review, and we now reverse the decision of the Court of Appeals.

[1] In *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 218 S.E.2d 476 (1975), our Court of Appeals held that restrictive covenants that grant broad discretionary power to architectural review committees to approve all construction in subdivisions are enforceable. With regard to the exercise of the power of the architectural review committees, that court stated:

> The exercise of the authority to approve the house plans cannot be arbitrary. . . . [A] restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith.

Id. at 195-96, 218 S.E.2d at 478-79 (1975); *accord Christopher Properties, Inc. v. Postell*, 106 N.C. App. 180, 415 S.E.2d 786 (1992); *Smith v. Butler Mountain Estates Property Owners Association*, 90 N.C. App. 40, 367 S.E.2d 401 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989); *Black Horse Run Property Owners Association, Inc. v. Kaleel*, 88 N.C. App. 83, 362 S.E.2d 619 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). It appears that most jurisdictions that have dealt with this issue have found that these covenants are enforceable as long as the determining body makes the decision reasonably and in good faith. *See* John Perovich, Annotation, *Validity and Construction of Restrictive Covenants Requiring Consent to the Construction on Lot*, 40 A.L.R.3d 864 (1971 & Supp. 1995).

In the instant case, the covenant states:

> No construction, reconstruction, remodeling, alteration or addition to any structure, building or fence, wall, road, drive, path or improvement of any nature shall be constructed without obtaining prior written approval of the Committee as to location, plan and specification. . . . The [ARC] shall be the sole arbiter of such plans and may withhold approval for any reason including purely aesthetic considerations.

Both parties agree that the restrictive covenant contained in defendants' deed is enforceable according to the decisions of the Court of Appeals. We agree that the above restrictive covenant is legally enforceable. The covenant specifically provides that the ARC is the sole arbiter of the plans and that the ARC can withhold approval for any reason, including purely aesthetic ones. There is no evidence or contention that the covenant was not entered into knowingly and voluntarily. Therefore, the covenant is enforceable according to its terms, at least in the absence of any evidence that the ARC acted arbi-

trarily or in bad faith in the exercise of its powers. Plaintiff contends that no such evidence was presented and judgment in its favor was appropriate notwithstanding the jury verdict to the contrary. We agree.

A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should be granted. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977). In considering any motion for directed verdict, the trial court must view all the evidence that supports the nonmovant's claim as being true, and that evidence must be considered in the light most favorable to the nonmovant, giving to the nonmovant the benefit of every reasonable inference that may legitimately be drawn from the evidence, with contradictions, conflicts and inconsistencies being resolved in the nonmovant's favor. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E.2d 582 (1977).

[2] In the instant case, viewing the evidence in the light most favorable to the nonmoving party, defendants' evidence shows that the vinyl siding closely resembled wood siding and that defendants' neighbors thought the vinyl siding looked attractive. Defendants, however, produced no evidence that the ARC acted arbitrarily or in bad faith when reviewing defendants' application or when making its decision.

Defendants argued and the Court of Appeals concluded that the fact that plaintiff had previously rejected prior applications for vinyl siding suggested that the ARC was unreasonable and acted in bad faith because it did not have an "open mind" when reviewing defendants' application. We disagree with this conclusion. Plaintiff's reliance on past practices and policies does not suggest that the ARC was being unreasonable or arbitrary. The evidence simply shows, even when examined in the light most favorable to defendants, that the ARC had previously evaluated the use of vinyl siding and found that it was not harmonious with the subdivision. Reliance on this past finding was not an example of bad faith. Defendants' evidence, presented through photographs and testimony, showed that the vinyl siding looked like wood, was of a good quality and was not objected to by neighbors. This evidence is not sufficient to show that plaintiff acted arbitrarily or in bad faith.

Instead, the uncontradicted evidence shows that the ARC on three occasions considered defendants' application for vinyl siding despite the fact that it had previously found the material unacceptable, that the members of the ARC visited defendants' house and looked at the vinyl siding before making a decision, that the ARC conducted a study and found that vinyl siding was not appropriate for North Raintree, and that previous applications had been rejected for that reason. The evidence also showed that the ARC consistently found that vinyl siding was not appropriate for this section of Raintree because the general theme of the community was a natural, contemporary style, whereas vinyl siding conveyed a colonial or traditional style.

Because no evidence was presented that plaintiff acted arbitrarily or in bad faith when making the decision to reject defendants' application for vinyl siding, the evidence was insufficient as a matter of law to raise a question of fact requiring submission to the jury. Directed verdict for the plaintiff would have been proper and, therefore, the trial judge erred in not granting plaintiff's motion for judgment notwithstanding the verdict.

By its second argument, plaintiff contends that the jury was improperly instructed. Having concluded that the evidence was insufficient to take the case to the jury, we find it unnecessary to determine this issue. We also find it unnecessary to address plaintiff's third and fourth arguments, which relate to the admissibility of certain evidence.

The decision of the Court of Appeals is reversed, and this case is remanded to that court with instructions that the case be remanded to the trial court for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

INTEGON INDEMNITY CORPORATION v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY

No. 516PA94

(Filed 3 November 1995)

1. Insurance § 549 (NCI4th)— loaner vehicle—garage liability—driver's policy—pro rata share

In a declaratory judgment action seeking a determination of the rights of the parties with respect to policy coverage applicable to an automobile accident, where Universal insured Meeker Lincoln-Mercury, which loaned the automobile involved in the accident to Hope and Allen Bridges, insured by Integon, who gave permission to use the vehicle to their daughter, Lisa Gaddy, who was insured by Atlantic Casualty, Universal is required to pay a pro rata share of the minimum limits required by the motor vehicle laws of North Carolina because the Universal policy provides that if there is other applicable insurance, Universal will pay its pro rata share of the minimum limits required by law and there is other applicable insurance here through Lisa Gaddy. Under the Universal policy, Lisa Gaddy is an insured as an operator of one of Meeker's automobiles within the scope of its permission. Although Universal argues that, because Lisa Gaddy has insurance with two other insurance companies which meet the minimum requirements of the Motor Vehicle Safety and Financial Responsibility Act, she is not an individual "required by law" to be an insured and the terms of the policy do not extend pro rata coverage to this claim, Lisa Gaddy does have other applicable insurance and under the terms of the policy Universal is responsible for a pro rata share of the minimum limits. The policy in *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, which involved similar facts and policies, contained limitations not present in the Universal policy at issue here.

Am Jur 2d, Automobile Insurance §§ 220, 246, 432.

Apportionment of losses among automobile liability insurers under policies containing pro rata clauses. 21 ALR2d 611.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like. 93 ALR2d 1047.

2. Insurance § 549 (NCI4th)— garage liability policy—driver's policy—defense costs

In an action arising from an automobile accident involving a vehicle loaned by an auto dealer, plaintiff Integon conceded that defense costs should not be prorated and the Court of Appeals' opinion on this issue was reversed.

Am Jur 2d, Automobile Insurance § 432.

Allocation of defense costs between primary and excess insurance carriers. 19 ALR4th 107.

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. 279, 447 S.E.2d 512 (1994), reversing the judgment entered in favor of defendant by Caviness, J., in the Superior Court, Buncombe County, on 1 October 1992. Heard in the Supreme Court 12 September 1995.

Blue, Fellerath, Cloninger & Barbour, P.A., by Frederick S. Barbour, for plaintiff-appellee.

Petree Stockton, L.L.P., by James H. Kelly, Jr. and Susan Holdsclaw Boyles, for defendant-appellant.

PARKER, Justice.

Plaintiff Integon Indemnity Corporation ("Integon") filed a declaratory judgment action seeking a determination of the rights of the parties with respect to policy coverage applicable to an automobile accident on 5 March 1989. The case was heard in Superior Court, Buncombe County, and judgment was entered on 1 October 1992. The trial court made *inter alia* the following findings of fact: On 5 March 1989 Meeker Lincoln-Mercury ("Meeker") owned a 1988 Peugeot automobile. On 5 March 1989 while the Meeker Peugeot was being operated by Lisa Gaddy, the vehicle overturned causing injury to Brandy Dryman. Meeker had loaned the Peugeot to Hope and Allen Bridges, parents of Lisa Gaddy. Lisa Gaddy had the permission of her parents to be operating the automobile at the time of the accident on 5 March 1989. At the time of the accident, Meeker was insured under a policy of insurance issued by defendant Universal Underwriters Insurance Company ("Universal"). The parties stipulated and the court further found that at the time of the accident, Integon provided

automobile liability coverage to Hope and Allen Bridges with liability limits in the minimum amount required by the North Carolina General Statutes and that a third insurer, Atlantic Casualty Insurance Company ("Atlantic"), provided a policy of automobile liability insurance covering Lisa Gaddy with liability limits in the minimum amount required by the North Carolina General Statutes.

Based on the foregoing findings of fact, the trial court concluded that at the time of the accident Lisa Gaddy, Allen Bridges, and Hope Bridges were insureds under both the Integon and Atlantic automobile liability policies, each policy with liability limits in the minimum limits required by the North Carolina General Statutes; Lisa Gaddy was using the Peugeot within the scope of permission granted by Meeker; Lisa Gaddy was not an insured under the Universal policy because she was not "required by law to be an INSURED" under the Universal policy by virtue of the coverage provided by Integon and Atlantic, which satisfied N.C.G.S. § 20-279.21(b)(2); by the terms of Universal's policy, Universal had no obligation to indemnify or defend Lisa Gaddy or her parents, Allen and Hope Bridges, in connection with the accident on 5 March 1989; and Integon is entitled to recover nothing from Universal.

On Integon's appeal to the Court of Appeals, that court reversed the trial court's judgment and remanded the cause for entry of judgment providing for defendant Universal to pay its pro rata share of the minimum limits required by the motor vehicle laws of North Carolina. On this issue we affirm the decision of the Court of Appeals.

[1] North Carolina's Motor Vehicle Safety and Financial Responsibility Act requires each automobile owner to carry a minimum amount of liability insurance providing coverage for the named insured as well as any other person using the automobile with the express or implied permission of the named insured. N.C.G.S. § 20-279.21(b)(2) (1993). Provisions of the Motor Vehicle Safety and Financial Responsibility Act are written into every automobile policy as a matter of law. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977). In accordance with this statutory requirement of coverage for permissive users, the insurance policy Universal issued to Meeker extended liability coverage to:

> With respect to the AUTO HAZARD:
>
> 1. YOU;
>
> 2. Any of YOUR partners, paid employees, directors, stockholders, executive officers, a member of their household or a member of

YOUR household, while using an AUTO covered by this Coverage Part, or when legally responsible for its use. The actual use of the AUTO must be by YOU or within the scope of YOUR permission;

3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

Under section 3 set out above, as an operator of one of Meeker's automobiles within the scope of its permission, Lisa Gaddy is an insured under the Universal policy. *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 338, 420 S.E.2d 155, 158 (1992). Thus Universal is responsible for providing liability coverage for Lisa Gaddy unless its policy contains language limiting or excluding coverage.

Although N.C.G.S. § 20-279.21(b)(2) requires each automobile owner to carry a minimum amount of liability insurance, we have previously held that this statute is satisfied if the terms of the policy exclude coverage in the event the driver of a vehicle is covered under some other policy for the minimum amount of liability coverage required by law. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444-45 (1967). Defendant Universal argues that the following provisions found in its policy expressly deny any coverage to a driver "required by law" to be an insured, when the driver has other policy coverage sufficient to satisfy N.C.G.S. § 20-279.21(b)(2):

UNICOVER COVERAGE PART 500

GARAGE

. . . .

THE MOST WE WILL PAY—Regardless of the number of INSUREDS or AUTOS insured by this Coverage Part, persons or organizations who sustain INJURY, claims made or suits brought, the most WE will pay is:

1. With respect to GARAGE OPERATIONS and AUTO HAZARD, the limit shown in the declarations for any one OCCURRENCE.

With respect to persons or organizations required by law to be an INSURED, the most WE will pay, in the absence of any

> other applicable insurance, is the minimum limits required by the Motor Vehicle Laws of North Carolina. When there is other applicable insurance, WE will pay only OUR pro rata share of such minimum limits.
>
> . . . .
>
> OTHER INSURANCE—The insurance afforded by this Coverage Part is primary, except:
>
> . . . .
>
> (2) WE will pay only OUR pro rata share of the minimum limits required by the Motor Vehicle Laws of North Carolina when:
>
> (a) a person or organization required by law to be an INSURED is using an AUTO owned by YOU and insured under the AUTO HAZARD . . . .

Defendant Universal argues that because Lisa Gaddy has insurance with two other insurance companies, Integon and Atlantic, which meets the minimum requirements of the Motor Vehicle Safety and Financial Responsibility Act, she is not an individual "required by law" to be an insured and the terms of the policy do not extend pro rata coverage to this claim. We have previously held that an individual operating an automobile with the owner's permission is an individual "required by law" to be an insured as that phrase is used in Universal's policy. *United Services*, 332 N.C. at 338, 420 S.E.2d at 158. We disagree with Universal's argument that its policy precludes coverage to a driver "required by law" to be an insured when the driver already has sufficient liability coverage. The policy provides that Universal will pay its pro rata share of the minimum limits required by law. The "most we will pay" clause in the Universal policy states that the most the company will pay for an individual required by law to be an insured is "the minimum limits required by the Motor Vehicle Laws of North Carolina" and that it will only pay this amount if the driver has no other insurance. In the event the driver does have other applicable insurance, the policy states that it will pay a pro rata share of such minimum limits. In this case Lisa Gaddy does have other applicable insurance; and under the terms of the policy, Universal is responsible for a pro rata share of the minimum limits.

Similarly, the "other insurance" provision of Universal's policy sets out that the insurance is primary except that it will only pay the "pro rata share of the minimum limits required by the Motor Vehicle

Laws of North Carolina" for an individual required by law to be an insured. Lisa Gaddy is an individual required by law to be an insured, and Universal is responsible for paying a pro rata share of the minimum requirements under the Motor Vehicle Safety and Financial Responsibility Act.

Defendant Universal argues that its position that Lisa Gaddy is not an insured under its policy is supported by *United Services*, a case with facts and insurance policies similar to those at issue here. In *United Services* the plaintiff insurance company provided coverage to the driver of a truck involved in a collision. At the time of the collision, the insured driver was operating the truck with the permission of the owner of the vehicle, Warden Motors, Inc. ("Warden"). Warden carried a garage owner's liability policy with defendant Universal Underwriters Insurance Company. *United Services*, 332 N.C. at 334, 420 S.E.2d at 156.

In *United Services* we held that Universal was required by law to insure persons who were operating the truck with the owner's permission. *Id.* at 338, 420 S.E.2d at 158. However, we also held that Universal had limited its liability under its "most we will pay" and "other insurance" clauses in contracting to pay only the amount, or amount in excess of any other insurance available, needed to comply with the Motor Vehicle Safety and Financial Responsibility Act. *Id.* at 336-37, 420 S.E.2d at 157-58.

The definition of "insured" present in the Universal policy before the Court in *United Services* is almost identical to the definition found in the policy at issue in this case. Each policy contains an identical provision extending coverage to any person "required by law" to be an insured. There are, however, significant differences in the Universal policy analyzed by the Court in *United Services* and the Universal policy currently before the Court. In *United Services* the subject Universal policy provided for the following limitations:

> Regardless of the number of INSUREDS or AUTOS insured by this Coverage Part, . . . the most WE will pay is:
>
> 1. With respect to GARAGE OPERATIONS and AUTO HAZARD, the limit shown in the declarations for any one OCCURRENCE.
>
> The portion of the limit applicable to persons or organizations required by law to be an INSURED is *only the amount (or amount in excess of any other insurance available to them)*

> *needed to comply with the minimum limits* provision of such law in the jurisdiction where the OCCURRENCE takes place.

Id. at 336, 420 S.E.2d at 157 (emphasis added). The "other insurance" provision stated:

> The insurance afforded by this Coverage Part is primary, *except it is excess*:
>
> . . . .
>
> 2. for any person or organization who becomes an INSURED under this Coverage Part as required by law.

Id. (emphasis added).

The Universal policy at issue in *United Services* clearly limited liability coverage for individuals "required by law" to be an insured to "only the amount (or amount in excess of any other insurance available to them) needed to comply with the minimum limits" of any applicable law. Similarly, the policy provided that it was excess for any person who becomes an insured as required by law. No such limitations are present in the Universal policy at issue in this case.

The Universal policy in the instant case provides that if there is other applicable insurance, Universal will pay its pro rata share of the minimum limits required by law. Since there is other applicable insurance, we conclude that by the terms of the policy, Universal has agreed to pay a pro rata share of the minimum limits required by the motor vehicle laws of North Carolina.

[2] An additional issue was before the Court regarding which of the insurance companies is primarily responsible for the defense of Lisa Gaddy. Defendant Universal argues that if Lisa Gaddy is covered under its policy, there is no provision in the policy obligating Universal to pay defense costs. Plaintiff Integon concedes that defense costs should not be prorated and states that each carrier has a separate duty to defend its own insured. Accordingly, on this issue the Court of Appeals' opinion is reversed.

AFFIRMED IN PART, REVERSED IN PART.

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

STATE OF NORTH CAROLINA v. WILLIAM EARL McNATT

No. 382A94

(Filed 3 November 1994)

1. **Homicide § 266 (NCI4th); Robbery § 79 (NCI4th)— use of rifle as club—robbery with firearm—felony murder**

Evidence that defendant committed a robbery-murder by using a rifle as a club rather than by firing it was sufficient to support defendant's conviction of felony murder in accordance with the trial court's instruction on the underlying felony of armed robbery that the jury must find that defendant obtained property "by endangering or threatening the life of the [victim] with [a] firearm," since the rifle did not cease to be a firearm by virtue of being used as a club.

Am Jur 2d, Homicide §§ 263 et seq.; Weapons and Firearms §§ 1, 2.

2. **Criminal Law § 436 (NCI4th)— closing argument—defendant's lack of remorse—not comment on failure to testify**

The prosecutor's closing argument asking the jury whether it had seen any remorse from the defendant was not an improper comment on defendant's failure to testify but was a proper comment on defendant's demeanor.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Gore, J., on 8 October 1993 in Superior Court, Hoke County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree felony murder of and robbery with a dangerous weapon from Tom Cameron. The trial court

sentenced defendant to life imprisonment for the murder conviction and stayed the judgment on the robbery with a dangerous weapon conviction because the robbery was the underlying felony supporting the felony murder verdict. We conclude that defendant received a fair trial, free from prejudicial error.

The State's evidence tended to show that on 21 March 1991 defendant and two of his friends, James and Bruce Harris, were fishing without permission in a private pond owned by Clyde Upchurch, a friend of the victim. The three men had with them a .22-caliber rifle they had brought for shooting snakes. While defendant and his friends were fishing, the victim approached in his car, cursing them for taking his fish and wanting to see their identification. As the victim was examining the identification, defendant picked up the rifle and swung the butt at the victim, hitting him on the right side of the head and knocking him to the ground. Defendant and Bruce Harris then proceeded to beat and kick the victim for about five minutes before taking his wallet, watch, and car keys. Defendant and his two friends fled when Upchurch, the owner, drove up to the pond. The victim was dead by the time Upchurch arrived. Police later found a wallet containing defendant's identification and fishing rods identified as the victim's in the woods near the pond.

Defendant did not present evidence.

[1] Defendant argues that the trial court erred in denying his motions to dismiss the charges for insufficiency of the evidence to support the convictions on the sole theory on which the court charged the jury. When the trial court instructed the jury on the offense of robbery with a dangerous weapon, the felony underlying the felony murder charge, it stated that for the jury to find defendant guilty of first-degree felony murder, the State must prove beyond a reasonable doubt that "the defendant had a firearm in his possession" and that "the defendant obtained the property by endangering or threatening the life of the person with the firearm." Defendant contends the evidence shows that he committed the robbery by using the rifle as a club, not as a firearm, and that there thus was no evidentiary basis for finding him guilty of endangering or threatening the life of a person "with a firearm."

In an opinion by Judge (now Justice) Webb, our Court of Appeals has held that a pistol used as a club qualifies as a dangerous weapon under the robbery with a dangerous weapon statute. *State v. Funderburk*, 60 N.C. App. 777, 299 S.E.2d 822, *disc. rev. denied*, 307

N.C. 699, 301 S.E.2d 392 (1983). That case was decided correctly, and its holding logically applies to a rifle as well as a pistol. The record does not suggest that the jury was confused in any way by the instructions or that it was unaware of the manner in which defendant used the rifle in the robbery-murder. The rifle did not cease to be a firearm by virtue of being used as a club. The jury could properly find from the evidence presented that in using the rifle as a club, defendant was "endangering or threatening the life of the [victim] with [a] firearm," as the instructions stated. This assignment of error is overruled.

[2] Defendant next argues that the prosecution's closing argument to the jury violated his rights to silence and to due process by drawing attention to his failure to testify. During closing argument, the following exchange took place:

> [PROSECUTOR]: Now, you've sat here through this trial. You've had a chance to look at the defendant, and you've had a chance to also look at these witnesses. Unlike James Harris, who cried when he was questioned by the SBI, Agent Wilson, have you seen any remorse from that side of the room? These officers can't stop that (indicating) man. They've done their duty. Ms. Powell [District Attorney] has done her duty. No one can stop this man, except 12 people.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

The record is unclear as to the specific portion of the statement to which defense counsel objected. Defendant contends the objection referred to the prosecutor's comment on defendant's lack of remorse ("[H]ave you seen any remorse from that side of the room?"). The objection was not lodged, however, until four sentences later, nor were any grounds given for the objection. Thus, it is difficult to ascertain the specific part of the argument defendant found offensive. Assuming arguendo that defendant was objecting to the comment regarding his lack of remorse, we nonetheless find no error.

As we have stated numerous times, counsel will be allowed wide latitude in the argument of hotly contested cases and the scope of that argument will largely be left to the discretion of the trial court. *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984). The prosecutor never commented directly or indirectly on defendant's failure to testify nor did he suggest or infer that defendant should have taken the witness stand. Rather, the prosecutor commented on

the demeanor of the defendant, which was before the jury at all times. *See, e.g., State v. Myers*, 299 N.C. 671, 679-80, 263 S.E.2d 768, 774 (1980). Such statements are not comparable to those which this Court has previously held to be improper comments on a defendant's failure to testify. *See, e.g., State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). Further, the jury was fully and properly instructed on defendant's right not to testify. We therefore reject defendant's contention that this argument drew attention to defendant's failure to testify, and this assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN FREDERICK JAHN

No. 557A94

(Filed 3 November 1995)

Homicide § 253 (NCI4th)— first-degree murder—noncapital prosecution—premeditation and deliberation

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where the evidence tended to show that, prior to the killing, defendant had been released from jail and desired to see his former girlfriend but lacked the transportation and the money to do so; he stole the car of a pizza delivery man; when the car stalled, defendant discovered a loaded gun in the glove compartment and removed it from the car; the victim offered defendant a ride, and defendant had the victim drive him to various locations in an attempt to obtain money and find his girlfriend; when defendant failed to get money and failed to find his girlfriend, he had the victim drive him down a secluded road; defendant shot the victim in the back of the neck after striking him on the head with the pistol at least seven times; and defendant then took the victim's car and drove away to resume his search for his girlfriend but later returned to move the victim's body. The number and nature of the wounds and the fatal shooting of the victim after he had been felled is also evidence tending to show premeditation and deliberation.

Am Jur 2d, Homicide § 425.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Downs, J., on 8 June 1994 in Superior Court, Catawba County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 13 October 1995.

Michael F. Easley, Attorney General, by R. Kendrick Cleveland, Associate Attorney General, for the State.

J. Matthew Martin for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was tried capitally upon an indictment charging him with the first-degree murder of Sean A. Burrow. The State's evidence tended to show that on the evening of 4 October 1993, defendant beat Burrow about the head with a pistol and then shot and killed him. At about 2:30 p.m. that day, defendant had been released from jail. Defendant was in need of both money and transportation. He was able to get a ride to Hickory and while there attempted to collect some money owed to him by some friends. At about 5:30 p.m., defendant stole the car of a Domino's Pizza delivery man. The stolen car, however, broke down at a Handy-Dandy store. Defendant took a loaded nine-millimeter pistol and ammunition from the glove compartment of the car. At about that time, Burrow approached defendant and offered him a ride.

Burrow drove defendant to see defendant's former girlfriend, Lisa Clark, but she was not at home. Defendant and Burrow then went to see Billy Branch, an acquaintance of defendant's. Defendant showed the gun to Branch. Defendant also attempted to collect some money owed to him by Branch's uncle, but was unsuccessful. At around 7:30 p.m., defendant instructed Burrow to drive him down Chicken-Man Road, a secluded, sparsely populated road in rural Catawba County. Defendant then "pistol-whipped" Burrow and shot him in the back of the neck at point-blank range. Defendant fled the scene in Burrow's car.

The jury found defendant guilty of first-degree murder and, in a separate capital sentencing proceeding, recommended a life sentence. The trial court entered sentence accordingly.

Defendant's only assignment of error is that the trial court erred in denying his motion to dismiss the charge of first-degree murder at

the close of all of the evidence. Defendant contends that there was insufficient evidence to show premeditation and deliberation.

When ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State and must give the State every reasonable inference to be drawn from the evidence. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). First-degree murder is the unlawful killing of another human being with malice, premeditation and deliberation. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation means that the act was thought out beforehand for some length of time, however[] short; but no particular amount of time is necessary for the mental process of premeditation." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Deliberation is an intent to kill carried out in a "cool state of blood" without the influence of a violent passion or a sufficient legal provocation. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

There is sufficient evidence of premeditation and deliberation in the present case to support defendant's first-degree murder conviction. The evidence tended to show that prior to the killing, defendant had been released from jail and desired to see his former girlfriend, Lisa Clark. Defendant, however, lacked the transportation and the money to do so. Therefore, defendant stole the car of a pizza delivery man. When the car stalled, defendant discovered a loaded gun in the glove compartment and removed it from the car. Burrow offered defendant a ride, and defendant had Burrow drive him to various locations in an attempt to obtain money and find Ms. Clark. When defendant failed to get money and failed to find Ms. Clark, he had Burrow drive him down a secluded road. There, defendant shot Burrow in the back of the neck after striking him on the head with the pistol at least seven times. Defendant then took Burrow's car and drove away to resume his search for Ms. Clark. Defendant later returned to move Burrow's body.

The number and nature of the wounds and the fatal shooting of Burrow after he had been felled is also evidence tending to show premeditation and deliberation. Dr. Vogel, who performed the autopsy, testified that Burrow suffered from five "rather deep" lacerations caused by "severe heavy blows" to Burrow's face and the back of the head. The wounds were severe enough to be potentially fatal if left untreated. Burrow's death, however, was not caused by the repeated blows he suffered, but by a gunshot wound. The evidence tended to

show that after Burrow had been felled, defendant held the pistol to the middle of the back of Burrow's neck and fired. Based on this evidence, the jury could reasonably find that defendant killed the victim after premeditation and deliberation. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES DANIEL WRIGHT

No. 549A94

(Filed 3 November 1995)

1. Appeal and Error § 506 (NCI4th)— first-degree murder—life sentence—errors cured

Any errors in a first-degree murder prosecution in the denial of defendant's various motions to allow the jury to be informed regarding his parole eligibility in the event he received a life sentence; in denying his motion for individual *voir dire* and requests to question several prospective jurors subsequent to their challenge for cause by the State; and in instructing the jury that a "no" answer to Issue Three on the "Issues and Recommendation as to Punishment" form had to be unanimous were rendered moot because defendant received a sentence of life imprisonment rather than death.

Am Jur 2d, Appellate Review § 721.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

2. Criminal Law § 1056 (NCI4th)— allocution—denied—no error

There was no error in a first-degree murder prosecution in the denial of defendant's motion for allocution, a request to be allowed to make unsworn factual assertions to the jury.

Am Jur 2d, Criminal Law § 531.

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Rousseau, J., on 8 March 1994 in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for robbery with a dangerous weapon was allowed by this Court on 22 February 1995. Heard in the Supreme Court 9 October 1995.

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

Polly D. Sizemore for defendant-appellant.

WHICHARD, Justice.

Defendant was indicted for the first-degree murder of and robbery with a dangerous weapon from Paul Leon Bloom. In a capital trial on the murder charge, the jury found defendant guilty but failed to reach a unanimous verdict on sentencing Issue Three, which read: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?" The trial court accordingly sentenced defendant to life imprisonment on the murder charge.

The jury also found defendant guilty of robbery with a dangerous weapon. Because the murder conviction was based on the felony murder rule and robbery with a dangerous weapon was the underlying felony, the court arrested judgment on the robbery conviction.

A detailed recitation of the facts is unnecessary to a resolution of the issues presented. The State's evidence showed basically that on 30 January 1993 defendant, together with Harvey Lee Oliver and Tracy Bernard Strickland, went to the Coliseum Car Wash at the intersection of Florida and Chapman Streets in Greensboro, North Carolina. Defendant and Oliver approached the victim, who was washing his car, and robbed him at gunpoint. Either defendant or Oliver then shot the victim in the back of the head with a .22-caliber rifle. Defendant told Strickland, "I shot the M-F." The victim died as a result of the gunshot wound to the back of the head. Defendant, Oliver, and Strickland divided among themselves equally the sixty dollars defendant and Oliver had taken from the victim in the robbery.

Defendant did not present evidence.

[1] Defendant argues that the trial court erred (1) in denying his various motions to allow the jury to be informed regarding his parole eligibility in the event he received a life sentence, (2) in denying his motion for individual *voir dire* and requests to question several prospective jurors subsequent to their challenge for cause by the State, and (3) in instructing the jury that a "no" answer to Issue Three on the "Issues and Recommendation as to Punishment" form (set forth above) had to be unanimous. With commendable candor, counsel for defendant conceded at oral argument that because defendant received a sentence of life imprisonment rather than a sentence of death, he cannot have been prejudiced by these errors, if any errors were in fact committed, and that these arguments are therefore moot. We agree, and we accordingly overrule these assignments of error.

[2] Defendant further argues only that the trial court erred by denying his motion for allocution, a request to be allowed to make unsworn factual assertions to the jury. At oral argument counsel for defendant conceded, again with commendable candor, that this Court has recently ruled that it is not error for the trial court in a capital case to deny such a motion. *See State v. Green*, 336 N.C. 142, 190-93, 443 S.E.2d 14, 42-44, *cert. denied*, —- U.S. —-, 130 L. Ed. 2d 547 (1994). On the authority of *Green*, this assignment of error is overruled.

We conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

J.D. ROBINETTE v. WILLIAM G. BARRIGER, W. MALCOLM BLALOCK AND ALEXANDER COUNTY

No. 527A94

(Filed 3 November 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, 116 N.C. App. 197, 447 S.E.2d 498 (1994), affirming in part, reversing in part and remanding with respect to an order signed by Cornelius, J., on 17 March 1992 in the Superior Court, Alexander County and a judgment signed by Helms (William H.), J., on 5 November 1992 in the Superior Court, Alexander County, the Court of Appeals' majority holding the trial

court correctly granted summary judgment for the County, correctly found no liability against Blalock and erred in not granting summary judgment for Barriger. Heard in the Supreme Court 11 October 1995.

Michael B. Brough & Associates, by Michael B. Brough, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter, James R. Morgan, Jr., and Ellen M. Gregg, for defendant-appellee Barriger.

PER CURIAM.

Justice Orr recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

AFFIRMED.

DORA POWELL, AS ADMINISTRATRIX OF THE ESTATE OF TIMOTHY GWAN POWELL (DECEASED) V. S & G PRESTRESS COMPANY, THE ARUNDEL COMPANY, MICHAEL MEANS AND RICHARD SCHOUTEN

No. 260A94

(Filed 3 November 1995)

Workers' Compensation § 62 (NCI4th)— Woodson claim not maintainable—language disavowed

The decision of the Court of Appeals that plaintiff may not maintain this *Woodson* action against the employer of her intestate is affirmed. However, language in the Court of Appeals decision suggesting that the Restatement (Second) of Torts § 8A illus. 1 illustrates the type of conduct required to satisfy the *Woodson* "substantial certainty" test is disavowed.

Am Jur 2d, Workers' Compensation §§ 75-87.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack. 49 ALR4th 926.

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

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. 319, 442 S.E.2d 143 (1994), affirming orders of summary judgment for the defendants entered by Brown (Frank R.), J., on 15 February 1993 and 18 February 1993 in Superior Court, New Hanover County, and by DeRamus, J., on 11 March 1993 in Superior Court, New Hanover County. Heard in the Supreme Court on 11 September 1995.

William H. Dowdy for plaintiff-appellant.

Johnson & Lambeth, by Beth M. Bryant and Robert White Johnson, for defendant-appellees.

Patterson, Harkavy & Lawrence, by Burton Craige, for the North Carolina Academy of Trial Lawyers, amicus curiae.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and Edward C. LeCarpentier III, for the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

However, as in *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995), we disavow the language of the Court of Appeals in its decision in this case suggesting that Restatement (Second) of Torts § 8A illus. 1 (1965) is illustrative of the type of conduct required to satisfy the "substantial certainty" test of *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

AFFIRMED.

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

CYNTHIA L. ECHOLS v. ZARN, INC. AND EDITH BARNETT

No. 538A94

(Filed 3 November 1995)

1. Workers' Compensation § 69 (NCI4th)— civil action against co-employee not maintainable

The decision of the Court of Appeals that plaintiff may not maintain this action for damages against her co-employee pursuant to *Pleasant v. Johnson*, 312 N.C. 710, is affirmed.

Am Jur 2d, Workers' Compensation § 99.

2. Workers' Compensation § 62 (NCI4th)— Woodson claim not maintainable—substantial certainty test—language disavowed

The decision of the Court of Appeals that plaintiff may not maintain this action against her employer pursuant to *Woodson v. Rowland*, 329 N.C. 330, is affirmed. However, language of the Court of Appeals in *Echols v. Zarn, Inc.*, 116 N.C. App. 364, suggesting that the Restatement (Second) of Torts § 8A illus. 1 illustrates misconduct which satisfies *Woodson's* "substantial certainty" test is disavowed.

Am Jur 2d, Workers' Compensation § 75.

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

Appeal by plaintiff 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. 364, 448 S.E.2d 289 (1994), affirming judgment for defendant entered by Albright, J., at the 25 January 1993 Civil Session of Superior Court, Rockingham County. On 2 March 1995, this Court allowed discretionary review of an additional issue. Heard in the Supreme Court 11 September 1995.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen III, Melinda Lawrence, and Maxine Eichner, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., and Jonathan B. Mason, for defendant-appellee.

PER CURIAM.

[1] With respect to plaintiff's first assignment of error as to whether she may maintain this action for damages against her co-employee, Edith Barnett, pursuant to the holding in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), we affirm the decision of the Court of Appeals.

[2] With respect to plaintiff's second assignment of error as to whether she may maintain this action against her employer, Zarn, Inc., pursuant to the holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), we also affirm the decision of the Court of Appeals. However, as we did in *Mickles v. Duke Power Company*, 342 N.C. 103, 463 S.E.2d 206 (1995), we disavow the language of the Court of Appeals in *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 378, 448 S.E.2d 289, 297 (1994), suggesting that the Restatement (Second) of Torts illustrates misconduct which satisfies *Woodson*'s "substantial certainty" test. Restatement (Second) of Torts provides as follows:

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Restatement (Second) of Torts § 8A illus. 1 (1965).

As we stated in *Mickles*,

> [a]ccording to well-known principles of tort liability, one who intentionally engages in conduct knowing that particular results are substantially certain to follow also intends those results for purposes of tort liability. *See Woodson*, 329 N.C. at 341, 407 S.E.2d at 229. In the above example, A is *actually* certain his act will injure or kill C. A successful claim under the *Woodson* exception does not require such actual certainty.

Mickles, 342 N.C. at 110, 463 S.E.2d at 211.

AFFIRMED.

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

GERTIE MAE BOOMER, ADMINISTRATRIX OF THE ESTATE OF JOYCE BOOMER FORBES, DECEASED v. SHERWOOD WATSON CARAWAY

No. 596PA94

(Filed 3 November 1995)

Judgments § 326 (NCI4th)— settlement involving minors—no estoppel to assert statute of limitations—disapproval of opinion language

A decision by the Court of Appeals that defendant was not estopped from asserting the statute of limitations in a wrongful death action because plaintiff-administratrix rather than defendant had an affirmative duty to seek judicial approval of a settlement benefitting deceased's minor children is affirmed. However, a statement by the Court of Appeals that it could not find defendant was estopped from asserting the statute of limitation defense "without evidence that defendant had an affirmative duty to seek judicial approval of the settlement" is disavowed to the extent it suggests that the question of who has the duty to seek judicial approval of a settlement is one involving the presentation of evidence rather than a question of law.

Am Jur 2d, Judgments § 222.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 116 N.C. App. 723, 449 S.E.2d 215 (1994), affirming judgment for defendant entered by Phillips, J., on 30 January 1993, in Superior Court, Pamlico County. Heard in the Supreme Court 10 October 1995.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., and Glenn C. Veit, for plaintiff-appellant.

Dunn, Dunn & Stoller, by David A. Stoller and Andrew D. Jones, for defendant-appellee.

PER CURIAM.

In affirming summary judgment for the defendant, the Court of Appeals said that it could not find defendant was estopped from asserting the statute of limitation defense "[w]ithout evidence that defendant had an affirmative duty to seek judicial approval of the settlement." *Boomer v. Caraway*, 116 N.C. App. 723, 726, 449 S.E.2d 215, 218 (1994). We disavow this language to the extent that it suggests

that the question of who has the duty to seek judicial approval of a settlement is one involving the presentation of evidence rather than a question of law. In all other respects, we agree with the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

WILLIAM C. POWELL, FOR AND ON BEHALF OF CAROLINA BIOLOGICAL SUPPLY COMPANY v. THOMAS E. POWELL, III, SAMUEL C. POWELL, AND CAROLINE POWELL

No. 509PA94

(Filed 3 Novebmer 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 116 N.C. App. 360, 448 S.E.2d 148 (1994), affirming an order entered on 22 March 1993 by Bailey, J., in Superior Court, Alamance County. Heard in the Supreme Court 9 October 1995.

Schell Bray Aycock Abel & Livingston, L.L.P., by Doris R. Bray and Michael R. Abel; and Floyd, Allen and Jacobs, L.L.P., by Jack W. Floyd, Constance Floyd Jacobs, and Robert V. Shaver, Jr., for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., and Wayne A. Logan, for defendant-appellee Thomas E. Powell III.

Petree Stockton, L.L.P., by Ralph M. Stockton, Jr., Daniel R. Taylor, Jr., and Donald M. Nielson for defendant-appellees Samuel C. Powell and Caroline Powell.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

HAWKINS v. STATE OF NORTH CAROLINA

[342 N.C. 188 (1995)]

JOHN HAWKINS v. STATE OF NORTH CAROLINA; N.C. DEPARTMENT OF HUMAN RESOURCES; WESTERN CAROLINA CENTER; J. IVERSON RIDDLE, BOTH INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS DIRECTOR OF WESTERN CAROLINA CENTER; PHILLIP J. KIRK, JR., INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; EARLINE BOYD BROWN, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY, RHONDA BENGE, INDIVIDUALLY AND IN HER REPRESENTATIVE CAPACITY, SUZANNE WILLIAMS, INDIVIDUALLY AND IN HER CAPACITY, VICKI CASH, INDIVIDUALLY AND IN HER CAPACITY, AND RALPH KEATON, INDIVIDUALLY AND IN HIS CAPACITY

No. 99PA95

(Filed 3 November 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 615, 453 S.E.2d 233 (1995), affirming in part, reversing in part, and remanding the order entered 30 November 1991 by Beal, J., in Superior Court, Burke County. Heard in the Supreme Court 13 October 1995.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Victoria L. Voight, Assistant Attorney General, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SHAW v. UNITED PARCEL SERVICE

[342 N.C. 189 (1995)]

PHILLIP SHAW, EMPLOYEE v. UNITED PARCEL SERVICE, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, Carrier

No. 579A94

(Filed 3 November 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, 116 N.C. App. 598, 449 S.E.2d 50 (1994), reversing in part an opinion and award of the North Carolina Industrial Commission, filed 22 March 1993, and remanding this case to the Commission to allow plaintiff to elect benefits pursuant to N.C.G.S. § 97-30. Heard in the Supreme Court 13 October 1995.

Gulley and Calhoun, by Wilbur P. Gulley, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by P. Collins Barwick, III, for defendant-appellants.

PER CURIAM.

AFFIRMED.

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

ARROYO v. SCOTTIE'S PROFESSIONAL WINDOW CLEANING

No. 403PA95

Case below: 120 N.C.App. 154

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1995.

BAIRD v. DELTA AIR LINES

No. 352P95

Case below: 119 N.C.App. 604

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

BARNETT v. KARPINOS

No. 393P95

Case below: 119 N.C.App. 719

Petition by defendant (Ralph Karpinos) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995. Petition by defendants (Arnold Gold, Thomas Snipes, Ben Wiseman, Marsha Gale and the Town of Chapel Hill) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995. Petition by defendant (Melissa G. McCall) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

BOWLIN v. DUKE UNIVERSITY

No. 333P95

Case below: 119 N.C.App. 178

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

BRANCH BANKING AND TRUST CO. v. STAPLES

No. 421P95

Case below: 120 N.C.App. 227

Petition by defendants (Matthew Carr and Joy Carr) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

BROWN v. FRIDAY SERVICES, INC.

No. 394P95

Case below: 119 N.C.App. 753

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

CRUMP v. BD. OF EDUCATION

No. 414P95

Case below: 119 N.C.App. 604

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

DOVER v. JOHNSON

No. 390P95

Case below: 119 N.C.App. 799

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

FLETCHER v. DANA CORPORATION

No. 339P95

Case below: 119 N.C.App. 491

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

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

No. 311PA95

Case below: 119 N.C.App. 589

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1995.

GEORGE v. GEORGE

No. 287P95

Case below: 115 N.C.App. 387

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

GRAY v. ORANGE COUNTY HEALTH DEPT.

No. 309P95

Case below: 119 N.C.App. 62
341 N.C. 649

Motion by petitioner (John D. Gray) for reconsideration of denial of petition for discretionary review dismissed 2 November 1995. Alternative petition by petitioner for rehearing dismissed 2 November 1995. Alternative motion by petitioner to stay issuance of mandate dismissed 2 November 1995.

HONEYCUTT v. WALKER

No. 266P95

Case below: 119 N.C.App. 220

Petition by defendant (N.C. Farm Bureau) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

HORNE v. UNIVERSAL LEAF TOBACCO PROCESSORS

No. 369P95

Case below: 119 N.C.App. 682

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

IN RE APPEALS OF SEARS AND J. C. PENNEY

No. 387PA95

Case below: 119 N.C.App. 800

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1995.

MANLEY v. MOTOR SUPPLY CO.

No. 398P95

Case below: 119 N.C.App. 800

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

McANELLY v. WILSON PALLET AND CRATE CO.

No. 429P95

Case below: 120 N.C.App. 127

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

NCNB NATIONAL BANK v. DELOITTE & TOUCHE

No. 286P95

Case below: 119 N.C.App. 106
341 N.C. 651

Motion by defendant for reconsideration of petition for writ of certiorari dismissed 2 November 1995.

PARIS v. WOOLARD

No. 425P95

Case below: 120 N.C.App. 200

Petition by third-party defendant (Agency Services, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

PARKER v. LITTLE RIVER CORP.

No. 397P95

Case below: 119 N.C.App. 800

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

RUPE v. INTEGON INDEMNITY CORP.

No. 382P95

Case below: 119 N.C.App. 800

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

SINNING v. CLARK

No. 331P95

Case below: 119 N.C.App. 515

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

STARNES v. BROYHILL FURNITURE INDUSTRIES

No. 400P95

Case below: 120 N.C.App. 201

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

STATE v. ALLEN

No. 70A86-3

Case below: 85CRS5243 Halifax Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Halifax County, denied 10 October 1995.

STATE v. BARNETTE

No. 428P95

Case below: 120 N.C. App. 201

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 November 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

STATE v. BROOKS

No. 273P95

Case below: 119 N.C. App. 254

Notice of appeal by defendant (Dallas Brooks) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed 2 November 1995. Petition by defendant (Dallas Brooks) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

STATE v. GILLEY

No. 328P95

Case below: 119 N.C. App. 606

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

STATE v. HOME LOAN MORTGAGE ASSISTANCE

No. 440P95

Case below: 118 N.C.App. 733

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 November 1995. Petition by defendant (Eric Scott Solheim) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

STATE v. KIRKPATRICK

No. 447P95

Case below: 120 N.C. App. 405

Motion by Attorney General for temporary stay allowed 20 October 1995 pending timely receipt and determination of the State's petition for discretionary review.

STATE v. ODUM

No. 368A95

Case below: 119 N.C. App. 676

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 dissenting opinion in the Court of Appeals denied 2 November 1995. Petition by defendant for discretionary review of the decision of the Court of Appeals pursuant to G.S. 7A-31 denied 2 November 1995. Motion by Attorney General to dismiss appeal by defendant pursuant to G.S. 7A-30 allowed 2 November 1995.

STATE v. ST. CLAIR

No. 373P95

Case below: 119 N.C.App. 799

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

STATE v. THOMAS

No. 375P95

Case below: 119 N.C. App. 708

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 2 November 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

STATE v. WOOTEN

No. 438P95

Case below: 120 N.C.App. 202

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

TAYLOR v. COLLINS

No. 402P95

Case below: 120 N.C.App. 202

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

TRULL v. CENTRAL CAROLINA BANK & TRUST CO.

No. 431P95

Case below: 120 N.C.App. 202

Petition by defendant (Player I) and intervenor defendant (Kitty Player Beck) for discretionary review pursuant to G.S. 7A-31 denied 2 November 1995.

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

WHITFORD v. GASKILL

No. 399PA95

Case below: 119 N.C.App. 790

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1995.

PETITION TO REHEAR

ISENHOUR v. UNIVERSAL UNDERWRITERS INS. CO.

No. 47PA94

Case below: 341 N.C.597

Petition by defendant to rehear pursuant to Rule 31 denied 2 November 1995.

STATE OF NORTH CAROLINA v. GEORGE CALE BUCKNER

No. 444A93

(Filed 8 December 1995)

1. **Jury § 153 (NCI4th)— first-degree murder—jury selection—whether the jurors could vote for death—no prejudicial error**

There was no prejudicial error in a first-degree murder prosecution where the prosecutor asked prospective jurors whether they could return a sentence of death if they found that an aggravating factor existed, that the aggravating factors outweighed the mitigating factors, and that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. Although defendant argued that the prosecutor repeatedly suggested to the jurors that they could decide this issue without reference to mitigating circumstances, a reasonable interpretation of the prosecutor's question is whether the juror could impose the death penalty if he or she found that the aggravating circumstances outweighed the mitigating circumstances. The purpose of the question was merely to screen potential jurors' views on capital punishment. Moreover, the court correctly charged in accordance with the North Carolina Pattern Jury Instructions and any error was cured by the trial court's instructions.

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 § 454 (NCI4th)— first-degree murder—defendant's argument—evidence evaluated in light of severity of sentence**

There was no prejudicial error in a first-degree murder prosecution where the trial court did not allow the defendant to argue that the jurors should evaluate the evidence in light of the severity of the sentence. Although defendant's statutory rights under N.C.G.S. § 15-176.5 and N.C.G.S. § 84-14 were violated, there was no prejudice because the jury in this case was well aware of the severity of the consequence of its verdict, as well as the punishments defendant would be facing. *State v. Smith*, 335 N.C. 539, is distinguishable because the determination that the restriction of

defendant's argument in that case was prejudicial was based on the combination of two errors; the Court never decided whether the instructions to disregard arguments about punishment were alone prejudicial. Here, the jury having been repeatedly and specifically told during *voir dire* that the sentence for first-degree murder was either life in prison or death, no reasonable possibility exists that a different result would have been reached had the error not been committed.

Am Jur 2d, Trial § 572.

3. Criminal Law § 439 (NCI4th)— first-degree murder— closing arguments—specific trial testimony—defendant not allowed to argue—no prejudicial error

There was no prejudicial error in a first-degree murder prosecution where defendant was not allowed to repeat specific trial testimony during closing arguments. Defendant was attempting to illustrate how this testimony contradicted and thus impeached other testimony, the purpose for which this testimony was presented. Defendant should have been permitted to continue with his argument, but the ruling did not constitute prejudicial error because defendant was able to argue that there were discrepancies and the jury was specifically instructed to remember the evidence; the value of this impeachment evidence was slight when considered with other evidence presented to the jury; this evidence does not bear on the issues of defendant's intent on the night of the murder and does not suggest that an accomplice had any intent to kill the victim; and defendant was allowed to argue other testimony of greater significance.

Am Jur 2d, Trial §§ 632, 692.

4. Criminal Law § 468 (NCI4th)— first-degree murder—closing arguments—defendant not allowed to argue sentencing or specific testimony—combined effect not prejudicial

There was no prejudicial error in the guilt phase of a first-degree murder prosecution where defendant contended that the combined effect of the two previous issues, not allowing defendant to argue that the evidence should be evaluated in light of the severity of the sentence and not allowing defendant to repeat certain specific testimony during closing arguments, required a new trial. The two arguments at issue would have had a very limited

effect on the ultimate decision of the jury and defendant has not established that a reasonable possibility exists that a different result would have been reached had the errors not been made.

Am Jur 2d, Trial § 572.

5. Criminal Law § 426 (NCI4th)— first-degree murder—prosecutor's argument—defendant's refusal to talk to police—impeachment—no error

There was no plain error in a first-degree murder prosecution where the prosecutor's closing argument referred to defendant's refusal to talk to the police. There was no evidence that defendant had been read his *Miranda* rights at the time of the silence and inaction referred to by the prosecutor, and the arguments made by the prosecutor were permissible as impeachment of defendant's testimony. Defendant's entire defense was based on his being a police informant who was at the scene of the crime attempting to gather incriminating evidence against the victim. It would have been natural for defendant to have told the police that an accomplice shot the victim and to have helped the police gather evidence even before defendant was brought to the police station; evidence that he did not do so contradicted his testimony. Additionally, it would have been natural for defendant to tell police that he had not shot anyone and that an accomplice had shot the victim when confronted with the accomplice's statement identifying defendant as the triggerman. Although defendant also argues that the prosecutor used defendant's reliance on his constitutional rights as substantive evidence of defendant's guilt, in the limited circumstances of this particular case, the argument was made to impeach defendant's testimony at trial and the court did not err in allowing the argument.

Am Jur 2d, Trial § 557.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

6. Criminal Law § 796 (NCI4th)— first-degree murder—instructions—aiding and abetting

There was no plain error in a first-degree murder prosecution in the court's instructions on aiding and abetting where defendant argued that the trial court failed to instruct that a defendant can-

not be guilty as a aider and abettor unless the defendant had the requisite *mens rea* for conviction of the crime charged, but the court used the phrase "knowingly advised, instigated, encouraged, procured or aided the other person or persons to commit the crime," and further instructed that to be guilty defendant "must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission." These instructions clearly convey that for the jury to find defendant guilty under the theory of aiding and abetting, defendant had to have knowingly participated in the murder based on an intent to assist in committing the crimes for which defendant was charged.

Am Jur 2d, Trial § 1256.

7. Constitutional Law § 342 (NCI4th)— first-degree murder— presence of defendant at proceedings

There was no error in a first-degree murder prosecution where defendant was not present on five occasions. The first was a pre-trial conference which, as it was prior to the commencement of trial, did not involve error, constitutional or otherwise. The second occasion occurred when the court listened to a tape recording in chambers outside the presence of defendant and with defense counsel's permission but made the decision as to the admissibility of the tape later in defendant's presence. On the third occasion the court took care of housekeeping matters while waiting for a late juror; when counsel began a discussion about a *voir dire* on the admissibility of certain tape recordings, the court stopped the discussion and began the conversation anew after defendant entered the courtroom. The fourth occasion was when the court asked in the absence of defendant whether the jurors were all back from a break, handed the bailiff a form to give to the jurors, and told counsel to start considering when the court should convene if the jury did not reach a decision as to defendant's sentence that day. And the fifth occasion, when the trial court ordered outside defendant's presence that the sentences for the noncapital offenses would run consecutively, occurred in the presence of defense counsel, with defense counsel's consent, and at a time when defendant had just been sentenced to death and was emotionally distraught. In all five instances at least one of defendant's counsels was present and representing defendant's interests, a record was made of everything that occurred outside

defendant's presence, and defendant's presence would have made no difference in the outcome of any of the conversations.

Am Jur 2d, Criminal Law §§ 692-694, 698, 699, 901, 902, 925, 927, 934.

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

8. Criminal Law § 496 (NCI4th)— first-degree murder—deliberations—request to rehear testimony—denial not plain error

There was no plain error in a first-degree murder prosecution where the trial court refused to grant the jury's request to rehear certain testimony, including that of defendant. The court granted the initial portion of the request, to review multiple pieces of evidence in the jury room, but specifically stated that it was denying the request to review testimony in its discretion and as a practical matter. Nothing in the record indicates that the trial judge was acting under a misapprehension of the limits of his discretion and the testimony covered over five hundred transcript pages; defendant's testimony alone spanned three days. The court never addressed the question of whether the court reporter could read back the testimony to the jury, but this request was never made by the jury.

Am Jur 2d, Trial §§ 1685, 1688.

9. Larceny § 25 (NCI4th); Constitutional Law § 189 (NCI4th)— armed robbery and larceny—larceny as lesser included offense—double jeopardy—judgment arrested

A judgment on a felonious larceny conviction was arrested where defendant was also found guilty of robbery with a dangerous weapon. Defendant argued that larceny is a lesser included offense of robbery with a dangerous weapon and that his double jeopardy rights were violated since the larceny was part of the same continuous transaction as the robbery with a dangerous weapon.

Am Jur 2d, Larceny § 13; Robbery §§ 9, 13, 17.

10. Criminal Law § 1355 (NCI4th)— first-degree murder—mitigating circumstances—no significant history of prior criminal activity—no error in submitting

There was no error in a first-degree murder sentencing hearing in submitting over defendant's objection the statutory miti-

gating circumstance of no significant history of prior criminal activity where defendant's felony convictions were closer in time to the crimes for which he was tried than the convictions in *State v. Lloyd*, 321 N.C. 301, in which the submission of the circumstance was upheld; all of defendant's charged criminal activity occurred within a brief period of time; most of the criminal activity was nonviolent; and defendant received probation and a suspended sentence for his prior convictions. Based on the evidence in this case, a rational juror could conclude that defendant did not have a significant history or prior criminal activity at the time of the murder.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 680 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances—peremptory instructions

The trial court did not err in a first-degree murder sentencing hearing by refusing to peremptorily instruct the jury on nonstatutory mitigating circumstances. If the evidence supporting a nonstatutory mitigating circumstance is uncontroverted and manifestly credible, the defendant is entitled to a peremptory instruction on that circumstance upon request, but must specify the particular mitigating circumstance deemed deserving of a peremptory instruction and a peremptory instruction for nonstatutory mitigating circumstances should reflect the distinction between nonstatutory and statutory mitigating circumstances. Here, defendant did not specifically request that peremptory instructions be given for all forty nonstatutory mitigating circumstances, and the only nonstatutory mitigating circumstance for which defendant specifically requested a peremptory circumstance, that defendant was a hard worker, could not be deemed uncontradicted and manifestly credible.

Am Jur 2d, Criminal Law § 598; Trial § 1415.

12. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's arguments—mitigating circumstances

There was no abuse of discretion in a first-degree murder sentencing hearing where the trial court overruled defendant's objections to prosecutorial arguments which he contended mischaracterized mitigating circumstances. Viewed in its entirety, the

prosecutor's argument did not misrepresent mitigating circumstances to the jury; in light of earlier definitions of mitigating circumstances given by the prosecutor, allowing these remarks was not an abuse of discretion. Furthermore, the trial court correctly instructed the jury as to the meaning of mitigating circumstances after the prosecutor had finished his closing argument.

Am Jur 2d, Criminal Law § 598; Trial §§ 640, 841.

13. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—defendant's argument restricted—statutory aggravating circumstances not presented—not allowed to argue

There was no abuse of discretion in a first-degree murder sentencing hearing in the trial court not allowing defendant to tell the jury in his argument about the statutory aggravating factors that the State did not present. The trial court's decision was based upon its a belief that absence of an aggravating circumstance is not evidence of a mitigating circumstance, a reasonable interpretation of *State v. Brown*, 306 N.C. 151.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 640, 841.

14. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—defendant's argument—people waiting for him in prison—not allowed

The trial court did not abuse its discretion in a first-degree murder sentencing hearing by not allowing defendant to argue that some of the people he had testified against would be waiting for him in prison. The court allowed defendant to ask the jury to consider the fact that defendant had testified or was ready to testify against people who had received prison sentences in the North Carolina Department of Correction, but did not allow the argument in question based on the fact that no evidence was presented as to the state of mind of the criminals defendant was willing to testify against or if these people were in fact waiting for defendant to arrive at prison.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 640, 841.

15. Criminal Law § 1325 (NCI4th)— first-degree murder—capital sentencing—Issues Three and Four

The trial court did not err in a first-degree murder sentencing hearing by reinstructing the jurors that they "may" consider miti-

gating circumstances at Issues Three and Four, after the initial instruction informed the jurors that they "must" consider mitigating circumstances at that stage.

Am Jur 2d, Trial § 841.

16. Criminal Law § 1339 (NCI4th); Constitutional Law § 175 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—murder during course of another crime

The trial court did not err during a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery.

Am Jur 2d, Trial § 841.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-*Gregg* cases. 67 ALR4th 942.

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

The trial court did not err in a first-degree murder prosecution by not allowing defendant to question jurors about their conceptions of life imprisonment and parole eligibility for a person convicted of first-degree murder.

Am Jur 2d, Criminal Law § 575; Jury § 206.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

18. Evidence and Witnesses § 287 (NCI4th)— first-degree murder and robbery—evidence of prior robbery

There was no plain error in a first-degree murder prosecution where the trial court allowed the prosecution to present the testimony of the victim of a prior robbery when defendant had already admitted committing the robbery during his testimony and had indicated a willingness to stipulate the existence of the robbery conviction.

Am Jur 2d, Evidence §§ 404, 413.

19. Criminal Law § 1337 (NCI4th)— first-degree murder—robbery defined as involving violence

The trial court did not err in a first-degree murder sentencing hearing by defining robbery as a felony involving violence or the threat of violence, thereby in defendant's contention expressing an opinion on an aggravating circumstance.

Am Jur 2d, Criminal Law § 598; Robbery § 1; Trial § 841.

20. Criminal Law § 1348 (NCI4th)— first-degree murder—mitigating circumstances—defined

The trial court did not err in a first-degree murder sentencing hearing by defining mitigating circumstances as matters about a crime making a punishment less than death appropriate.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1445.

21. Criminal Law § 1363 (NCI4th)— first-degree murder—nonstatutory mitigating circumstances—instructions

There was no plain error in a first-degree murder sentencing hearing where the court instructed the jury that to find a nonstatutory mitigating circumstance, the jury had to find it existed and then whether it had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1445.

22. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—consideration of mitigating circumstances at issue three

The trial court did not commit plain error in a first-degree murder capital sentencing hearing by instructing jurors on their consideration of mitigating circumstances at Issue Three.

Am Jur 2d, Trial §§ 1441, 1445, 1447.

23. Criminal Law § 1327 (NCI4th)— first-degree murder—sentencing—duty to recommend death

There was no plain error in a first-degree murder capital sentencing hearing where the trial court instructed the jurors that they had a duty to recommend death if they found the sentencing issues against defendant.

Am Jur 2d, Trial §§ 1441, 1445, 1447.

24. Criminal Law § 1329 (NCI4th)— first-degree murder—sentencing—Issues Three and Four—unanimous verdicts

The trial court did not commit plain error in a first-degree murder capital sentencing hearing by instructing the jurors that they had to reach unanimous verdicts on Issues Three and Four.

Am Jur 2d, Trial §§ 1441, 1445.

25. Homicide § 493.1 (NCI4th)— first-degree murder—premeditation and deliberation—grossly excessive force

The trial court did not commit plain error in a first-degree murder prosection by instructing the jury that evidence of the use of grossly excessive force could be used to infer premeditation and deliberation where the evidence in this case supports a finding that the victim was shot twice in the body, and that defendant then moved closer and shot the victim in the head.

Am Jur 2d, Homicide § 45.

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.

26. Criminal Law § 796 (NCI4th)— first-degree murder—aiding and abetting—acting in concert—instructions—actual or constructive presence

There was no plain error in a first-degree murder prosecution where defendant contended that the court erred in its instructions on aiding and abetting and acting in concert by failing to instruct the jury that a defendant cannot be guilty under these theories unless he is actually or constructively present at the scene of the crime, but all of the evidence, and defendant's own testimony, established that defendant was in fact present.

Am Jur 2d, Trial § 1256.

27. Criminal Law § 1326 (NCI4th)— first-degree murder—capital sentencing—instructions—burden of proof

There was no plain error in a first-degree murder capital sentencing hearing where the court instructed the jury that defendant has the burden of establishing mitigating circumstances by a preponderance of the evidence, which meant that defendant had to satisfy the jury as to the existence of mitigating circumstances.

Am Jur 2d, Trial §§ 1441, 1445.

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

A sentence of death in a first-degree murder prosecution was not disproportionate where the aggravating circumstances found by the jury were supported by the evidence, nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the penalty is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. While this was a robbery-murder case, in several of which juries have returned life sentences, the victim here was murdered in the sanctity of his own home rather than at a convenience store and there was no evidence of any impairment of defendant's ability to appreciate the criminality of his conduct, defendant was convicted not solely upon the theory of felony murder but also on the theories of premeditation and lying in wait, and the victim was shot three times, once after he had fallen to the ground wounded. The most significant feature of this case is that defendant committed this murder by lying in wait for his victim.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Beal, J., at the 7 September 1993 Criminal Session of Superior Court, Gaston County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felonious larceny was allowed 22 September 1994. Heard in the Supreme Court 12 April 1995.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

Richard A. Rosen and Winston B. Crisp for defendant-appellant.

PARKER, Justice.

Indicted for the first-degree murder of Eddie Marvin Dow ("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 theories of premeditation and deliberation, felony murder, and lying in wait.

The jury also found defendant guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, felonious larceny, and possession of stolen goods. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the murder conviction. The trial court sentenced defendant accordingly. The trial court also sentenced defendant to ten years' imprisonment for the conspiracy to commit robbery with a dangerous weapon, forty years' imprisonment for robbery with a dangerous weapon, and ten years' imprisonment for felonious larceny, each sentence to run consecutively. The trial court arrested judgment on the conviction for possession of stolen goods. We arrest judgment on the felonious larceny conviction and otherwise conclude that the jury selection, guilt-innocence phase, and sentencing at defendant's trial were free from prejudicial error; and the death sentence is not disproportionate.

The State's evidence tended to show that on the night of 19 February 1992, defendant met with Anthony Cathcart, Dennis Eason, and Jamie Bivens, at Cathcart's home. Earlier that day the men had discussed robbing the victim, a local bondsman for whom Bivens, Eason, and defendant had worked in the past. The victim was known to carry large sums of money in a briefcase. The State presented evidence that defendant had been talking about robbing the victim for some time and that it was his idea to rob the victim on this night.

When defendant and Bivens arrived at Cathcart's home around 8:00 p.m., Bivens went into the house and changed into camouflage clothing. Bivens also had ski masks for himself and defendant and socks which he wore on his hands. Defendant was wearing a long leather jacket and Isotoner gloves and was carrying his brother's SKS rifle; he did not change his clothes. All four men got into Bivens' Jeep and drove towards the victim's home. Eason and Cathcart dropped Bivens and defendant off at the top of the victim's driveway and then went to meet their dates for the evening.

After exiting the vehicle, defendant and Bivens walked towards the victim's home. They stopped and hid behind a utility building located near the victim's house and waited for the victim to get home. After the victim pulled into his carport and got out of his car, defendant shot the victim three times: once in the back, once in the shoulder, and once in the head. The head wound was fatal, but either of the other two wounds also could have been fatal.

Defendant and Bivens then grabbed the briefcase in which the victim carried his money, broke into the victim's car, and drove the vehicle from the scene of the crime. Defendant and Bivens abandoned the victim's car in a parking lot and fled on foot into the woods with the briefcase. As the two men ran, they discarded car keys, ski masks, the socks Bivens had on his hands, and the rifle. While in the woods, defendant and Bivens opened the briefcase, removed over $25,000, and discarded the briefcase. Defendant also hid the murder weapon in the woods.

Defendant and Bivens eventually made it out of the woods and walked to a Mini-Mart, where Bivens attempted to call Eason and Cathcart. Eason and Cathcart were not at home, so defendant called his friend Paul Bridges to come pick up him and Bivens. Bridges picked them up and then drove them to Gaston Memorial Hospital, where a car belonging to another of defendant's friends was parked with the keys in it. Defendant and Bivens borrowed the car to drive to defendant's home to get a change of clothes. On the way back to the parking lot, Bivens discarded his boots and some of the clothes he had been wearing. Eason and Cathcart then picked up defendant and Bivens in the hospital parking lot.

When Bivens and defendant got into the car, defendant told Eason and Cathcart that he shot the victim and that "his [victim's] brains were all over the carport." The four men then went to Bivens' and Eason's apartment and split up the money. While they were at the apartment, Eason's mother called to tell the men that the victim had been killed. The four men left the house to take Eason and Cathcart to Cathcart's house for the night. After defendant and Bivens dropped off the other two men, they went to the victim's office and met with his family. Bivens and defendant spent the night with the victim's family, traveling between the office, the scene of the crime, and the victim's brother's home. The two men also attended the victim's wake and funeral.

On 23 February 1992, based on information they received from Cathcart and two girls, the police asked defendant and Bivens to come to the police station. At the police station Bivens confessed to his involvement in the crime but claimed that it was defendant who actually killed the victim. Bivens also claimed that the robbery was defendant's idea and that he had only gone along with defendant's plan because defendant threatened to harm his wife and unborn

child. On the same day he confessed, Bivens helped the authorities recover some of the physical evidence hidden in the woods.

While Bivens was confessing, defendant was left in a room alone where he fell asleep. The police officers eventually came back, woke him up, and confronted him with Bivens' claim that defendant killed the victim. Defendant responded by saying that he had not shot anybody and that he was willing to make a statement but that he wanted his attorney present before he would make any statement. The officers stopped questioning defendant but did not contact an attorney for him.

Defendant presented evidence that he was a police informant and that he had been asked by the Gastonia City Police and a multijurisdictional task force to obtain incriminating information on the victim. Defendant testified that it was Bivens' idea to rob the victim and that defendant had gone along with the idea in the hopes of gathering some evidence against the victim. Defendant admitted that he went with Bivens to the victim's home and that he was carrying his brother's SKS rifle. Defendant testified that once he and Bivens arrived at the utility building, he put the rifle down. Defendant testified that he did not think that Bivens was actually going to rob or kill the victim.

Defendant testified that the reason he fled the scene and participated in dividing the money and discarding the physical evidence was that he was in shock and fear after the murder. Defendant did not tell the victim's family what had happened because the victim's brother threatened to kill the person responsible for the victim's death, and defendant knew that the last person to work as an informant against the victim had been killed. Defendant also claimed that he told Eason and Cathcart that Bivens had shot the victim.

At sentencing the State presented evidence of defendant's prior conviction for common-law robbery and the testimony of Ronald Greene, the victim of the common-law robbery. Greene testified that defendant and another man had lured him away from a gay bar in Charlotte, taken him out into the country, held a gun on him, and robbed him. Greene claimed defendant was the man who held the gun on him during the robbery. Other evidence was presented indicating that at an earlier date, Greene had said that it was the second man, not defendant, who was holding a gun on Greene.

At sentencing defendant presented evidence that: (i) his father was an alcoholic; (ii) his younger brother, Robert, was killed in a fire that destroyed their family trailer when defendant was six years old; (iii) defendant completed high school and made average grades, even though his intelligence was somewhat below normal; (iv) he participated on both the wrestling and track teams in high school; (v) he was active in his church and in the local Boys Club and had passed every level of Boy Scouts, except Eagle; (vi) he finished Marine boot camp but was later dismissed without an honorable discharge because he left the Marines for a year without permission to be with his dying father; and (vii) he had been married and maintained a good relationship with his former wife's family.

Defendant's evidence also established that he acted as an informant while in Central Prison awaiting trial in this case and that he had testified at the trials of two men who were in prison. Defendant had also helped the police stop another inmate's plot to kill a witness who was intending to testify against the inmate.

The State's rebuttal evidence showed that while employed as a security guard at Eastgate Mall in 1989, defendant had been involved in numerous breaking or enterings and larcenies. The State's evidence further showed that defendant had convinced an assistant manager of a convenience store to get him the keys to the store so that he could rob it. Defendant also had been convicted of trafficking in narcotics. This conviction was the result of defendant stealing drugs from his employer when he was working at Eckerd Drugs. Defendant became a police informant so that he would not have to serve time in prison for the trafficking in narcotics conviction. All of these crimes occurred between 29 September 1989 and 16 January 1990. Defendant pled guilty to these crimes on 14 October 1991. His sentences were suspended, and he received five years' supervised probation and was required to make restitution payments each month.

The jury found the aggravating circumstances that defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (Supp. 1994), and that the murder was committed by defendant while he was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5). The jury found the statutory mitigating circumstances of defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); that defendant testified truthfully on behalf of the state in prosecution of Michael Dial and Wendell House for the felony

of murder, N.C.G.S. § 15A-2000(f)(8); and the catchall circumstance, N.C.G.S. § 15A-2000(f)(9). The jury also found twenty-eight of forty nonstatutory mitigating circumstances.

JURY SELECTION

[1] Defendant maintains that he is entitled to a new sentencing hearing because the final question the prosecutor asked prospective jurors concerning the death penalty was improper.

The final question asked was as follows:

> If you found that an aggravating circumstance existed and you found that the aggravating factors outweigh the mitigating factors and you found that the aggravating factors were substantially—were sufficiently substantial to call for the imposition of the death penalty; could you return a sentence of death?

Defendant argues that this description of North Carolina's ultimate sentencing issue is erroneous. The jury must decide, as a final matter, whether the State has proved beyond a reasonable doubt that the aggravating circumstance or circumstances found are "sufficiently substantial to call for the imposition of the death penalty *when considered with the mitigating circumstance or circumstances found.*" *State v. McDougall*, 308 N.C. 1, 33, 301 S.E.2d 308, 327 (emphasis added), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Defendant argues that because the prosecutor repeatedly suggested to the jurors that they could decide this final issue without reference to mitigating circumstances, defendant must be granted a new sentencing hearing. We disagree.

Both the State and the defendant have the right to question prospective jurors about their views on the death penalty. *State v. Green*, 336 N.C. 142, 159, 443 S.E.2d 14, 24, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994). The manner and extent of such an inquiry lie within the trial court's discretion. *Id.* "The trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of an abuse of its discretion." *State v. Conaway*, 339 N.C. 487, 508, 453 S.E.2d 824, 837-38, *reconsideration denied*, 339 N.C. 740, 457 S.E.2d 304 (1995).

Here, the trial court did not abuse its discretion in allowing the prosecutor to ask the final question during jury *voir dire*. The purpose of the question was merely to screen potential jurors' views on

capital punishment. A reasonable interpretation of the prosecutor's question is whether the juror could impose the death penalty if he or she found that the aggravating circumstances outweighed the mitigating circumstances. This inquiry is permissible. *See State v. Zuniga*, 320 N.C. 233, 250, 357 S.E.2d 898, 910 (holding that it was permissible to ask whether a juror would consider death sentence if juror determined aggravating circumstances outweighed mitigating circumstances), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

Even assuming *arguendo* that the question was improper, any error was cured by the trial court's instructions. *See State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 469 (holding that any prejudice resulting from a misstatement of the law by the prosecutor was cured by trial court's proper instruction on applicable law), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988). The trial court correctly charged the jury in accordance with the North Carolina Pattern Instructions as to the consideration to be given to both aggravating and mitigating evidence in capital sentencing. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[2] Defendant begins by arguing that the trial court committed reversible error by denying defendant the right to argue that the jurors should evaluate the evidence in this case in light of the severity of the potential sentence. During the guilt-innocence closing arguments, defendant argued:

> Ladies and Gentleman, I know this is long and I know this is tedious, but my client, and I hope you understand, is facing life in prison. I—in my own heart I feel I've made the point and I think I've made it very clearly, but I don't want to stop and say, "Gee, I should've told you about more." So if you'll just—

The trial court at this point interrupted and said:

> Mr.—Mr. Bell [defense counsel], just a moment. Now, Members of the Jury, I want to caution you to recall my instructions to you when we began the jury selection process.
>
> At this stage of this trial the question before you is the guilt or innocence of the defendant as to each of the charges against him. This is not the point where any jury considers what punishment may be imposed.

> So, Mr. Bell, in his argument, will no longer refer to what punishments may be imposed. That is not appropriate. You are to disregard that portion of his argument previously made in regard to that.
>
> Can you-all follow those instructions? If you can, please raise your hands.

Defendant argues that these instructions by the trial court were reversible error pursuant to this Court's decision in *State v. Smith*, 335 N.C. 539, 438 S.E.2d 719 (1994). Defendant argues that this restriction violated defendant's constitutional right to effective assistance of counsel and to present his defense. Defendant also argues that this error cannot be deemed harmless because the evidence of guilt in this case was not overwhelming.

N.C.G.S. § 15-176.5 provides that "[w]hen a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge." N.C.G.S. § 84-14 provides in part that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." We conclude that the trial court erred when it instructed the jury that defendant's argument discussing punishment should be disregarded. This was a violation of defendant's statutory rights under N.C.G.S. § 15-176.5 and N.C.G.S. § 84-14. *See State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976).

N.C.G.S. § 15A-1443(a) provides in part that

> [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.

Pursuant to N.C.G.S. § 15A-1443(a), we must now determine whether the error at issue was prejudicial to defendant. *See State v. Walters*, 294 N.C. 311, 314, 240 S.E.2d 628, 630 (1978) (holding that the burden of showing error under N.C.G.S. § 84-14 is on defendant); *see also State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986) (analyzing an error under N.C.G.S. § 84-14, pursuant to N.C.G.S. § 15A-1443(a)).

N.C.G.S. § 15-176.5 provides the State or the defendant with the right "to inform the jury of the consequences of a verdict of guilty [in a capital case]." *State v. McMorris*, 290 N.C. at 289, 225 S.E.2d at 555. N.C.G.S. § 84-14 also "secures to counsel the right to *inform* the jury of the punishment prescribed for the offense for which defendant is being tried." *State v. Walters*, 294 N.C. at 313, 240 S.E.2d at 630. The jury in this case was well aware of the severity of the consequence of its verdict of first-degree murder, as well as the punishments defendant would be facing if he was found guilty of first-degree murder.

In addressing the jury panel prior to the beginning of *voir dire*, the trial court instructed the entire jury panel that defendant had been charged with first-degree murder and that "[t]his is a crime for which the death penalty may be imposed." The trial court also noted that in the sentencing proceeding, it would be determined if defendant would be sentenced to death or life imprisonment. Additionally, during jury selection the jurors were asked by counsel if they were willing "to consider both possible sentences in this case, life imprisonment or death." The *voir dire* thus informed and educated the jury as to the consequence of a verdict of guilty of first-degree murder. Notice to the jury of the consequences is the right protected by N.C.G.S. § 15-176.5 and N.C.G.S. § 84-14.

State v. Smith, 335 N.C. 539, 438 S.E.2d 719, relied upon by defendant is distinguishable. In *Smith* the defendant was not only not allowed to argue concerning the sentences he could receive if found guilty of first-degree murder, but he was also restricted in making his argument that he was not guilty. *Id.* at 542, 438 S.E.2d at 721. This Court stated, "We cannot hold that not allowing the defendant's attorney to argue that the defendant was not guilty in combination with the refusal to allow him to argue the severity of the punishment was harmless." *Id.* at 543, 438 S.E.2d at 721.

The determination by this Court that the errors could not be harmless was based on the combination of the two errors. The Court never decided whether the instructions to disregard arguments about punishment, standing alone, were so prejudicial to the defendant as to require that he be granted a new trial.

In the present case, the jury having been repeatedly and specifically told during *voir dire* that the sentence for first-degree murder was either life in prison or death, we conclude no reasonable possibility exists that had the error in question not been committed, a dif-

ferent result would have been reached at trial. Defendant has not shown prejudice, and this assignment of error is overruled.

[3] Next, defendant argues that the trial court erred when it did not allow defendant to repeat specific trial testimony of one witness during closing arguments in the guilt-innocence phase. Defendant argues his right to argue his entire case to the jury was improperly limited in violation of N.C.G.S. § 84-14 and N.C.G.S. § 15A-1230(a).

During the trial Iris Bolin testified about a conversation between Bivens and Joyce Haas in July 1991. During this conversation Haas talked about robbing and killing Eddie Dow, the victim in this case. Specifically, Bolin testified that Bivens had come over to Haas' home and told Haas that he had gotten a job with Dow. Haas told Bivens to get in good with Dow; Bivens responded that it would take some time before Dow would trust him. Then Haas related a plan to Bivens which involved robbing and killing Dow and splitting the money with Haas. Bolin also testified that Bivens did not respond to these statements by Haas and that three other people, in addition to herself and Bivens, were present during the conversation.

During closing argument defendant stated that there were some things he wanted the prosecutor to address in his closing argument to the jury. The first thing that defendant asked the prosecutor to address was Bivens' testimony that he had first heard about the plan to rob Dow at the mall on the day of the murder. Defendant then argued:

> Never talked about it with Joyce—with Mamma Haas and the Strawberry Gang; that's what Jamie Bivens said. He said, "Oh, no; I heard it being talked about, but no, I didn't have anything to do with it." Wrong. Iris Bolin came in here and told you—

The prosecutor objected to the statement, saying "[t]hat was for impeachment purposes"; and the trial court sustained the objection and instructed the jury "that you're to remember the evidence; you'll remember the instructions the Court has—may have given. It is for you to determine, from all the evidence, what the facts are. And the attorneys are allowed wide latitude in their arguments, but remember, this is argument and not evidence." Defendant's counsel continued his closing argument by stating: "You heard Iris Bolin describe the conversation. Match her description with what Jamie Bivens said and let Mr. Lands [the prosecutor] resolve that discrepancy beyond a reasonable doubt."

"Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom." *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). N.C.G.S. § 15A-1230(a) provides in part that "[a]n attorney may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 84-14 allows counsel to argue the facts and law of the case.

In this case defendant was attempting to set forth the testimony of Iris Bolin in order to illustrate how that testimony contradicted and thus impeached Bivens' testimony. The testimony had been submitted for this very reason, and defendant should have been permitted to continue with his argument. *See State v. Bondurant*, 309 N.C. 674, 688, 309 S.E.2d 170, 179 (1983) (holding that it is proper to refer to evidence of prior acts of misconduct in the closing arguments on the issue of credibility, but it is improper to argue about misdeeds for any purpose other than impeachment because the acts were submitted for impeachment purposes only); *State v. Wall*, 304 N.C. 609, 618, 286 S.E.2d 68, 74 (1982) (determining whether a trial court erred in not declaring a mistrial when evidence submitted for impeachment purpose was used substantively in closing, indicating that evidence that is admitted for impeachment can be referred to for that purpose only in closing).

We turn now to the question of whether the ruling constituted prejudicial error. "Under N.C.G.S. § 15A-1443(a) the test for prejudicial error in matters not affecting constitutional rights is whether 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Gardner*, 316 N.C. at 613, 342 S.E.2d at 877. The burden of showing prejudice pursuant to N.C.G.S. § 15A-1443(a) is on defendant.

We conclude that 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 trial. First, defendant was able to argue that there were discrepancies between the testimony of Iris Bolin and Jamie Bivens. The alleged conversation between Haas and Bivens had been presented in detail to the jury during the trial, and Bolin had testified that five people were present and Bivens had not responded when Haas mentioned robbing and killing Dow. The jury was specifically instructed by the trial court to remember the evidence.

Second, the value of this particular impeachment testimony was slight when considered with other evidence presented to the jury. The evidence presented at trial established that defendant went with Bivens to the victim's home on the night of the murder. Defendant admitted that he was with Bivens but testified that he only went with Bivens to get evidence that could be used by the police against the victim. Defendant also admitted that on the night of the murder, he was carrying the murder weapon, which belonged to defendant's brother, and that he took the weapon when he and Bivens exited the Jeep. The evidence also showed that on the night of the murder, defendant was wearing gloves, while Bivens had socks on his hands.

The significant contested issues were whether defendant had the intent to help Bivens rob and murder the victim, if in fact Bivens killed the victim, or whether defendant killed the victim. Bolin's testimony that Bivens heard someone besides defendant talking about robbing and murdering the victim months before the murder is of little value in determining these issues. This evidence does not bear in any way on what defendant's intent was on the night of the murder; nor does it suggest that Bivens had any intent to kill the victim, as he was simply listening to someone else and did not respond in any way to the comments.

Of much greater significance was Samantha Cobb's testimony that she had heard Bivens and Eason discuss robbing and killing the victim just weeks before the murder. Defendant was allowed to argue, without objection, about Cobb's testimony and how it contradicted Bivens' testimony. Defendant was also given ample opportunity to argue how the testimony of other witnesses, interested and uninterested, impeached Bivens' testimony.

Defendant was convicted of the crime of first-degree murder; unquestionably, defendant was at the scene of the crime with Bivens when the victim was killed. The jury was instructed that it could find defendant guilty of first-degree murder on the basis of aiding and abetting or acting in concert or on the basis that defendant actually pulled the trigger. We conclude that on the evidence in this record, defendant cannot show that there is a reasonable possibility that had defendant been allowed to argue in his closing about the specific testimony of Iris Bolin, a different result would have been reached at trial.

[4] Defendant also asks us to consider the alleged errors in this issue and the previous issue together and conclude that the combination of

the two errors requires that defendant be granted a new trial. Having considered this argument, we still conclude defendant has not established that a reasonable possibility exists that had the errors not been made, a different result would have been reached at trial. Our review of the evidence discloses that the two arguments at issue would have had a very limited effect on the ultimate decision of the jury in this case. The jury was fully aware of the consequences of its decision at the guilt-innocence phase and had also been fully exposed to the evidence that would have impeached defendant during trial. Therefore, defendant's assignment of error is overruled.

[5] Next, defendant argues that the prosecutor's flagrant and repetitive closing argument asking the jurors to penalize defendant for exercising his constitutional rights entitles defendant to a new trial.

At trial defendant testified that a few days after the murder, he went to the police station and was put into a room by himself. At the station defendant fell asleep; he awoke when police officers came in and told him that Bivens had claimed that defendant killed the victim. Defendant said that he had not shot anybody and that he would be willing to make a statement but wanted Locke Bell, his attorney, to be present. The police did not ask any more questions but also did not contact defendant's attorney. Defendant was eventually arrested. During closing argument the prosecutor repeatedly noted that defendant did not make a statement to the police; that he would not talk to the police; that he never told the police that Bivens had shot the victim; and that he had not helped the police gather evidence as Bivens had. Defendant did not object to these arguments at trial.

After the prosecutor finished his closing argument, the trial court, *sua sponte*, instructed the jury:

> Now, before I begin my instructions to you, there's one point I need to take up with you. Before luncheon recess, the District Attorney had made some argument in regard to the defendant not making a statement to officers after the defendant was arrested.
>
> Now, it is your duty to remember and recall all of the evidence. I tell you that a person under arrest has a right to request that an attorney be present in such a situation. So you should disregard the argument about the defendant's failure to make a statement at such a time and place.
>
> Can all of you follow this instruction? If you can, please raise your hands.

Defendant concedes that the prosecution could cross-examine defendant about his silence. However, defendant argues that the prosecutor's arguments during closing violated defendant's rights to due process of law and to be protected against self-incrimination. Defendant also argues that the flagrancy of the violations amounts to gross impropriety and that the trial judge's belated instruction could not cure the prejudice that resulted.

Where there is no objection to the closing argument in a capital case, an appellate court will review the argument;

> "but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."

State v. Brown, 320 N.C. 179, 194-95, 358 S.E.2d 1, 13 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). We conclude that the prosecutor's closing arguments at issue in this case were made to emphasize impeaching testimony at trial and that the arguments did not impermissibly violate defendant's constitutional right to remain silent.

We begin our analysis by noting that there is no evidence that defendant had been read his *Miranda* rights at the time of the silence and inaction referred to by the prosecutor during his closing argument.

> The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976), that when a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), which includes the right to remain silent, there is an implicit promise that the silence will not be used against that person. The Court in *Doyle* held it is a violation of a defendant's rights under the Fourteenth Amendment to the Constitution of the United States to then impeach the defendant on cross-examination by questioning him about the silence.

State v. Hoyle, 325 N.C. 232, 236, 382 S.E.2d 752, 754 (1989).

However, the United States Supreme Court has also held that in certain situations, a defendant's silence can be used to impeach a defendant without violating a defendant's constitutional rights. In

Jenkins v. Anderson, 447 U.S. 231, 65 L. Ed. 2d 86 (1980), the Court held that a prosecutor could cross-examine the defendant about his failure for thirty days prior to his arrest to tell anyone he was acting in self-defense on the night of the murder and that the prosecutor could mention this failure in his closing argument. In *Jenkins* the Court held that defendant's Fifth Amendment rights were not violated by the use of his prearrest silence. *Id.* at 238, 65 L. Ed. 2d at 95. In *Fletcher v. Weir*, 455 U.S. 603, 71 L. Ed. 2d 490 (1982) (per curiam), the Court held:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 607, 71 L. Ed. 2d at 494. The Court also noted in *Fletcher* that the

> "[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."

Id. at 606, 71 L. Ed. 2d at 493-94 (quoting *Jenkins*, 447 U.S. at 239, 65 L. Ed. 2d at 95) (citation omitted).

As there is no evidence in this case that defendant had been read his *Miranda* rights at the time of the silence and inaction referred to by the prosecutor during his closing argument, we will now consider whether the arguments made by the prosecutor were permissible as impeachment of defendant's testimony at trial.

This Court has addressed the issue of allowing the prosecutor to use evidence of defendant's silence to impeach the defendant during cross-examination in *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980), and *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977). In

Foddrell this Court held that it was permissible for a prosecutor to cross-examine a defendant about his prearrest silence, as the "evidence was competent to impeach his testimony at the trial and it was offered for no other purpose." *Foddrell*, 291 N.C. at 558, 231 S.E.2d at 626. In *Lane* the defendant testified at trial that he had an alibi for the crime for which he was being tried. The State asked defendant on cross-examination why he had not told the police or the prosecutor about this alibi prior to trial. This Court, in determining whether the cross-examination was permissible, noted:

> "Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment. . . .
>
> '. . . [I]f the former statement fails to mention a material circumstance presently testified to, *which it would have been natural to mention in the prior statement*, the prior statement is sufficiently inconsistent,' . . . . [Citations omitted.] [Emphasis added.]"

Lane, 301 N.C. at 386, 271 S.E.2d at 276 (quoting *State v. Mack*, 282 N.C. 334, 339-40, 193 S.E.2d 71, 75 (1972)) (citations omitted) (alterations in original). The Court went on to hold in *Lane* that "[t]he crux of this case is whether it would have been natural for defendant to have mentioned his alibi defense at the time he voluntarily stated [to the police] that he 'did not sell heroin to this person.' " *Id.*

The question now before this Court is whether in light of defendant's testimony at trial, defendant's silence about Bivens' guilt amounts to an inconsistent statement that the prosecutor could argue in closing. We conclude that defendant's silence about Bivens' guilt, prior to taking the stand, was evidence of an inconsistent statement in this particular case; and it was not error for the prosecutor to make the arguments impeaching defendant's testimony at trial.

In the instant case defendant's entire defense was based on the fact that he was a police informant and was at the scene of the crime attempting to gather incriminating evidence against the victim. At trial defendant testified about his activities as a police informant and how he gathered information about criminal activities and then passed that information on to the police. Defendant also named some of the people whom he had gathered evidence against and set up for the police. Defendant also testified that the police had specifically

asked him to gather evidence about the victim. Defendant presented evidence tending to show that he continued to gather evidence of the criminal activity of others and to pass that information on to the police even while he was in jail awaiting trial.

Under these specific facts, we conclude that it would have been natural for defendant to have told the police that Bivens shot the victim and to have helped the police gather evidence in the case even before defendant was brought to the police station. Evidence that defendant did not do so contradicted defendant's testimony that he was acting as a police informant on the night of the murder and was at the crime scene simply to gather incriminating evidence against the victim. Additionally, we conclude that when confronted with Bivens' statement identifying defendant as the triggerman, it would have been natural for defendant not only to tell the police, "I didn't shoot anyone," but also to tell the police that Bivens shot the victim.

Defendant also argues that even if the prosecutor could have mentioned defendant's silence during his closing argument in order to impeach defendant's testimony at trial, the prosecutor's arguments were still erroneous in that he used defendant's reliance on his constitutional rights as substantive evidence of defendant's guilt. We conclude that in the limited circumstances presented by this particular case, the prosecutor's closing argument on defendant's failure to talk to police was made to impeach defendant's testimony at trial. The prosecutor raised the question during closing argument that if in fact Bivens shot the victim, as defendant alleged at trial, why did defendant not say so when he was talking to the police, and why did defendant not help in the gathering of evidence in this particular case. Such arguments impeached defendant's testimony at trial that on the night of the murder, he was at the victim's home simply to gather evidence to be used against the victim.

Based on defendant's testimony at trial, the natural tendency would be for defendant to have mentioned Bivens' guilt at some point prior to defendant's taking the stand. On the particular facts of this case, the trial court did not err in allowing the prosecutor during his closing argument to make reference to defendant's silence since the fact that defendant remained silent as to Bivens' guilt impeached the value of defendant's testimony at trial. Defendant's assignment of error is overruled.

[6] Defendant next contends the trial court erred in instructing the jury on aiding and abetting. Specifically, defendant argues that the

trial court failed to instruct that a defendant cannot be guilty as an aider and abettor unless the defendant had the requisite *mens rea* for conviction of the crime charged.

The trial court gave the following general instructions on the theory of aiding and abetting:

> A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that if he does aid and abet, he is guilty of the crime just as if he had personally done all of the acts necessary to constitute the crime.
>
> Now, I charge that for you to find the defendant guilty of robbery with a dangerous weapon or murder in the first-degree or murder in the second-degree or felonious larceny or any one of those charges because of aiding and abetting, the State must prove three things beyond a reasonable doubt.
>
> First, that the crime was committed by some other persons, second, that the defendant knowingly advised, instigated, encouraged, procured or aided the other persons to commit that crime. However, a person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty, he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. And, third, that the defendant's actions or statements caused or contributed to the commission of the crime by that other person.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about February 19th, 1992, some person or persons other than the defendant committed the crimes of robbery with a dangerous weapon or murder in the first-degree or murder in the second-degree or felonious larceny or any of these, and that the defendant knowingly advised, instigated, encouraged, procured or aided the other person or persons 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 the other person, it would be your duty to return a verdict of guilty of that crime.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict

based on aiding and abetting, a verdict of guilty based upon aiding or abetting.

The trial court did not repeat these instructions during the charges for robbery with a dangerous weapon, first-degree murder, and felonious larceny. Instead, the trial court mentioned that it had already charged the jury on aiding and abetting and that the jury could consider the earlier instructions in regard to each specific crime charged. Defendant did not object to the aiding and abetting instructions. The instructions were repeated at the jury's request after deliberations had begun. Defendant objected to the reinstruction but not to the specific language used in the instructions.

Defendant having failed to object to the content of the instructions at trial, we review for plain error. To find plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

Defendant argues that the aiding and abetting instructions constitute error in that they do not require the jury to find that defendant himself had the requisite mental state for conviction of the crimes charged. Defendant also argues that by telling the jurors that they only had to find that defendant "knowingly advised, instigated, encouraged, procured or aided the other person or persons to commit that crime," the trial court not only misinformed the jurors as to what *mens rea* they had to find, it also completely nullified defendant's primary defense. We disagree.

Our recent opinion in *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995), establishes that the aiding and abetting instructions in this case did not constitute plain error. In *Allen* the defendant argued that the trial court committed plain error in its instructions on aiding and abetting because the instructions did not require the jury to find that defendant premeditated and deliberated or that he shared a criminal purpose or intent with codefendant to kill the victim. The Court held the instructions did not rise to the level of plain error because they included the phrase "knowingly aided," which has the probable interpretation of requiring a jury "to determine that defendant knowingly participated in the crime based on an intent to assist [another] in committing it." *Id.* at 558, 453 S.E.2d at 158.

Here, the trial court used the phrase "knowingly advised, instigated, encouraged, procured or aided the other person or persons to commit the crime." The court further instructed that to be guilty, defendant "must aid or actively encourage the person committing the crime or in some way communicate to this person his *intention* to assist in its commission." (Emphasis added.) We conclude these instructions clearly convey that for the jury to find defendant guilty under the theory of aiding and abetting, defendant had to have knowingly participated in the murder based on an intent to assist Bivens in committing the crimes for which defendant was charged. The instructions were not erroneous, and defendant's assignment of error is overruled.

[7] Defendant next contends that the trial court erred in conducting proceedings outside defendant's presence and that this conduct violated defendant's Sixth, Fifth, and Fourteenth Amendment rights under the United States Constitution and his rights under Article I, Section 23 of the North Carolina Constitution. Defendant points to five particular instances where he contends that he was not present and should have been: (i) at a pretrial conference; (ii) at an in-chambers conference; (iii) at a discussion with counsel prior to the beginning of court one day; (iv) at a discussion with counsel concerning the jury form and jury deliberations during sentencing; and (v) at the time when the court clarified that the noncapital sentences, which had been imposed in defendant's presence, were to run consecutively.

At the outset we note that under the federal Constitution, in addition to his right to be present under the Confrontation Clause, a defendant has a due process right to be present even in situations where he is not presenting evidence or confronting witnesses when it can be said that the defendant's presence " 'has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . . [and] to the extent that a fair and just hearing would be thwarted by his absence.' " *United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 490 (1985) (per curiam) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 108, 78 L. Ed. 674, 678-79 (1934)). Further, as defendant correctly notes, under our State Constitution a defendant has the right to be present at every stage of his trial; and if a defendant is being tried for a capital felony, that right cannot be waived. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). Not every error caused by a defend-

ant's absence requires reversal as these errors are subject to a harmless-error analysis. *Id.* at 33, 381 S.E.2d at 653.

To begin, we consider the instance when defendant was not present for the pretrial conference. On 7 September 1993 the trial court noted for the record that on 3 September 1993 a conference was held at which defendant was not present although his attorneys were. According to the trial court, at the conference the court discussed the plans for the trial's daily schedule; the basics of publicity; security in the courtroom; the jury selection procedure, which had previously been discussed; and the availability of a jury questionnaire. There was also a brief, nonbinding review of pending motions and a discussion of the possibility of a motion to continue. After the trial court recorded what had been discussed at the pretrial hearing, defendant argued his motion to continue, which was denied.

This case was called for trial on 7 September 1993. We conclude that since the conference at issue took place on 3 September 1993, prior to the commencement of defendant's trial, no error, constitutional or otherwise, was committed. *See State v. Rannels*, 333 N.C. 644, 652, 430 S.E.2d 254, 258 (1993) (holding that it was not error to have private, unrecorded sidebar conferences with potential jurors where conferences took place before calendar for session was called and before oath administered to jury); *State v. Cole*, 331 N.C. 272, 275, 415 S.E.2d 716, 717 (1992) (holding that defendant's constitutional right to be present at all stages of his trial does not arise before the trial begins); *see also State v. Chapman*, 342 N.C. 330, 464 S.E.2d 661 (1995).

Our review of the other four instances where defendant contends his absence violated his constitutional rights reveals that any violation of his rights was harmless beyond a reasonable doubt. In the first instance the trial court conducted an in-chambers meeting in defendant's absence during which a tape of a conversation between the victim and another person was played. The trial court noted for the record, after receiving defense counsel's permission to do so outside the presence of defendant, that the court had listened to the tape, that no motions as to the tape were to be heard at that time, and that no rulings were made as to the tapes either in chambers or in court. From the record as to the substance of the in-chambers conference it is clear that all that occurred during the conference was that the trial court listened to one tape. The trial court's decision as to the admissibility of that tape and two others occurred later and in defendant's presence.

In the second instance defendant argues that the trial court erred when it took care of housekeeping matters outside defendant's presence while the court waited for a juror who was late. The transcript reveals that on 24 September 1993, a juror overslept. Prior to bringing defendant into the courtroom, the court determined which juror was missing and had someone call the juror. The court then asked if counsel foresaw a need to have any *voir dire* on any matters before the testimony that had been interrupted by the evening recess was resumed. When counsel began to get into a discussion about a *voir dire* on the admissibility of certain tape recordings and the order of testimony, the trial court stopped the discussion and said that it would be necessary to bring defendant into the courtroom before the court went any further. After defendant entered the courtroom, the trial court began the conversation anew, asking defendant what motions *in limine* he was considering and specifically asking defendant to address the motion as to the admissibility of the tapes.

Next, defendant argues that it was error for the trial court to ask in the absence of defendant if the jurors were all back from a jury break and to hand the bailiff the jury form to give to the jurors when they had all returned. At this point the court also told counsel to start considering when the court should reconvene if the jury did not reach a decision as to defendant's sentence on that day. No further discussion of this issue occurred between counsel and the trial court because the jury reached a decision as to defendant's sentence, and judgment was entered by the trial court that same day.

Finally, defendant argues that the trial court erred by ordering, outside defendant's presence, that the sentences for the noncapital matters would run consecutively. When the sentences for the capital and noncapital offenses were imposed, the trial court did not indicate that the sentences would run consecutively. Upon request of the prosecutor, defense counsel was brought back into the courtroom; and the trial court noted for the record that the court intended that the sentences run consecutive to each other. The trial court asked if defense counsel had any problem with defendant not being present at this portion of the proceedings. Defense counsel indicated that he did not think it was necessary to have defendant present. The sentences as to the noncapital felonies had already been imposed; no evidence was presented during the time defendant was absent nor was any argument made beyond the State's request that the sentences run consecutively to which defense counsel interposed an objection.

Assuming *arguendo* that defendant's federal and state constitutional rights were implicated in any of these situations, we conclude that any error was harmless beyond a reasonable doubt.

> Where " 'the transcript reveals the substance of the [*ex parte*] conversations, or the substance is adequately reconstructed by the trial judge at trial,' " *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 763 (1994) (quoting *State v. Boyd*, 332 N.C. 101, 106, 418 S.E.2d 471, 474 (1992)), and it is manifest from the transcript that defendant was not harmed because his presence would have made no difference in the outcome of the conversation, the error has been held harmless beyond a reasonable doubt. *State v. Payne*, 328 N.C. 377, 389, 402 S.E.2d 582, 589 (1991).

State v. Williams, 339 N.C. 1, 29, 452 S.E.2d 245, 262 (1994), *cert. denied*, — U.S —, 133 L. Ed. 2d 61 (1995).

In *State v. Huff*, 325 N.C. 1, 27-28, 381 S.E.2d 635, 650, the defendant became emotionally distraught during the introduction of certain testimony and was removed from the courtroom. Upon request of defense counsel, the trial court continued the proceeding in defendant's absence. When discussing *Huff*, this Court has noted that

> the error of continuing the trial in defendant's absence was harmless because defense counsel was present and able to challenge the evidence being offered and the [c]ourt had a full record from which to review its admissibility. Further, there was no showing that, given his condition, defendant himself could have aided in defending against the witnesses' testimony.

State v. Buchanan, 330 N.C. 202, 220-21, 410 S.E.2d 832, 843 (citing *Huff*, 325 N.C. at 35-36, 381 S.E.2d at 655).

In this case in all five instances at least one of defendant's counsel was present and representing defendant's interests. Additionally, a record was made of everything that occurred outside defendant's presence. The record shows that defendant's presence would have made no difference in the outcome of any of the conversations. Finally, with regard to the clarification that the noncapital sentences would run consecutively, we note that as in *Huff*, at the time of the trial court's decision, defendant was emotionally distraught. Defendant had just been sentenced to death; and his counsel told the court, "I don't think he's [defendant's] in any shape to even really know what's going on in here right now." Defendant's absence during the five particular situations challenged by defendant "beyond a rea-

sonable doubt . . . did not contribute to the verdict obtained[,]" *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967); and, thus, any error was harmless. *Huff*, 325 N.C. at 33, 381 S.E.2d at 653-54. This assignment of error is overruled.

[8] Next, defendant argues that the trial court committed plain error by refusing to grant the jury's request to rehear the testimony of defendant; Bivens; and SBI Special Agent Trochum, the forensic firearms and tool mark examiner who examined the rifle used to kill the victim.

After beginning jury deliberations at the guilt-innocence phase, the jurors sent out a note asking to be allowed to see various items of evidence and to review the testimony of defendant, Bivens, and Trochum. The trial court informed counsel, in the absence of the jury, that "in my discretion and it's a practical matter, I will not order the preparation of transcripts of portions of the evidence, and I will try to instruct the jury in regard to that." When the jury was brought into the courtroom, the court instructed:

> Now, Members of the Jury, in regard to the items you've mentioned as Agent Trochum's testimony and the testimony of Mr. Buckner [defendant] and Mr. Bivens, it is not possible to give you a transcribed version of testimony of any portion of the trial—of this trial's testimony. That is not feasible.

Defendant did not object to the failure of the judge to submit this testimony to the jury. The trial court did grant the initial portion of the jury's request to review multiple pieces of evidence in the jury room.

N.C.G.S. § 15A-1233(a) provides in part:

> 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.

If the judge denies the jury's request to review evidence or testimony

> upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable. In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented.

State v. Lang, 301 N.C. 508, 510, 272 S.E.2d 123, 124-25 (1980) (citation omitted).

In *State v. Lewis*, 321 N.C. 42, 361 S.E.2d 728 (1987), the jurors asked if they were allowed to review evidence that had been presented in the case, either transcripts or pictures. After conferring with trial counsel, the judge told jurors that they could examine photographs but not the transcript because " 'I just don't think that's the way to do things.' " *Id.* at 51, 361 S.E.2d at 734. This Court held that it appeared that the trial judge in denying the jury's request for transcripts exercised his discretion because he considered the request of the jury and allowed it in part and denied it in part. *Id.*

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), the Court held that it was not error to deny a jury's request to review the testimony of two particular witnesses when "[i]t is clear from this record that the trial court was aware of its authority to exercise its discretion and allow the jury to review the expert's testimony." *Id.* at 290, 439 S.E.2d at 571.

In this case the trial judge specifically stated that he was denying the jury's request to review the testimony "in his discretion." It is clear that the judge was aware of his discretionary authority pursuant to the statute. Further indication that he realized that it was within his discretion to grant or deny the jury's request is evident from the fact that he granted a portion of the jury's request, the request to review physical evidence in the jury room. *Lewis*, 321 N.C. at 51, 361 S.E.2d at 734.

Defendant argues that the trial court erred because it could have had the testimony read to the jury by the court reporter. Defendant states in his brief, "Thus, to the extent that the trial court was purporting to exercise its discretion, it was doing so under a misapprehension of the limits of that discretion."

We disagree with defendant's interpretation of the trial court's comments. The court never addressed the question of whether the court reporter could read back the testimony to the jury, but this specific request was never actually made by the jury. Nothing in the record indicates the trial judge was acting under a misapprehension of the limits of his discretion when he made his decision. The trial judge, in his discretion, denied the jury's request because it was not practical or feasible. The testimony of these three witnesses covered

over five hundred transcript pages; defendant's testimony alone spanned three days. To have the court reporter read the testimony back to the jury was no more feasible or practical than to have the testimony transcribed and the transcript submitted to the jury.

We conclude that the trial judge acted within his discretion and with the understanding that the decision as to the jury's request was fully within his discretion when he denied the jury's request to review the testimony of Trochum, Bivens, and defendant. No evidence supports defendant's argument that the trial judge was acting under a misapprehension of the limits of his discretion. Defendant's assignment of error is without merit.

[9] Defendant also contends the trial court erred by failing to dismiss or arrest judgment on the felonious larceny conviction. Defendant argues that larceny is a lesser included offense of robbery with a dangerous weapon. *See State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). Defendant further argues that since the larceny in the present case was part of the same continuous transaction as the robbery with a dangerous weapon, the trial court violated defendant's federal and state constitutional rights to be free of double jeopardy by convicting him for both crimes. We agree; and based on the authority of *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), we arrest judgment on the felonious larceny conviction.

SENTENCING PROCEEDING

[10] Next, defendant argues that the trial court committed reversible error when it submitted the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). Defendant notes that he strenuously objected to the submission of this circumstance and that no rational juror could have found that defendant's criminal record was not significant.

"[T]his Court has held that where evidence is presented in a capital sentencing proceeding that may support a statutory mitigating circumstance, N.C.G.S. § 15A-2000(b) directs that the circumstance must be submitted for the jury's consideration absent defendant's request or even over his objection." *State v. Ingle*, 336 N.C. 617, 642, 445 S.E.2d 880, 893 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995).

A review of the record reveals that defendant's criminal record consisted principally of a series of crimes which all occurred between

29 September 1989 and 16 January 1990. These crimes included seven breaking or entering convictions, a common-law robbery conviction, and a drug trafficking conviction. There was also some evidence that colleagues of defendant believed he was violent and that defendant carried a firearm after he had been convicted of a felony, which in itself is a felony. The only violent criminal activity by defendant that was addressed in any detail at trial related to defendant's conviction for common-law robbery. However, the evidence showed that in the common-law robbery case, evidence was presented that defendant's coconspirator, not defendant, was the instigator or main actor in the crime. The evidence also shows that on 14 October 1991, defendant pled guilty to the seven breaking or enterings, the common-law robbery, and the trafficking charge. The superior court in sentencing defendant placed defendant on probation and entered a fifteen-year suspended sentence.

In *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991), this Court held the trial court correctly submitted the (f)(1) mitigating circumstance even though there was evidence defendant had been convicted of two felonies and seven alcohol-related misdemeanors. *Id.* at 313, 364 S.E.2d at 324.

In this case defendant's felony convictions were closer in time to the crimes for which he was being tried than were the felony convictions in *Lloyd*. However, based on the evidence presented in this case, a rational juror could conclude that defendant did not have a significant history of prior criminal activity at the time of the murder. All of defendant's charged criminal activity occurred within a brief period of time; most of the criminal activity was nonviolent; and defendant received probation and a suspended sentence for his prior convictions. Defendant's assignment of error is overruled.

[11] Next, defendant argues that the trial court committed reversible error when it refused, as a matter of law, to peremptorily instruct the jury on those nonstatutory mitigating circumstances supported by uncontroverted evidence. In his brief defendant argues that every nonstatutory mitigating circumstance was deserving of a peremptory instruction and that the judge erred in failing to instruct peremptorily as to the nonstatutory mitigating circumstances because the trial judge was acting under the misapprehension that a peremptory

instruction for nonstatutory mitigating circumstances was not permissible.

If the evidence supporting a nonstatutory mitigating circumstance is uncontroverted and manifestly credible, the defendant is entitled to a peremptory instruction on that circumstance upon his request. *State v. Green*, 336 N.C. 142, 173-74, 443 S.E.2d 14, 32-33, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). However, a defendant must specify the particular mitigating circumstance that he deems deserving of a peremptory instruction. *State v. Skipper*, 337 N.C. 1, 41, 446 S.E.2d 252, 274 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). The trial judge is not "required to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor." *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979). Further, the peremptory instruction for statutory mitigating circumstances is not appropriate for nonstatutory mitigating circumstances. *Green*, 336 N.C. at 173, 443 S.E.2d at 32. While the jury must accord mitigating value to a statutory mitigating circumstance found by it, the jury may deem a nonstatutory mitigating circumstance found by it to be without mitigating value. *Id.* at 173-74, 443 S.E.2d at 32-33. A peremptory instruction for nonstatutory mitigating circumstances should reflect this distinction between nonstatutory and statutory mitigating circumstances. *Id.* at 174, 443 S.E.2d at 33.

In the present case defendant first noted that he would be asking for a peremptory instruction for "a number" of the circumstances; later, defendant argued that defendant "deserves a p[er]emptory instruction on each one of those mitigating factors there . . . and if the Court wants me to address these specifically, I will be more than happy to." The trial court responded that it did in fact want defendant to specifically address each circumstance. Defendant then proceeded to go through the mitigating circumstances, the facts that supported the circumstances, and why the nonstatutory circumstances could be deemed to have mitigating value. However, the only circumstance for which defendant specifically requested a peremptory instruction was that defendant was a hard worker.

Later, when the trial court was going over the mitigating circumstances it would submit to the jury, defendant did not ask for a peremptory instruction for any of the circumstances. The Court eventually addressed the question of peremptory instructions one more time; and defendant argued that where all the evidence tends to show

that a particular mitigating circumstance exists, the defendant is entitled to a peremptory instruction and that there is no distinction between statutory and nonstatutory mitigating circumstances.

The trial court then indicated that it was considering giving a peremptory instruction for some of the statutory mitigating circumstances. The trial court noted that statutory mitigating circumstances are deemed mitigating as a matter of law and stated that a peremptory instruction is appropriate if there is no evidence to the contrary. The trial court stated it would not give such an instruction for nonstatutory circumstances. Defendant then requested a peremptory instruction as to one of the statutory mitigating circumstances but did not mention any of the nonstatutory mitigating circumstances. Defendant never distinguished between a peremptory instruction for statutory and nonstatutory mitigating circumstances; indeed, in his arguments during the charge conference, he indicated he saw no difference between the statutory and nonstatutory mitigating circumstances. Earlier, defendant had argued that even the nonstatutory mitigating circumstances were actually statutory, as they fell under the catchall circumstance, N.C.G.S. § 15A-2000(f)(9).

Defendant was not entitled to a peremptory instruction for any circumstances except the ones he specifically discussed with the trial court. *See Skipper*, 337 N.C. at 41, 446 S.E.2d at 274. The only nonstatutory mitigating circumstance for which defendant specifically requested that a peremptory instruction be given was that defendant was a hard worker. We conclude that the evidence as to this circumstance could not be deemed uncontradicted and manifestly credible because there was evidence defendant stole from two of his employers and stopped working for another employer after being involved in a fight at work. Additionally, the trial court correctly determined that it should not give the same peremptory instruction for nonstatutory and statutory mitigating circumstances. *Green*, 336 N.C. at 173, 443 S.E.2d at 32.

On appeal defendant argues that the trial court should have given peremptory instructions for all forty nonstatutory mitigating circumstances. We conclude that since defendant did not specifically request that peremptory instructions be given as to all nonstatutory mitigating circumstances, the trial court did not err by not giving such an instruction. *Skipper*, 337 N.C. at 41, 446 S.E.2d at 274. Additionally, we conclude that the trial court did not err by not giving a peremptory instruction as to the nonstatutory mitigating circumstances because

defense counsel never requested a proper peremptory instruction for nonstatutory mitigating circumstances. Defendant's assignment of error is overruled.

[12] Defendant next argues that the trial court improperly interfered with defendant's case in mitigation by overruling defendant's objection to prosecutorial arguments which mischaracterized the role of mitigating circumstances and by limiting defendant's argument about mitigating circumstances.

First, defendant argues that the trial court erred by overruling defendant's objection to the following two arguments by the prosecutor: (i) "Mitigating circumstances. What you're looking for is some reason to explain why George Cale Buckner on February 19, 1992, was standing outside Eddie Dow's home . . . . What you're looking for is for a mitigating circumstance"; and (ii) "The simple fact is they've not offered you any effect [sic], and they certainly haven't offered you any effect [sic] that would lead to an excuse or even a partial excuse as to what he was doing down there that night." Defendant argues that the prosecutor's arguments about mitigating circumstances were a misstatement of the law and that the statements limited the jury from giving full consideration to the mitigating evidence.

As we have often said, "the conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge," *State v. Whiteside*, 325 N.C. at 398, 383 S.E.2d at 916.

Our review of the prosecutor's closing argument reveals that before discussing the specific mitigating circumstances at issue in this case and before making the statements defendant contends are error, the prosecutor defined mitigating circumstances pursuant to the pattern jury instructions. Specifically, the prosecutor stated that a

> [m]itigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing—self-defense would be a justification or excuse for a killing—or to reduce it to a lesser degree of crime than first-degree murder—something that would drop this down to a second-degree murder; but—and this is it—but may be considered as ext[e]nuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders. That is the definition of a mitigating circumstance.

After defining mitigating circumstances pursuant to the pattern jury instructions and noting that the defendant must prove mitigating cir-

cumstances by a preponderance of the evidence, the prosecutor began reviewing defendant's forty-six submitted mitigating circumstances. The prosecutor read mitigating circumstances six through thirteen and then stated they "[m]ay be considered as ext[e]nuating or reducing the moral culpability of the killing by making it less deserving of extreme punishment other than first-degree murder. You deem the weight you give those." It was after the correct definition of mitigating circumstances was given two times that the prosecutor made the statement defendant argues was erroneous.

Viewed in its entirety, the prosecutor's argument did not misrepresent mitigating circumstances to the jury. We conclude that in light of the earlier definitions of mitigating circumstances given by the prosecutor, the trial court did not abuse its discretion in allowing these additional remarks to be made.

Furthermore, the trial court correctly instructed the jury as to the meaning of mitigating circumstances after the prosecutor had finished his closing argument. Assuming *arguendo* that the prosecutor's statements were erroneous, the error was cured by the trial court's proper instructions. *See State v. Anderson*, 322 N.C. at 38, 366 S.E.2d at 469 (holding that any prejudice resulting from misstatements of law made by the prosecutor during closing was cured by the trial court's proper instruction on the applicable law); *see also State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

[13] Defendant also argues that the trial court erred when (i) it refused to let defendant argue to the jurors that they should consider that defendant's crime did not fit within many statutory aggravating circumstances not discussed by the State, and (ii) it did not let defendant argue the significance of the danger defendant had exposed himself to when he testified against inmates who would, like defendant, be incarcerated in the North Carolina Department of Correction. After reviewing defendant's closing argument, we conclude that the trial judge did not abuse his discretion by restricting defendant's argument.

Defendant attempted to argue, "I want to tell you the statutory aggravating factors that the State has not presented." The prosecutor objected, and a *voir dire* was held on the issue of the propriety of defendant's argument. The trial court ruled that pursuant to this Court's decision in *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert.*

denied, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982), it would sustain the prosecution's objection to this line of argument. In *Brown* this Court held that it was not error not to submit the absence of a particular aggravating circumstance as a mitigating circumstance, holding that the absence of an aggravating circumstance did not show "the presence of a mitigating one." *Id.* at 179, 293 S.E.2d at 587.

We conclude that the trial court's ruling that defendant could not argue about the aggravating circumstances that the State had not presented was not "manifestly unsupported by reason," as the trial court's decision was based on its belief that absence of an aggravating circumstance is not evidence of a mitigating circumstance. This belief was based on a reasonable interpretation of this Court's decision in *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569.

[14] Finally, defendant argues that the trial court abused its discretion when it did not allow him to argue that some of the people defendant had testified against would be waiting for him when he went to prison. The trial court instructed the jury to disregard this argument, stating that "there is nothing in the record with regard to the individuals referred to in these matters of where they are[,] what their intentions are—motivations—or what their relationship with the defendant would be now." The trial court did allow defendant to ask the jury to consider the fact that defendant had testified or was ready to testify against people who had received prison sentences in the North Carolina Department of Correction.

Trial counsel are "entitled to argue all the facts submitted into evidence, as well as any reasonable inferences therefrom." *State v. Conaway*, 339 N.C. at 524, 453 S.E.2d at 847. The trial court did not allow the argument in question to be made based on the fact that no evidence was presented as to the state of mind of the criminals defendant was willing to testify against or if these people were in fact waiting for defendant to arrive at prison. The trial court did allow defendant to argue facts based on the evidence that had been presented to the jury. We conclude that the trial court's decision that the evidence and any reasonable inference to be made from the evidence did not support an argument that people were waiting for defendant in prison was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant's assignment of error is overruled.

ADDITIONAL ISUES

[15-24] Defendant raises ten additional issues which he concedes have been decided against his position by this Court: (i) the trial court erred by reinstructing the jurors that they "may" consider mitigating circumstances at Issues Three and Four, after the initial instruction informed the jurors that they "must" consider mitigating circumstances at that stage; (ii) the trial court violated defendant's rights by submitting the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery; (iii) the trial court violated defendant's rights by not allowing him to question jurors about their conceptions of life imprisonment and parole eligibility for a person convicted of first-degree murder; (iv) the trial court committed plain error by allowing the prosecution to present the testimony of the victim of a prior robbery, when defendant had already admitted committing the robbery during his testimony and had indicated a willingness to stipulate to the existence of the robbery conviction; (v) the trial court improperly defined robbery as a felony involving violence or the threat of violence, thereby expressing an opinion on an aggravating circumstance; (vi) the trial court committed plain error by defining mitigating circumstances as matters about a crime making a punishment less than death appropriate; (vii) the trial court committed plain error by instructing the jury that to find a nonstatutory mitigating circumstance, the jury first had to find it existed and then whether it had mitigating value; (viii) the trial court committed plain error by instructing jurors on their consideration of mitigating circumstances at Issue Three; (ix) the trial court committed plain error by instructing the jurors they had a duty to recommend death if they found the sentencing issues against defendant; and (x) the trial court committed plain error by instructing the jurors that they had to reach unanimous verdicts on Issues Three and Four.

We have considered defendant's arguments with respect to each of these issues and have found no reason to depart from our prior holdings, which defendant has correctly recognized as dispositive. *See State v. Ward*, 338 N.C. 64, 122, 449 S.E.2d 709, 742 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). Therefore, we overrule these assignments of error.

[25] Defendant also sets forth three additional issues in this portion of his brief, which he does not concede have been decided against him. First, defendant argues that the trial court committed plain error

by erroneously instructing the jury on theories of guilt and premeditation and deliberation that were not supported by the evidence. Specifically, defendant argues that the trial court should not have instructed that evidence of the "use of grossly excessive force" could be used to infer premeditation and deliberation. Defendant did not object to the instruction at trial.

In *State v. Smith*, 328 N.C. 99, 138, 400 S.E.2d 712, 734 (1991), this Court held that there was evidence of the use of grossly excessive force where the defendant shot the victim two times at close range. *See also State v. Cummings*, 326 N.C. 298, 316-17, 389 S.E.2d 66, 76-77 (1990) (holding that there was evidence of grossly excessive force where the defendant shot the victim once in the arm and then in the base of the skull). The evidence in this case supported a finding that the victim was shot twice in the body, and then defendant moved closer to the victim and shot him in the head. The evidence in this case supports an instruction to the jury that premeditation and deliberation may be established by proof of circumstances from which premeditation and deliberation may be inferred, such as "use of grossly excessive force." We conclude that defendant's assignment of error is without merit.

[26] Second, defendant argues that the trial court committed plain error and violated defendant's rights to due process in its instructions to the jury on aiding and abetting and acting in concert by failing to instruct the jury that a defendant cannot be guilty under these theories unless he is actually or constructively present at the scene of the crime. Defendant did not object to the instruction at trial.

As defendant did not object to the trial court's failure to instruct that actual or constructive presence is required for defendant to be found guilty under these theories, this court will only review the assignment of error for plain error. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. As noted earlier, to conclude there is plain error, the "error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Id.* (quoting *State v. Bagley*, 321 N.C. at 213, 362 S.E.2d at 251). We conclude that any error in the trial court's instructions cannot rise to the level of plain error because all the evidence, and defendant's own testimony, established that defendant was in fact present at the scene of the crime. Hence, any potential error in the instruction as to this particular fact could not have been so funda-

mental as to amount to a miscarriage of justice or probably have resulted in the jury reaching a different verdict. Defendant's assignment of error is overruled.

[27] Finally, defendant argues that the trial court committed plain error by instructing the jury that defendant has the burden of establishing mitigating circumstances by a preponderance of the evidence, which the court then indicated meant that defendant had to "satisfy" the jury as to the existence of mitigating circumstances. Defendant argues that this definition of preponderance of the evidence was insufficient and constituted plain error. This Court rejected defendant's argument in *State v. Payne*, 337 N.C. 505, 532-33, 448 S.E.2d 93, 109 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). Defendant presents no new argument which persuades us we should overrule our previous decision. Defendant's assignment of error is overruled.

PROPORTIONALITY

[28] Having found defendant's trial and capital sentencing proceeding to be free of prejudicial error, we are required by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (i) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, —— U.S. ——, 129 L. Ed. 2d 924 (1994).

The existence of the following two aggravating circumstances was found by the jury: (i) that defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (ii) that this murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5).

After a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we are convinced that the jury's finding of each of these aggravating circumstances was supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 133, 443 S.E.2d 306, 334 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). We compare this case to similar cases within a pool which we defined in *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), and in *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). Our consideration on proportionality review is limited to cases roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994). 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. at 198, 443 S.E.2d at 47.

Defendant was convicted of first-degree murder on the theories of premeditation and deliberation, felony murder, and lying in wait. He was also convicted of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felonious larceny. The jury found both the submitted aggravating circumstances: (i) that defendant had previously been convicted of a felony involving the use or threat of violence to the person and (ii) that this murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon.

Of the forty-six mitigating circumstances submitted, the jury found thirty-two of them. While six statutory mitigating circumstances were submitted to the jury, only four were found. The four statutory mitigating circumstances found by the jury were: (i) defendant's age at the time of the murder, N.C.G.S. § 15A-2000(f)(7); (ii) that defendant testified truthfully on behalf of the State in the prosecution

of Michael Dial for the felony of murder, N.C.G.S. § 15A-2000(f)(8); (iii) that defendant testified truthfully on behalf of the State in the prosecution of Wendell House for the felony of murder, N.C.G.S. § 15A-2000(f)(8); and (iv) the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The jury declined to find the statutory mitigating circumstances that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), and that this murder was committed by another person and defendant was only an accomplice in or accessory to the murder and his participation in the murder was relatively minor, N.C.G.S. § 15A-2000(f)(4). The nonstatutory mitigating circumstances found by the jury related to (i) defendant's activities as a police informant both prior to his arrest in connection with this murder and after his incarceration while awaiting trial; (ii) defendant's service in the Marine Corps; (iii) defendant's care of his alcoholic father before he died; and (iv) defendant's participation in church, sports, and other school activities.

We begin our analysis by comparing this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *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; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Of these seven cases, three involved murders committed during armed robbery: *State v. Benson*, *State v. Stokes*, and *State v. Young*. However, none of these cases is sufficiently similar to the instant case to merit a finding of disproportionality here.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517, the defendant was convicted of first-degree murder solely on the theory of felony murder. The victim died of cardiac arrest after being robbed and shot in the legs by the defendant. The sole aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. This Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant intended only to rob the victim, as defendant shot the victim in the "legs rather than a more vital part of his body." *State v. Benson*, 323 N.C. at 329, 372 S.E.2d at 523. In this case, unlike in *Benson*, defendant was convicted on the theories of premeditation and deliberation, felony murder, and

lying in wait. Also, the jury here found two aggravating circumstances, that defendant had previously been convicted of a violent felony and that the murder occurred while defendant was engaged in a robbery. Further, defendant clearly intended to kill the victim, shooting him twice in the body and once in the head.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653, the defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder solely on the theory of felony murder. The sole aggravating circumstance found by the jury was that the crime was especially heinous, atrocious, or cruel. Here, defendant was convicted on the theories of premeditation and deliberation, felony murder, and lying in wait. Unlike in *Stokes*, in the instant case there was strong evidence of premeditation and deliberation. The jury in this case found two aggravating circumstances. Additionally, there was evidence that defendant was the instigator of the robbery that led to the victim's murder and was the only person who actually shot the victim.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181, the defendant, who had been drinking heavily all day, suggested to two other men that they rob and kill the victim to be able to purchase more alcohol. The three walked to the victim's house and entered. Once inside, they robbed and murdered the victim. The jury found as aggravating circumstances that the murder was committed for pecuniary gain and during the course of a robbery or burglary.

This case is distinguishable from *State v. Young*. First, unlike in *State v. Young*, the defendant in the instant case was convicted of first-degree murder not only on the theory of felony murder, but also on the theories of premeditation and deliberation and lying in wait. Further, the killing in *Young* was not as coldly calculated as in the instant case, where defendant planned this robbery-murder for several weeks and lay in wait for the victim at the victim's home. Unlike in *Young*, in the instant case there is no evidence that defendant was intoxicated at the time of the murder.

We conclude that this case is not sufficiently similar to any of the above cases to warrant a finding of disproportionality in this case.

Further, in support of his argument that his death sentence is disproportionate, defendant contends that the majority of robbery-murder cases has resulted in sentences of life imprisonment. However, this Court has long rejected any mechanical or empirical

approach to the comparison of cases that are superficially similar. *State v. Robinson*, 336 N.C. at 139, 443 S.E.2d at 337. In conducting proportionality review, our attention is focused on an " 'independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.' " *Id.* (quoting *State v. Pinch*, 306 N.C. at 36, 292 S.E.2d at 229).

While we recognize that juries have returned life sentences for several robbery-murders, our review of robbery-murder life cases in the pool reveals that the instant case is distinguishable when compared to a majority of those cases. Many of these cases involved robbery-murders at a convenience store or the mitigating circumstance that the defendant's ability to appreciate the criminality of his conduct was impaired. *See, e.g.*, *State v. Medlin*, 333 N.C. 280, 426 S.E.2d 402 (1993); *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983). In defendant's case, the victim was murdered in the sanctity of his own home; and there was no evidence of any impairment of defendant's ability to appreciate the criminality of his conduct.

Defendant cites two robbery-murder cases in which juries returned life sentences and which he claims are most similar to his case. Both cases involved the aggravating circumstance that defendant had been previously convicted of a violent felony.

In *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991), defendant and Mack Lee Nichols burst into a video store, where Nichols killed the owner and seriously wounded a clerk. The two men then robbed the store and fled. Defendant was convicted of first-degree murder on the theory of felony murder. The jury found as aggravating circumstances that the defendant had a previous conviction of a violent felony and that the murder was committed for pecuniary gain. The jury found the statutory mitigating circumstance that defendant was a minor accomplice in a capital felony committed by another person.

In *State v. Oliver*, 334 N.C. 513, 434 S.E.2d 202 (1993), defendant and three accomplices attempted to rob two men in the house where they were staying. Defendant shot the first man when he opened the door and shot the second man as he fled from the apartment. Defendant was convicted solely on the theory of felony murder. The jury found as aggravating circumstances that the defendant had previously been convicted of a violent felony, that the murder was committed while defendant was engaged in a burglary, and that the murder was committed for pecuniary gain. The jury found two statutory mitigating circumstances: (i) that the murder was committed while

the defendant was mentally or emotionally disturbed and (ii) that defendant's capacity to appreciate the criminality of his conduct at the time of the murder was impaired.

Unlike in *Black* and *Oliver*, where the defendants were convicted solely upon the theory of felony murder, in the instant case defendant was also convicted of first-degree murder on the theories of premeditation and deliberation and lying in wait. A conviction based on premeditation and deliberation indicates a more cold-blooded and calculated killing than a conviction based on felony murder. *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). Additionally, while the victim in *Black* was shot only one time, in the instant case the victim was shot three times, once after he had fallen to the ground wounded. Further, in *Black* the defendant did not actually shoot the victim. In the instant case the evidence indicated that defendant was the person who actually shot the victim. Unlike in *Oliver*, in the instant case the issues of any mental or emotional disturbance and defendant's ability to appreciate the criminality of his conduct were not raised by the evidence and were, therefore, not before the jury for its consideration.

We conclude that this case is most analogous to cases in which this Court has held the death penalty not to be disproportionate.

The most significant feature of this case is that defendant committed this murder by lying in wait for his victim. In *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, the defendant lay in wait under the victim's window until the victim was in the most opportune place to be shot. *Id.* at 231-32, 358 S.E.2d at 34. The defendant then shot the victim once in the head, killing him almost instantly. *Id.* The jury found the sole aggravator that defendant had previously been convicted of a felony involving the use or threat of violence to a person. *Id.* at 219, 358 S.E.2d at 26.

In affirming the death penalty in *Brown*, the Court emphasized that the crime of first-degree murder by lying in wait at the victim's home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *Id.* at 231, 358 S.E.2d at 34.

As in *Brown*, the murder in the instant case was calculated and deliberate. Defendant discussed killing the victim prior to going to his

residence. He went to the victim's home and hid behind a utility building. Immediately after the victim exited his car in his carport, defendant shot him three times. Defendant made no attempt to rob the victim until after he shot him. As in *Brown*, "[i]n the lengthy, purposeful plotting, and in the execution of his crime, the defendant displayed a cold callousness and obliviousness to the value of human life." *Id.* at 232, 358 S.E.2d at 34. Defendant had demonstrated these qualities before, including the commission of a common-law robbery in which he held a gun to his victim's head.

While in *Brown* the jury found only the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person, in defendant's case the jury found as an additional aggravating circumstance that defendant committed the murder while engaged in a robbery.

In *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709, the defendant decided to rob and perhaps kill the victim in order to obtain the proceeds from the victim's small convenience store. Armed with a semi-automatic rifle, defendant and Wesley Harris hid in the bushes behind the victim's home. *Id.* at 128, 449 S.E.2d at 745. When the victim arrived and exited her truck, defendant opened fire. *Id.* The victim suffered at least three nonfatal wounds before she was killed by a bullet to the head. *Id.* Defendant and Harris then proceeded to rob the victim and flee the scene. *Id.*

Although the sole aggravating circumstance found in *Ward*, that the murder was committed for pecuniary gain, was not submitted in the instant case, we find the facts of *Ward* to be nearly identical to the crime at issue. Both cases involved cold and calculated murders committed by lying in wait for the victim at the victim's own residence. In each case the defendant opened fire upon the unsuspecting victim, who was unaware of the danger and had no opportunity to seek protection. In each case only after the victim was felled did the defendant seek to rob the victim. As in *State v. Brown*, in both these cases "the defendant displayed a cold callousness and obliviousness to the value of human life." *State v. Brown*, 320 N.C. at 232, 358 S.E.2d at 34.

In light of the above and the calculated and unprovoked nature of the murder in this case, we find that this case rises to the level of cases in which this Court has approved the death penalty. Based on the experienced judgment of the members of this Court, we conclude that defendant's death sentence is not excessive or disproportionate.

We hold that defendant received a fair trial and capital sentencing proceeding free from prejudicial error. In comparing his case to similar cases in which the death penalty was imposed and in consideration of both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO. 92CRS4663—ROBBERY WITH A DANGEROUS WEAPON—NO ERROR.

NO. 92CRS4664—FIRST-DEGREE MURDER—NO ERROR.

NO. 92CRS5671—CONSPIRACY TO COMMIT ROBBERY WITH A DANGEROUS WEAPON—NO ERROR.

NO. 92CRS5672—FELONIOUS LARCENY—JUDGMENT ARRESTED.

STATE OF NORTH CAROLINA v. JAMES EDWARD JAYNES

No. 194A92

(Filed 8 December 1995)

1. Appeal and Error § 155 (NCI4th)— conversation between men and jurors—court's failure to ascertain substance—waiver of error

Defendant waived any error in the trial court's failure to conduct an inquiry into the substance and possible prejudicial impact of a conversation between one or more jurors and two men, one of whom was a defense witness, where the trial court warned the men that they would be jailed if they again talked to jurors; the trial court denied the prosecutor's request that it inquire further into the matter; defense counsel did not object to the trial court's action or request any further inquiry into the alleged conversations but answered negatively when asked by the court whether there was anything further on the issue; and defendant has not contended that the trial court's inaction amounted to plain error. N.C. R. App. P. 10(b)(1) and 10(c)(4).

Am Jur 2d, Appellate Review § 614.

2. Criminal Law § 78 (NCI4th)— pretrial publicity—denial of change of venue

The trial court did not err by denying defendant's motion for a change of venue or a special venire for his murder trial because of pretrial publicity where defendant introduced nineteen newspaper articles or letters to the editor and the transcripts of ten radio or television reports concerning the victim's murder, including letters to the editor written by defendant's ex-wife and daughters; the prosecutor and defense counsel asked all prospective jurors whether they had heard or read about defendant's case and whether they had formed any opinions which would prevent their giving defendant a fair trial; three prospective jurors who stated that they had formed opinions were excused; and even though some prospective jurors indicated they had read or heard about the murder, all jurors who actually served on the jury either stated that they had not formed an opinion or that they had formed an opinion but could set it aside and make a decision as to defendant's guilt solely from the evidence presented at trial. The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law § 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

3. Jury § 102 (NCI4th)— jury selection—subjective responses to pretrial publicity—disallowance of improper or repetitious questions

In a prosecution for murder and other crimes wherein a prospective juror indicated that she was familiar with the basic facts of the crimes due to newspaper and television coverage of those crimes, the trial court did not err by sustaining an objection to defense counsel's questions as to what the juror's reaction had been when she heard of the crimes and how she felt about a person who could do such things where the court allowed extensive questioning of the juror with regard to the influence, if any, that media coverage might have had upon her as well as with respect to any other biases she might have had, and the objections sus-

tained by the court were to questions which were not proper as to form or tended to be repetitious.

Am Jur 2d, Jury § 210.

4. Jury § 142 (NCI4th)— jury selection—death penalty for crime—improper attempt to stake out juror

The trial court did not err by sustaining an objection to defense counsel's question as to whether a prospective juror had "any opinion as to whether a person accused of this crime should receive the death penalty" since the question improperly sought to stake out the juror as to the appropriate penalty to be imposed prior to any evidence being received, and it was unnecessary for defendant to receive an answer to this question in order to make an informed decision as to whether to use a peremptory challenge.

Am Jur 2d, Jury § 279.

5. Jury § 102 (NCI4th)— jury selection—effect of pretrial publicity—disallowance of repetitious questions

The trial court did not err by sustaining the State's objections to certain questions by defense counsel to a prospective juror as to whether what he had read or heard about the crimes in question had caused him to form any beliefs or opinions or would influence him in the decision of the case where the questions to which the trial court sustained objections were repetitious questions which were fully answered by the prospective juror in response to other questions by defense counsel.

Am Jur 2d, Jury § 210.

6. Jury § 102 (NCI4th)— jury selection—reason for reference to "murder"—question disallowed—other similar testimony

The trial court did not err in sustaining an objection to defense counsel's question to a prospective juror, "You said that you saw there was a murder or read there was a murder and a trailer was burned. Why did you call it a murder?" where, at another point, defense counsel was permitted to ask the juror whether he had formed an opinion that there was a murder in this case based upon what he had read or heard.

Am Jur 2d, Jury § 210.

7. Jury § 203 (NCI4th)— jury selection—opinion on defendant's guilt—ability to set aside—denial of challenge for cause

Assuming *arguendo* that a prospective juror in a capital trial had formed an opinion on defendant's guilt from pretrial publicity, the trial court did not err in denying defendant's challenge of the juror for cause where the juror stated clearly and unequivocally that he could set aside that opinion and reach a decision based solely on the evidence presented at trial.

Am Jur 2d, Jury § 294.

8. Evidence and Witnesses § 623 (NCI4th)— summary denial of motion to suppress at trial—same issue determined in pretrial hearing

The trial court committed no error, constitutional or otherwise, by summarily denying defendant's motion to suppress an inculpatory letter he wrote to his accomplice on 25 October 1990 where defendant made a pretrial motion to suppress letters he had written to his accomplice while incarcerated on the ground they were improperly solicited by the accomplice acting as an agent of the State; the prosecutor introduced at the pretrial suppression hearing two letters written by defendant to the accomplice on 17 and 24 October 1990; the trial court found upon substantial evidence that the accomplice was not acting as an agent of the State and did not solicit the letters and ruled that the letters were admissible; when the 25 October letter was tendered as evidence at trial, defendant objected and asked for a hearing pursuant to his pretrial motion; there was no remaining legal basis for the motion to suppress at trial because the grounds for the motion were the same as to all three letters and had previously been ruled upon; and defendant was given a full opportunity to present any evidence in support of his grounds for suppression of the letters during the pretrial hearing on his motion. N.C.G.S. § 15A-977(c)(1).

Am Jur 2d, Motions, Rules and Orders § 45.

9. Arson and Other Burnings § 32 (NCI4th); Homicide § 278 (NCI4th)— interval between killing and burning—occupancy of dwelling—first-degree arson—felony murder

The evidence was sufficient to show that the killing of the victim and the burning of his dwelling were so joined by time and

circumstances as to be part of one continuous transaction and therefore supports a finding that the dwelling was "occupied" within the meaning of N.C.G.S. § 14-58, and the evidence was thus sufficient to support defendant's conviction of first-degree arson and the trial court's submission of felony murder to the jury predicated on the felony of first-degree arson, where it tended to show that defendant and his accomplice parked their car near the victim's mobile home at approximately 11:00 p.m.; after murdering and robbing the victim, they drove both of his vehicles to another county and then returned for the car in which they had originally arrived; and at that time, which was between 2:00 and 2:30 a.m., defendant burned the mobile home to destroy the evidence. The fact that the time interval between the murder and the arson was as much as three and one-half hours did not prevent a finding based on all the surrounding circumstances that the interval was "short" enough for the murder and the arson to be parts of one continuous transaction.

Am Jur 2d, Arson § 40.

10. Constitutional Law § 189 (NCI4th)— double jeopardy—armed robbery and larceny

The trial court violated defendant's federal and state constitutional rights to be free of double jeopardy by sentencing him both for armed robbery and for larceny of the victim's two vehicles where the evidence tended to show that defendant and his accomplice loaded items of the victim's personal property into the victim's vehicles and drove them away; the takings of the vehicles and the other items occurred simultaneously and were linked together in a continuous act or transaction; and there was thus only one taking, and the larcenies were lesser-included offenses of the armed robbery.

Am Jur 2d, Criminal Law § 279.

11. Criminal Law § 794 (NCI4th)— acting in concert—actual or constructive presence—instruction not required

The trial court did not commit plain error in failing to instruct the jury that a defendant's actual or constructive presence at the scene of the crime is required before defendant may be convicted under the theory of acting in concert where all of the evidence was to the effect that defendant was either the perpetrator or that

defendant was present and acted together with an accomplice in committing the offenses.

Am Jur 2d, Trial §§ 1244 et seq.

12. Burglary and Unlawful Breakings § 147 (NCI4th)— instructions—opening door—breaking

The trial court did not commit plain error by instructing the jury in a first-degree burglary trial that "[w]alking through an open door and opening the same would constitute a breaking and an entry" since opening a partly opened door is a "breaking" and walking through an open doorway is an "entering" under the law of burglary, and taken in context, the trial court's instructions required that the jury find both a breaking and an entering before convicting defendant.

Am Jur 2d, Burglary § 69.

Entry through partly opened door or window as burglary. 70 ALR3d 881.

13. Evidence and Witnesses § 3099 (NCI4th)— impeachment—state of mind purpose—repetitious question not allowed

Assuming *arguendo* that defense counsel's question to a witness as to the state of mind and purpose of defendant's accomplice for breaking into the high school he had attended was competent to show that the accomplice was capable of planning criminal activity and thus to impeach the accomplice's testimony that defendant was the leader in the robbery-murder of the victim, the trial court acted within its discretion to prevent repetitious questioning by its exclusion of this question where the witness had already testified as to the accomplice's purpose for breaking into the school, and other testimony showed that the accomplice was capable of planning criminal activity.

Am Jur 2d, Witnesses §§ 864, 867.

14. Criminal Law § 544 (NCI4th)— unspecified convictions and charges—possible sentences—objections sustained—failure to declare mistrial

The trial court did not err by failing to declare a mistrial *ex mero motu* in this capital trial when the prosecutor on three occasions asked defense witnesses about unspecified convictions and charges against defendant in another county and the possible sentences defendant faced in that county where the court sus-

tained defendant's objections to the prosecutor's question on each occasion, and no evidence prejudicial to defendant was introduced in response to the prosecutor's questions.

Am Jur 2d, Trial § 437.

15. Evidence and Witnesses § 52 (NCI4th); Constitutional Law § 161 (NCI4th)— shoes not provided to officers by defendant—testimony not shifting of burden of proof

The trial court's admission of an SBI agent's testimony in response to a question by the prosecutor that neither defendant nor his attorney had given the shoes worn by defendant on the night of the crime to law officers for comparison with shoeprints at the crime scene did not improperly allow the State to shift the burden of proof to defendant in violation of his right to due process but merely allowed the witness to inform the jury of defendant's failure to support his theory of the case.

Am Jur 2d, Criminal Law § 825; Evidence § 176.

16. Criminal Law § 412 (NCI4th)— *opening statement*—remark about not guilty plea—no placement of burden on defendant

The prosecutor's remark during his opening statement that defendant "has come here and pled not guilty, denies this offense, and by that plea says that he doesn't know anything about these charges or offenses and didn't have anything to do with it" did not unconstitutionally impose a burden of persuasion on defendant and did not go beyond the proper scope and function of an opening statement.

Am Jur 2d, Trial § 522.

17. Evidence and Witnesses § 2471 (NCI4th)— prosecution witnesses—findings that sentencing concessions not made—supporting evidence

There was no merit to defendant's contention that the prosecutor denied his state and federal due process rights by failing to disclose sentencing concessions made to two prosecution witnesses in exchange for their cooperation and testimony against defendant where substantial evidence supported the trial court's findings and conclusions that no express or implied plea or sentencing concessions were made to either prosecution witness prior to testimony by the witness in defendant's trial.

Am Jur 2d, Criminal Law § 222.

18. Criminal Law § 1323 (NCI4th)— capital sentencing—statutory militating circumstances—instruction permitting finding of no mitigating value—prejudicial error

The trial court erred by instructing the jury in a capital sentencing proceeding that it was for the jury to decide whether any statutory mitigating circumstances it found to exist had mitigating value. Furthermore, this error was prejudicial and entitled a defendant sentenced to death to a new capital sentencing proceeding where it is impossible to determine whether the jurors found some of the statutory mitigating circumstances submitted to exist but decided to give them no mitigating value.

Am Jur 2d, Trial §§ 1441 et seq.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Ferrell, J., on 23 April 1992 in Superior Court, Polk County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals on additional convictions for first-degree arson, first-degree burglary, robbery with a dangerous weapon, and two counts of larceny of an automobile was allowed 9 July 1993. The appeal was heard in the Supreme Court 7 December 1993. On 2 March 1994, defendant filed a motion for appropriate relief with the Supreme Court, which remanded the case on 11 May 1994 to the Superior Court, Polk County, for an evidentiary hearing. The Superior Court denied the motion for appropriate relief in an order entered by Llewellyn, J., on 12 June 1995.

Michael F. Easley, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.

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

MITCHELL, Chief Justice.

On 28 January 1991, defendant James Edward Jaynes was indicted for first-degree murder, first-degree arson, first-degree bur-

glary, robbery with a dangerous weapon, and two counts of felonious larceny of an automobile. He was tried capitally at the 6 April 1992 Criminal Session of Superior Court, Polk County. On 16 April 1992, the jury returned verdicts finding defendant guilty of all offenses as charged. Defendant was convicted of first-degree murder on the theory of premeditation and deliberation and under the felony murder doctrine. Following a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death. On 23 April 1992, the trial court entered judgments sentencing defendant to death for first-degree murder and to consecutive sentences of imprisonment of fifty years for first-degree arson, fifty years for first-degree burglary, forty years for robbery with a dangerous weapon, and ten years for each count of felonious larceny of an automobile. Defendant appealed to this Court as a matter of right from the first-degree murder conviction. On 9 July 1993, we allowed defendant's motion to bypass the Court of Appeals with respect to his appeals from the remaining convictions.

The State's evidence tended to show *inter alia* that in October 1990, Paul Frederick Acker, the victim, was in the process of clearing land for a cattle farm. Several buildings, including a barn and a workshop, had already been built on the farm. Acker was living there alone in a mobile home until his house could be constructed. He kept numerous personal items as well as tools and equipment in his mobile home and in other buildings on the farm. He also owned a 1985 Volvo automobile and a 1988 Ford pickup truck.

Jerry Nelon was employed by Acker in the summer of 1990 to clear land off of Highway 108. Nelon's work crew included prisoners on work release from the Spindale Prison Camp in Spindale, North Carolina. One of these men was Dan Marr.

Shane Smith testified at trial that he and defendant James Edward Jaynes had gone to school together. In February 1990, Smith began dating defendant's cousin. From that time on, Smith and defendant saw each other often. Because defendant had moved away from home and had no car, he frequently asked Smith for transportation.

About three weeks prior to 10 October 1990, defendant informed Smith that Acker's farm was a potential break-in site. Defendant asked Smith if he could borrow Smith's car to locate the farm, but Smith refused. At this point, defendant informed Smith that Dan Marr had told him about the farm and had previously worked there. Smith

took defendant to see Dan Marr, and the three of them discussed going to Acker's farm. Following the discussion, Smith, accompanied by Marr and defendant, drove to the farm.

During the next two and one-half weeks, defendant and Smith made approximately four trips to Acker's farm. They walked on the property and entered sheds, outbuildings, and Acker's mobile home. During these trips, defendant and Smith observed personal property that they wanted to take for Marr and themselves.

On 10 October 1990, defendant went to Smith's workplace. Defendant told Smith to pick him up at Philip Doster's mobile home, which was located in the same mobile home complex where defendant lived. Smith picked up defendant at about 10:15 p.m., and they went to Acker's farm in Polk County. Defendant was armed with both a .25-caliber pistol and a .22-caliber rifle.

At approximately 11:00 p.m., Smith and defendant arrived at Acker's property. They parked about 250 yards from Acker's mobile home and walked along the driveway toward it. When they reached the mobile home, they saw Acker's Volvo and truck but saw no one outside the home. No lights were on inside, and the doors were closed. Defendant told Smith that he was going to knock on the front door and say that his car was stuck. He would then leave if anyone answered. Smith went to the rear of the mobile home to see if lights came on when defendant knocked on the door. Defendant knocked and asked if anyone was home. He then ceased knocking on the door, and for a few moments it was quiet.

Smith next heard a gunshot and saw a light come on in the mobile home. He heard defendant call his name, and he went around the home and entered the front. There, he saw Acker lying on his back and not moving. Smith also saw defendant holding the rifle and standing next to Acker's body. Defendant put the rifle down and picked up the pistol. Thereafter, defendant fired at the victim's body. Smith closed his eyes when the shots were fired. Defendant next gave Smith the pistol and ordered him to fire it. Smith fired once and then ran outside. A moment later, Smith heard two more shots fired from inside the mobile home. Defendant then came outside and warned Smith that he must not say anything about the events that had just occurred.

Defendant then reentered the mobile home, while Smith stayed on the front porch. Smith asked defendant to cover the body.

Defendant laughed and stated that "it was no big deal." Thereafter, defendant covered the body with a blanket.

Next, defendant asked Smith to drive Acker's truck over to Acker's workshop and load it, and Smith complied. Meanwhile, defendant loaded Acker's Volvo with personal items from Acker's mobile home. After Acker's truck and car were loaded, defendant and Smith drove the vehicles to Rutherford County. Defendant drove the Volvo while Smith drove the truck. They left Smith's car parked beside the road near Acker's farm. Smith followed defendant to a logging road near Marr's house, where they left the loaded truck. Defendant then took Smith back to Polk County in Acker's Volvo to retrieve Smith's car.

Defendant and Smith arrived at the victim's farm at approximately 2:00 a.m. on 11 October 1990. Before taking Smith to the place where they had previously parked, defendant returned to Acker's residence. Defendant found a two-and-one-half gallon gasoline can. He then told Smith to meet him at the bottom of the hill. As Smith was walking down the road, he turned and saw the mobile home in flames. Smith then ran to the car. He later asked defendant why he had burned the mobile home, and defendant stated, "To destroy any evidence."

Smith retrieved his car and followed defendant back to Rutherford County. They left the Volvo on the logging road near Dan Marr's residence. Afterwards, Smith drove defendant to his grandmother's home. Defendant took the .25-caliber pistol, while Smith kept the .22-caliber rifle in his car until 13 October, when he hid it under a sofa in his parents' living room.

On 12 October 1990, defendant and Smith discussed where to put the property they had taken from the victim's farm. They had planned to store some of the stolen items in a barn near Dan Marr's house, but Marr refused to let them do so. Instead, they took the truck to an abandoned house near Oak Springs Road in Rutherford County and unloaded the stolen items there. Defendant and Smith covered the stolen items with plastic bags and took the truck back to the location near Marr's home.

Larry Marelli, who worked for the victim, testified that he drove to Acker's mobile home at approximately 7:50 a.m. on 11 October 1990 and found it on fire. Marelli observed that the victim's car and truck, along with certain other items, were missing and that the door

to the workshop was open. After observing the scene, Marelli returned to his home to call the police. Law enforcement officers arrived at Acker's mobile home within five minutes. At approximately 10:05 a.m., SBI Agent Mika Elliott examined the crime scene and discovered the victim's body there. He found a two-and-one-half gallon gasoline can inside the mobile home. He also discovered that the telephone line had been cut.

On 13 October 1990, a deer hunter discovered the items of stolen property defendant and Smith had left covered by plastic bags near the Oak Springs Road site and reported it to the Rutherford County Sheriff's Department. Thereafter, Detective R.H. Epley and Detective Jake Gamble went to the site where the property had been found. The officers also contacted Philip Doster, who directed them to the old logging road where they found the victim's Volvo.

At approximately 6:00 p.m., Detective Epley and SBI Agent Bruce Jarvis began a surveillance of the area where the victim's Volvo had been discovered. At about 8:00 p.m., the officers observed a car back up the road and stop near the Volvo. Defendant and Smith then got out of the car that had backed up the road. They went to the Volvo and unlocked and opened its trunk. The officers then arrested defendant and Smith.

Philip Doster testified that in October 1990, he was the manager of a mobile home complex in Rutherford County. Defendant had moved to the complex in the summer of 1990. Doster often socialized with defendant and Smith. In October, defendant offered to sell Doster a weed eater, a chain saw, and a car battery. Doster and defendant drove in Doster's truck to two different locations in Rutherford County. At one location, Doster saw a pickup truck with tools and other goods. At the other location, Doster saw a Volvo. Defendant opened the trunk of the Volvo and showed Doster a computer and a stereo.

Doster ultimately bought the weed eater, the chain saw, and the car battery. He said that he bought the items from defendant on behalf of the Rutherford County Sheriff's Department because the Department was interested in recovering stolen property and had promised to reimburse him for property that he purchased. Doster asked defendant how he had acquired the goods in the vehicles, and defendant responded that he "had to kill a guy to get [them.]" Defendant told Doster that defendant and Smith had gone to a man's mobile home intending to rob him. Defendant had carried a .22-

caliber rifle, and Smith had carried a .25-caliber pistol. Smith had knocked on the door and told the man who answered that his truck had broken down and he needed help. As the man began to walk back down the hallway of his mobile home, defendant shot him with the rifle. The victim did not die, so defendant shot him again. Defendant then called for Smith to enter the mobile home and directed him to shoot the victim. Doster testified that either Smith or defendant told Doster that one of them shot the victim twice, once in the shoulder and once in the head. Defendant also told Doster that he and Smith had poured gasoline on the victim after they shot him and that they had then set fire to the mobile home.

Doster testified that he had warned defendant that he would tell the authorities all that he knew if he was ever questioned about what defendant had told him. Defendant had responded that he could not be prosecuted because the evidence that could convict him had been destroyed.

Doster stated that in September 1990, defendant had told him about a place owned by a millionaire from New York that he planned to "check out." Doster later heard defendant say that he would murder someone and become rich. On another occasion, defendant told Doster that he and Smith had been to that particular man's home and had entered the home, taken a few dollars, and left. Doster recalled defendant saying that someone was going to pick him up from the mobile home complex and take him to see the place. Doster also had seen defendant with a .22-caliber rifle a few weeks prior to the murder.

Curtis David Barker testified that he had been an inmate at the Polk County jail and had shared a cell with defendant on 13 and 14 October 1990. Barker asked defendant why he was there, and defendant replied that he had been charged with murder and arson. Defendant explained that he had been found in possession of stolen property. Barker then commented that from what he had heard, defendant could only be charged with receiving stolen goods. Defendant responded, "No, I'm guilty of it all. It was premeditated, we knew what we [were] doing when we were doing it."

Later, defendant related to Barker that he and Smith had planned to rob a certain person's mobile home. Defendant explained that he and Smith had been to the mobile home prior to the killing. They had realized that they would need to kill the occupant to carry out the robbery because he never left the residence for long periods of time.

Defendant said that he had a .22-caliber rifle and a .25-caliber pistol. On the night of the murder, defendant and Smith watched the mobile home from the woods for a while and then approached the front door. Smith knocked on the door. When the occupant answered, Smith said that he had car trouble and asked to use the telephone. Defendant said that as Smith entered the home, he "turned around and fired two shots into the man." The victim told them not to kill him, but defendant told Smith to "[g]o ahead and get it over with." Next, defendant and Smith removed various items of personal property from the mobile home, placed them into the victim's two vehicles, and drove the vehicles off the property. Defendant and Smith then returned to the mobile home, obtained gasoline from the barn, poured the gasoline on the body and throughout the mobile home, and set the mobile home on fire. On either the 15th or 16th of October, Barker reported to Deputy Sheriff James Carter what defendant had said during their conversation.

On 12 October 1990, Dr. Robert Thompson, a forensic pathologist, performed an autopsy on the victim's body. Dr. Thompson testified that the body was burned after the victim's death. He testified that two bullets were found in the victim's brain. One bullet was consistent with a .25-caliber bullet, and the other was deformed to the extent that the caliber could not be determined. Dr. Thompson opined that Acker had died as a result of the gunshot wounds to the head. Other evidence introduced at trial is discussed at later points in this opinion where it is relevant.

[1] By an assignment of error, defendant contends that the trial court erred in failing to conduct an inquiry into the substance and possible prejudicial impact of a conversation between one or more jurors and two men, one of whom was a defense witness. This issue is not properly before this Court.

The record indicates that during the trial, the trial court was informed that two men had been seen talking to one or more of the jurors. The trial court warned the men that they would be jailed if they did so again. The prosecutor requested that the trial court inquire further into the matter because the prosecutor had seen one of the men talking with defense counsel earlier. The trial court declined to do so.

Defendant did not object to the trial court's action or request any further inquiry into the alleged conversations. To the contrary, after direct questioning by the trial court as to whether there was anything

further for defendant on this issue, defendant's counsel responded, "No, sir."

As a result of defendant's failure to object at trial, this purported error has been waived. *State v. Gibbs*, 335 N.C. 1, 49, 436 S.E.2d 321, 349 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994); *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983); N.C. R. App. P. 10(b)(1). Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court. *State v. Upchurch*, 332 N.C. 439, 421 S.E.2d 577 (1992); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986).

Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure provides:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is *specifically and distinctly* contended to amount to plain error.

N.C. R. App. P. 10(c)(4) (emphasis added); *accord Gibbs*, 335 N.C. at 49, 436 S.E.2d at 349. Defendant has not contended that the trial court's inaction here amounted to plain error. This assignment of error has been waived and is dismissed.

[2] By another assignment of error, defendant contends that the trial court erred in denying his motion for a change of venue or, in the alternative, for a special venire to be drawn from Henderson County. The trial court conducted a pretrial hearing and denied defendant's motion. Defendant argues that the trial court abused its discretion and committed reversible error by denying the motion because there was "a reasonable likelihood that the defendant could not have received a fair trial in Polk County."

In support of his motion, defendant introduced nineteen newspaper articles or letters to the editor and the transcripts of ten radio or television reports concerning the murder of Paul Frederick Acker. He contends that the pretrial publicity was emotionally charged, particularly letters to the editor of the *Tryon Daily Bulletin* written by the victim's ex-wife and daughters. Defendant notes that thirty-eight of the forty-eight prospective jurors questioned about the pretrial publicity "indicated that they were familiar with some specifics of the case," while only seven "indicated that they had no information regarding the case." He argues that Polk County is particularly sus-

ceptible to pretrial publicity because "it is a small, sparsely populated county" and many of the prospective jurors knew someone involved in the trial as a party, witness, or attorney.

The statute pertaining to change of venue provides:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

N.C.G.S. § 15A-957 (1988).

This Court has stated:

> The test for determining whether venue should be changed is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pre-trial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant.

State v. Yelverton, 334 N.C. 532, 539-40, 434 S.E.2d 183, 187 (1993). Further, we wish to reemphasize here that "[t]he best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. at 228, 400 S.E.2d at 34.

Applying the above rules in our review of the newspaper articles and the other publicity concerning this case, we conclude that the trial court did not err in concluding that defendant failed to meet his burden of proving that pretrial publicity prevented his receiving a fair and impartial trial. Each prospective juror was examined in detail during *voir dire*. The prosecutor and defense counsel asked all

prospective jurors whether they had heard or read about defendant's case and whether they had formed any opinions which would prevent their giving defendant a fair trial. The prosecutor in fact excused two prospective jurors because they confessed to having formed opinions based on what they had learned from the newspaper, television, and publicity. Another prospective juror was excused because she stated that she had formed an opinion after she obtained information about the case at her job. Some prospective jurors indicated they had read about or heard of the murder of Acker. However, all jurors who actually served on the jury either stated that they had not formed an opinion or stated that they had formed an opinion but could set it aside and make a decision as to defendant's guilt solely from the evidence presented at trial.

Because the trial court could reasonably conclude that defendant was unable to show that the jurors who actually decided his case were prejudiced, the trial court did not commit error by denying defendant's motion for a change of venue or special venire. This assignment of error is overruled.

By another assignment of error, defendant contends that the trial court erred in sustaining the State's objections to questions posed by his counsel to prospective jurors concerning their subjective responses to pretrial publicity. Defendant argues that this denied him the right to a fair and impartial jury as well as the statutory right to a meaningful exercise of his peremptory challenges. We disagree.

During *voir dire*, counsel for defendant sought to question several potential jurors as to their subjective reactions to pretrial publicity about this case. The trial court allowed defense counsel to conduct individual *voir dire* of prospective jurors regarding their exposure to news media accounts and "word-of-mouth coverage." Numerous objections were lodged by the prosecution and sustained by the trial court.

The trial court has the duty to supervise the examination of prospective jurors. Regulation of the manner and extent of questioning of prospective jurors rests largely in the trial court's discretion. N.C.G.S. § 9-14 (1986); *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). We have stated that:

> The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for

> cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969). "Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges." *State v. Jarrette*, 284 N.C. 625, [637-38,] 202 S.E.2d 721 [,730] (1974) [,*death sentence vacated*, 420 U.S. 903, 49 L. Ed. 2d 1206 (1976)].

Young, 287 N.C. at 387, 214 S.E.2d at 771; *see also* N.C.G.S. § 15A-1214(c) (1986).

Defendant complains that the trial court in the present case limited defendant to: "(1) objective questions concerning the content of . . . [each] juror's knowledge regarding the case, and (2) the ultimate questions of whether . . . [each] juror had predetermined the defendant's guilt and whether . . . [each] juror could put aside prior information or biases and act impartially." We do not agree with this characterization of the trial court's actions.

Although all parties have the right "to inquire diligently of prospective jurors in order to assess their fitness to serve, it is within the court's discretion to control the manner and extent of such inquiry." *State v. Peele*, 54 N.C. App. 247, 249, 282 S.E.2d 578, 580 (1981); *accord State v. Young*, 287 N.C. at 387, 214 S.E.2d at 771. The trial court is given broad discretion in this regard, and its decisions as to the appropriate extent and manner of questioning of prospective jurors "will not be overturned absent an abuse of discretion." *State v. Mash*, 328 N.C. 61, 63, 399 S.E.2d 307, 309 (1991).

[3] Defendant first points out under this assignment of error that prospective juror Marilyn Geodriac, who later served on the jury, indicated in response to questioning that, due to local newspaper and television coverage of the crimes for which defendant was charged, she was familiar with the basic facts surrounding those crimes. Defendant complains that he was not allowed to ask Ms. Geodriac what her reaction had been when she had heard about the crimes or how she felt about a person who could do such things. Defendant further complains that the trial court also sustained objections to certain questions he sought to ask Ms. Geodriac concerning whether she had formed an opinion as to any of the facts of the case or as to whether a person accused of the crimes at issue should receive the death penalty.

We note that the trial court allowed extensive questioning of prospective juror Geodriac with regard to the influence, if any, that such media coverage might have had upon her as well as with respect to any other biases she might have had. For example, counsel for defendant was permitted to ask Ms. Geodriac: "Based upon anything that you may have seen through the media coverage, did it cause you to form an opinion as to the guilt or innocence of Jimmy Jaynes, this defendant?" Her answer indicated that she had formed no such opinion. Counsel for defendant was also permitted to ask Ms. Geodriac: "Could you decide this case based upon the facts or evidence . . . presented at the trial of this matter; or do you thin[k] you may be influenced by what you may have read or heard about this case prior to today?" She answered: "No, I think I could—just by what's presented here." Counsel for defendant asked no further questions of Ms. Geodriac after receiving that answer.

We do not believe that the trial court abused its discretion in limiting the questioning of prospective juror Geodriac. Although the trial court sustained objections to questions which were not proper as to form or which tended to be repetitious, it permitted counsel for defendant to ask questions of a sufficient number and nature to determine whether the prospective juror was disqualified to serve and to exercise defendant's peremptory challenges intelligently.

[4] Defendant also contends that the trial court erred by sustaining an objection to his question as to whether prospective juror Geodriac had "any opinion as to whether a person accused of this crime should receive the death penalty." The objection was properly sustained, as this question improperly sought to stake out the juror as to the appropriate penalty to be imposed, prior to any evidence being received. *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 (1993). Further, it was unnecessary for defendant to receive an answer to this question in order to make an informed decision as to whether to use a peremptory challenge. *See State v. Quick*, 329 N.C. 1, 16, 405 S.E.2d 179, 189 (1991).

[5] Defendant next complains in support of this assignment of error that he was not permitted to ask prospective juror David Rowe, who ultimately served on the jury, certain questions as to whether what he had read or heard about the crimes in question had caused him to

form any beliefs or opinions or would influence him in the decision of the case. Defendant was permitted, however, to ask: "From the accounts that you read in the newspapers of this case, have you formed or expressed any opinion concerning the guilt or innocence of the crime charged?" Mr. Rowe answered: "Not knowing any of the facts except for what I read in the newspapers, I've not formed any opinions, no." Defendant was then permitted to ask: "Would what you have read in the paper influence your decision making in this matter?" Mr. Rowe answered: "What I read in the newspaper informed me as to what the news media had reported. I'm not sure if it—you would say that has influenced me one way or the other. It informed me of it happening." Defense counsel then asked: "Well, the information that you received, did that cause you to form a belief or opinion?" Mr. Rowe answered: "I believe it happened." Thereafter, Mr. Rowe stated, in response to questioning, that he could not put that belief out of his mind. At a later point, however, in response to questioning by counsel for defendant, Mr. Rowe stated that he would not base his judgment in the case in any way on anything he had read in a newspaper, but would base his decision upon the evidence at trial. Further, he stated several times thereafter, in response to questions by counsel for defendant, that he could set aside any belief or opinion that he had and act solely on the evidence introduced at trial. The questions as to which the trial court sustained objections appear to have been repetitious questions which were properly and fully answered by the prospective juror in response to other questions by counsel for defendant. Accordingly, the trial court did not abuse its discretion in sustaining the objections to those repetitious questions.

[6] Defendant next argues in support of this assignment of error that the trial court erred in sustaining an objection to his question of prospective juror David Neilsen: "You said that you saw there was a murder or read there was a murder and a trailer was burned. Why did you call it a murder?" However, at another point, counsel for defendant was permitted to ask Mr. Neilsen whether he had formed an opinion that there was a murder in this case based upon what he had read or heard. He answered: "I believe it was—as I can recall, no, I don't know that I formed any particular opinion about it. I believe that what was indicated in the—you know—in the paper or on the news." Counsel for defendant then asked: "So is that why you termed it a murder?" Mr. Neilsen answered: "Yes, sir, I didn't even give any thought to why I termed it that really." Again, we find it clear that the trial court permitted proper questions of the prospective juror but

prevented repetitious questions. The trial court did not abuse its discretion in this regard.

In his brief, defendant further argues in support of this assignment of error that he "also attempted to question other prospective jurors on this panel, against whom the defendant exercised peremptory challenges, with respect to their personal opinions regarding the case and as to whether they had been [a]ffected emotionally by the media coverage." He contends that the trial court abused its discretion or otherwise erred by sustaining objections to such questions. Having reviewed the transcript of the jury *voir dire* in its entirety, we conclude that in each instance the questions at issue were either repetitious or improper as to form.

The trial court allowed thorough inquiry into views that would render any prospective juror unable to be fair, consider the evidence, and follow the law. Such questions were sufficient to reveal any bias that a prospective juror might have had and to ensure a fair and impartial jury. *State v. Mash*, 328 N.C. at 64, 399 S.E.2d at 309. Therefore, the trial court did not abuse its broad discretion in controlling the extent and manner of questioning of the prospective jurors.

[7] By another assignment of error, defendant contends that the trial court erred in denying his motion to excuse prospective juror Ross Fox for cause. Defendant contends that the prospective juror had formed an opinion, based on pretrial publicity, as to defendant's guilt. Because the prospective juror stated unequivocally that he could be totally objective, we disagree.

During *voir dire*, the following colloquy occurred between counsel for defendant and prospective juror Fox:

> Q. Without telling me what your opinion is in this regard, have you formed an opinion as to the guilt or innocence of Jimmy Jaynes, as he sits here today, in your own mind?
>
> A. That's very difficult to answer from a point that, yes, I can come in here with a clean slate, but—and also, yes, I have formed somewhat of an opinion, not totally, just on the hearsay. I mean the hearsay from outside that, yes, this is the person who did this action. *And—ah—so I, you know, read that in the paper, I've read his name in the paper; so therefore I would be foolish to say that, no, I have not formed an opinion.*

(Emphasis added.) Thereafter, counsel for defendant asked Mr. Fox if he could set aside whatever opinion he had formed and render a fair and impartial verdict. Without hesitating, Mr. Fox replied: "I would be totally objective, totally objective." In response to other questions by counsel for defendant, Mr. Fox stated that what he had read or heard would not influence his judgment in the case.

Counsel for defendant challenged prospective juror Fox for cause, and the trial court denied that challenge. Defendant then peremptorily excused Mr. Fox. Later, after defendant had exhausted his peremptory challenges, he attempted to renew his challenge for cause. The challenge was again denied.

Defendant argues that prospective juror Fox acknowledged that he had formed an opinion regarding defendant's culpability and, therefore, that the trial court erred in denying his challenge of Mr. Fox for cause. N.C.G.S. § 15A-1212 provides in part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (9) For any other cause is unable to render a fair and impartial verdict.

Recently, this Court held that

> [t]he granting of a challenge for cause under N.C.G.S. § 15A-1212(9) rests in the sound discretion of the trial court. *See, e.g., State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993); *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). We will not disturb the trial court's ruling on a challenge for cause absent a showing of an abuse of that discretion. *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993).
>
> Where the trial court can reasonably conclude from the *voir dire* examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory. *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992); *see also Mu'Min v. Virginia*, 500 U.S 415, [431], 114 L. Ed. 2d 493, 509, *reh'g denied*, [501] U.S.

[1269], 115 L. Ed. 2d 1097 (1991) (relevant question when trial preceded by extensive pretrial publicity is not whether jurors remember the case but whether they have such fixed opinions that they cannot judge the defendant impartially).

State v. Green, 336 N.C. 142, 166-67, 443 S.E.2d 14, 28-29, *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 547 (1994).

Here, assuming *arguendo* that prospective juror Fox had formed an opinion as to defendant's culpability, he stated clearly and unequivocally that he could set aside that opinion and reach a decision based solely on the evidence presented at trial. Such answers were sufficient to support the action of the trial court, which heard the answers and observed the prospective juror's demeanor, in denying the challenge for cause. Therefore, we conclude that the trial court did not err by denying the challenge for cause. This assignment of error is overruled.

[8] By another assignment of error, defendant contends that the trial court erred by denying his motion for a hearing on the admissibility of an inculpatory letter he wrote. Defendant contended at trial that the letter had been solicited by an agent of the State in violation of defendant's right to counsel guaranteed by Article I, Sections 19 and 23 of the Constitution of North Carolina and by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Prior to trial, defendant moved to suppress twenty-five letters and oral statements he had made while incarcerated, contending that they were improperly obtained by State agents. He contended that they were solicited by his accomplice, Stanley Shane Smith, and other inmates acting as agents of the State at a time when defendant was represented by counsel. The trial court held a hearing regarding the motion to suppress the letters. The prosecutor asked the court to limit the suppression hearing to the admissibility of two letters written on 17 October 1990 and 24 October 1990, since those were the only letters it intended to introduce. Defendant agreed to a limited hearing, stating that another suppression hearing could be held if the prosecutor attempted to introduce any other letters. The trial court made no ruling as to the scope of the hearing.

The prosecutor introduced the two letters during the hearing on defendant's motion to suppress. In the 17 October letter, defendant urged Smith not to confess. He wrote: "If you didn't say anything, we can beat it in court. They won't cut you a deal on murder or arson."

In the 24 October letter, defendant suggested to Smith that they might explain their presence near the Volvo by stating that they were directed by an anonymous person to drive the Volvo and Ford truck to Charlotte, North Carolina, and park them with the keys inside. They could also say that in exchange for the service, defendant and Smith were to be allowed to keep the merchandise contained in the Volvo.

During the hearing, the prosecutor called Smith as a witness. He testified that he did not solicit the letters and that he was not an agent for a law enforcement agency at any time. Smith said that defendant had given fellow inmate Curtis Barker the 17 October letter and that Barker had delivered it to Smith. Defendant had also sent the 24 October letter to Smith in the same manner. Another inmate, Furmon Henderson, corroborated Smith's testimony. Smith said that he gave the letters that he had received to law enforcement officers. Officer Pruitt further corroborated this testimony. Defendant offered no evidence to refute Smith's testimony. The trial court made findings and concluded that *at no time* was Smith an agent of the State and that defendant's rights were not violated. Therefore, the trial court held that the letters and certain oral statements were admissible.

During the later trial, the prosecutor sought to introduce a third letter that was dated 25 October 1990 and sent to Smith by defendant. In the letter, defendant told Smith not to talk and that the prosecution would make no deals. Defendant further told Smith that they could get out of trouble if they worked together. The trial court denied defendant's motion for a suppression hearing, admitted the letter into evidence, and then denied defendant's motion to strike the letter after it was read into evidence.

Defendant now contends in support of this assignment that the trial court's summary denial of his motion to suppress the third letter was error because a judge may summarily deny a motion to suppress only if there is no legal basis for the motion. He also contends that "precluding a criminal defendant from presenting evidence in support of a motion to suppress is constitutional error" under *Crane v. Kentucky*, 476 U.S. 683, 90 L. Ed. 2d 636 (1986).

N.C.G.S. § 15A-977(c) provides in pertinent part that "[t]he judge may summarily deny the motion to suppress evidence if . . . [t]he motion does not allege a legal basis for the motion." N.C.G.S. § 15A-977(c)(1) (1988). When the third letter—the letter of 25 October—was tendered as evidence at trial, defendant objected

and asked for a hearing pursuant to his pretrial motion. The basis for the pretrial motion was that Smith had been acting as an agent for the State. The trial court, based upon substantial evidence, had previously determined in its findings of fact and conclusions of law that:

> [t]he Witness Smith *at no time* was serving as an agent of the law enforcement agencies of the State of North Carolina; nor did he elicit on their behalf any incriminating statement from the defendant after any charges had been lodged against the defendant and in the absence of counsel. . . . ; but that nevertheless the production of any such incriminating statement was voluntarily made on his own without having been elicited by the Witness Smith.

(Emphasis added.) Furthermore, there was little in the third letter that was not already before the jury as a result of the introduction of the first two letters. Because the grounds for the motion to suppress were the same as to all three letters and had previously been ruled upon, we conclude that there was no remaining legal basis for the motion and no reason for another suppression hearing. Therefore, the trial court properly denied defendant's request for another suppression hearing before the 25 October letter was admitted into evidence. N.C.G.S. § 15A-977(c); *see State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993) (no error in refusing to conduct *voir dire* where the facts make it apparent that evidence will be admitted).

We further conclude that defendant was not precluded from presenting evidence in support of his motion to suppress in such manner as to be constitutional error under *Crane v. Kentucky*, 476 U.S. 683, 90 L. Ed. 2d 636. Defendant was given full opportunity to present any evidence in support of his grounds for suppression of the letters during the pretrial hearing on his motion. After he tendered his evidence at that hearing, the trial court made findings and conclusions rejecting those grounds. At trial, defendant merely renewed the motion to suppress that had previously been made and denied, and he relied upon the same grounds already rejected by the trial court. We conclude that the trial court committed no error, constitutional or otherwise, by summarily denying defendant's renewed motion to suppress during the trial of this case. This assignment of error is without merit and is overruled.

[9] By another assignment of error, defendant contends that the trial court erred in instructing the jury on the theory of felony murder to the extent that it allowed the jury to rely on the felony of first-degree

arson as the predicate felony supporting that theory. Defendant contends that first-degree arson could not be used in this case as the predicate felony for the felony-murder theory because the evidence at trial was insufficient to support his conviction for first-degree arson. Specifically, he contends that there was no evidence that the burned dwelling was "occupied" for purposes of N.C.G.S. § 14-58 or that the killing and the burning were part of the same criminal incident. Defendant says that the evidence would only support a finding that the time interval between the death of the victim and the burning of the mobile home was too remote, and the relationship between the two events too attenuated, for them to be part of one continuous transaction. We disagree.

When measuring the sufficiency of the evidence to support submission of a charged offense to the jury, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Quick*, 329 N.C. at 31, 405 S.E.2d at 197. The test of the sufficiency of the evidence to withstand defendant's motion to dismiss "is the same whether the evidence is direct, circumstantial, or both." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991).

Our arson statute provides in pertinent part: "There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree . . . ." N.C.G.S. § 14-58 (1993). "[F]or purposes of the arson statute, a dwelling is 'occupied' if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction." *State v. Campbell*, 332 N.C. 116, 122, 418 S.E.2d 476, 479 (1992). In the present case, the evidence tended to show that the victim was dead at the time the mobile home was burned. Smith estimated that he and defendant parked their car at approximately 11:00 p.m. After murdering and robbing the victim, they drove both of his vehicles to Rutherford County and then returned for the car in which they had originally arrived. At that time, defendant burned the mobile home to destroy the evidence. Smith testified that this occurred between 2:00 and 2:30 a.m.

Construing the evidence in the light most favorable to the State, defendant carried out his plan to murder and rob the victim and then burned the evidence of those crimes as parts of one continuous transaction. The fact that the time interval between the murder and the arson was as much as three and one-half hours did not prevent a find-

ing based on all the surrounding circumstances that the interval was "short" enough for the arson and the murder to be parts of one continuous transaction. In this case, given the extent to which defendant went to hide the stolen property and the complexity of defendant's criminal scheme, the murder and arson were "so joined by time and circumstances as to be part of one continuous transaction," *id.*, and therefore support a finding that the dwelling was "occupied" within the meaning of N.C.G.S. § 14-58. Therefore, the evidence was sufficient to support defendant's conviction for first-degree arson. Accordingly, the trial court did not err in submitting the first-degree murder charge to the jury on the theory of felony murder, predicated on the felony of first-degree arson. This assignment is without merit and is overruled.

[10] By another assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the two charges of felonious larceny against him and by entering judgments for those two larcenies and also for robbery with a dangerous weapon. Larceny is a lesser included offense of robbery with a dangerous weapon. *See State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988) (overruling *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987)). Defendant argues that the robbery with a dangerous weapon and the larcenies of the vehicles in the present case all were part of a single, continuous criminal transaction. Therefore, defendant contends that the larcenies were lesser-included offenses of the robbery with a dangerous weapon and that the trial court violated his federal and state constitutional rights to be free of double jeopardy by sentencing him both for robbery with a dangerous weapon and for the lesser-included offenses of larceny of the victim's vehicles. We agree.

The State charged defendant with one count of robbery with a dangerous weapon for the taking of all items of the victim's personal property other than the vehicles and with separate counts of felonious larceny for the taking of each of the victim's vehicles. Under our law, larceny is a lesser-included offense of robbery with a dangerous weapon. *Id.* " 'A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place.' " *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (quoting *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986)). The opinion of the majority in *White* explained that although larceny is a lesser-included offense of robbery with a dangerous weapon, convictions of a defendant for both robbery with a dangerous weapon and larceny may be upheld,

but only if the larceny and the robbery with a dangerous weapon "involved two separate takings." *White*, 322 N.C. at 517, 369 S.E.2d at 818.

In the present case, there was no basis on which to distinguish the taking of the smaller items of personal property from the takings of the vehicles. The evidence tended to show that defendant and Smith loaded the victim's property into the victim's vehicles and drove them away. The takings of the vehicles and the other items occurred simultaneously and were linked together in a continuous act or transaction. *But cf. State v. Barton*, 335 N.C. 741, 746, 441 S.E.2d 306, 309 (1994) (holding on the facts of that case that a robbery with a dangerous weapon and larceny involved separate takings and did not violate double jeopardy). Therefore, there was but one taking, and the larcenies were lesser-included offenses of the robbery with a dangerous weapon. *White*, 322 N.C. at 517, 369 S.E.2d at 818. The action of the trial court in sentencing this defendant for the robbery with a dangerous weapon and also for the two counts of larceny for the taking of the vehicles—lesser-included offenses of the robbery—violated federal and state constitutional principles against double jeopardy. Accordingly, we arrest judgment on the two larceny convictions. *See Adams*, 331 N.C. at 333, 416 S.E.2d at 389.

[11] By another assignment of error, defendant contends that the trial court committed reversible error in failing to instruct the jury that a defendant's actual or constructive presence at the scene of the crime is required before defendant may be convicted under the theory of acting in concert. The record reflects that there was no objection to the trial court's instruction. Therefore, our review is limited to review for plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). We have previously explained that to reach the level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Stated another way, the error must be one "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Having reviewed the trial court's instructions on acting in concert, we detect no plain error. In *State v. Gilmore*, 330 N.C. 167, 409 S.E.2d 888 (1991), defendant took issue with the exact jury instruc-

tion on acting in concert that is at issue in the present case. Gilmore assigned as error the trial court's denial of his request to instruct the jury that he must have been present when the offense was committed for him to be guilty under the theory of acting in concert. In *Gilmore*, this Court concluded that when a defendant is in close enough proximity to the scene of the murder to be able to render assistance to the killer in committing the crime, if needed, he is constructively present. *Id.* at 172, 409 S.E.2d at 890; *see also State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Sellers*, 266 N.C. 734, 147 S.E.2d 225 (1966). In *Gilmore*, we further concluded that "[t]he evidence of [Gilmore's] actual or constructive presence at the scene of the murder was sufficiently strong enough that a charge on this feature of the case was not necessary." *Gilmore*, 330 N.C. at 172, 409 S.E.2d at 890-91.

Similarly, in this case, the evidence tended to show that defendant was at the scene with another man and was actively participating in carrying out the offenses. Overwhelming evidence tended to show that even when Smith and defendant were not actually side by side, defendant, like the defendant in *Gilmore*, was in close enough proximity to the scene to be able to render assistance if needed. A specific charge on defendant's presence was unnecessary, as all of the evidence was to the effect that defendant was either the perpetrator or that defendant was present and acted together with Smith in committing the offenses. Defendant has failed to show plain error. This assignment of error is overruled.

[12] By another assignment of error, defendant contends that the trial court committed reversible error by instructing the jury that the element of breaking required to prove first-degree burglary can be satisfied by evidence of entry through an open door. We disagree.

Defendant challenges the following instruction of the trial court:

> Now, members of the jury, the defendant has been accused of First Degree Burglary. I charge you that for you to find the defendant guilty of First Degree Burglary, the state must prove these things beyond a reasonable doubt: First, that there was a breaking and an entry by the defendant. Second, that it was a dwelling house that was broken into and entered. A breaking need not be actual; that is, the person breaking need not physically remove the barrier himself. *Walking through an open door and opening the same would constitute a breaking and an entry.* Third, that the breaking and entering was during the night

> time. Fourth, that at the time of the breaking and entering, the dwelling was occupied. Fifth, that the owner did not consent to the breaking and entering. And, sixth, that at the time of the breaking and entering, the defendant intended to commit larceny, which is defined to be the taking and carrying away of the personal property of another, without his consent, with the intent to deprive the owner of its possession permanently, the taker knowing that he was not entitled to take it.

(Emphasis added.) Defendant contends that with this instruction, the trial court equated the element of breaking with the element of entering, thereby removing breaking from the jury's consideration as a distinct element.

Again, the record reflects that there was no objection to the instruction. Therefore, our review is limited to review for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375.

Having reviewed the trial court's instructions on first-degree burglary, we find no plain error. Burglary is the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein, and whether the building is occupied at the time affects only the degree of the burglary. *State v. Mumford*, 227 N.C. 132, 41 S.E.2d 201 (1947). A breaking in the law of burglary constitutes any force, however slight, "employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed." *State v. Wilson*, 289 N.C. 531, 539, 233 S.E.2d 311, 316 (1976). Therefore, any use of force, however slight, to open a door in order to enter it clearly would suffice as the breaking required for burglary. *Id.* As a result, the trial court's instruction that "[w]alking through an open door and opening the same would constitute a breaking and an entry" certainly was not plain error; opening a partly opened door is a "breaking" and walking through an open doorway is an "entering" under the law of burglary. Taken in context, the trial court's instructions required that the jury find both a breaking and an entering before convicting defendant. The trial court was "not required to frame its instructions with any greater particularity than [was] necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). This assignment of error is without merit and is overruled.

[13] By another assignment of error, defendant contends the trial court erred in sustaining the prosecutor's objection to a question he

asked of a defense witness concerning the state of mind of the State's only eyewitness. We do not agree.

Chris Roach testified about break-ins that he and State's witness Shane Smith had committed together. Roach testified that he and Smith had broken into the high school that Smith had attended and had stolen the records of all students whose last names began with the letters "M" through "Z," including Smith's. When counsel for defendant asked Roach why Smith stole the records of all students whose last names began with the letters "M" through "Z," the prosecutor objected and the trial court sustained the objection.

Defendant contends that the trial court's ruling was erroneous. He argues that the answer would have tended to show that Smith was capable of devising a scheme to conceal a break-in and, thereby, would have impeached Smith's testimony that defendant was the leader in the murder and robbery of Paul Acker.

The record shows that at the time the trial court sustained this objection, Roach had already testified as to Smith's state of mind and purpose for breaking into the school. Roach was asked and answered questions on this subject as follows:

> Q. Whose idea was it to commit [the high school] breaking and entering?
>
> A. It was Shane Smith's.
>
> Q. Did he tell you why he wanted to do so?
>
> A. The reason for breaking in was to get some school records. At the time he was then interested in going to a flight school in Florida. It was called Embree Riddle Flight School; and his grades, if I remember right, were not good enough to attend that school. So he thought that if he did away with the records, then there wouldn't be any trace of his grades.

Since Roach had already testified as to Smith's purpose for breaking into the school, the question as to which the objection was sustained was repetitious. Further, Roach testified that he and Smith had committed a number of break-ins together. Roach testified that on one occasion, Smith had promised Roach that if he would not implicate Smith, Smith would arrange for his lawyer to get Roach out of jail. This testimony was sufficient to show that Smith was capable of planning criminal activity. Assuming *arguendo* that the question was proper, the trial court merely acted within its discretion to prevent

repetitious questioning. This assignment of error is without merit and is overruled.

[14] By another assignment of error, defendant contends that the trial court erred in failing to declare a mistrial *ex mero motu* in response to repeated acts of prosecutorial misconduct in his trial. We disagree.

On three occasions, the prosecutor asked defense witnesses about alleged unspecified charges and convictions of defendant in Rutherford County. On the first occasion, the prosecutor asked a witness, "Do you know what felonies Jimmy Jaynes has been convicted of in Rutherford [C]ounty?" Counsel for defendant objected, and the objection was sustained. The next two occasions occurred during testimony given by an administrative assistant for the district attorney's office. The prosecutor asked him, "And would you tell the members of the jury for what offenses [defendant] stands charged in Rutherford County . . . ." The same witness was later asked, "How many years is Mr. Jaynes looking at over there in Rutherford, Mr. Webb?" On each occasion, counsel for defendant objected to the question, and the objection was sustained.

The decision to grant a mistrial is within the trial court's discretion. *State v. Marlow*, 334 N.C. 273, 287, 432 S.E.2d 275, 283 (1993); *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990). This is particularly true where, as here, defendant has not moved for a mistrial. A mistrial may be granted only when the case has been prejudiced at trial to such an extent that a fair and impartial verdict is impossible. *Marlow*, 334 N.C. at 287, 432 S.E.2d at 283; *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). A trial court's decision regarding a motion for mistrial will not be disturbed on appeal unless the trial court clearly has abused its discretion. *Id.* In the present case, the trial court sustained each of defendant's three objections. As a result, no evidence prejudicial to defendant was introduced in response to the prosecutor's questions concerning defendant's alleged prior crimes or convictions. The trial court's actions were sufficient to remedy any possible harm resulting from the mere asking of the three questions by the prosecutor. The trial court did not err by failing to declare a mistrial. This assignment of error is overruled.

[15] By another assignment of error, defendant contends that the trial court erred by overruling his objection to a question by the pros-

ecutor relating to the lack of evidence presented by defendant. We disagree.

The prosecutor asked SBI Agent Mika Elliott whether defendant or his attorneys had given the shoes defendant had worn on the night of the crime to law enforcement officers for comparison with shoeprints at the crime scene. The trial court overruled defendant's objection, and Elliott answered that they had not done so. Defendant contends that the trial court's ruling improperly allowed the State to shift the burden of proof to defendant, thereby violating defendant's constitutional rights to due process. Defendant recognizes that this Court has rejected similar arguments in prior cases. *E.g.*, *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987) (holding that the State may bring to the attention of the jury a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State); *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986) (holding that testimony that defendant did not provide blood sample is admissible). Likewise, we conclude that in this case, the answer to the prosecutor's question merely informed the jury of defendant's failure to support his theory of the case, and it was not error to admit it as evidence. This assignment of error is overruled.

[16] By his next assignment of error, defendant contends that the trial court erred in overruling his objection to an improper statement made by the prosecutor during opening arguments. We disagree.

During his opening statement to the jury, the prosecutor stated the following:

> Of course, Mr. Jaynes has come here and pled not guilty, denies this offense, and by that plea says that he doesn't know anything about these charges or offenses and didn't have anything to do with it.

Defendant's objection was overruled by the trial court. Defendant insists on appeal that this statement unconstitutionally imposed a burden of persuasion on him. We do not interpret this statement as carrying any such meaning.

In a criminal jury trial, "[e]ach party must be given the opportunity to make a brief opening statement." N.C.G.S. § 15A-1221(a)(4) (1988). Rule 9 of the General Rules of Practice for the Superior and District Courts specifically provides for an opening statement:

> At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.
>
> . . . .
>
> Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

Gen. R. Pract. Super. and Dist. Ct. 9, 1995 Ann. R. N.C. 7. Further, this Court has concluded that:

> "While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. It should not be permitted to become an argument on the case or an instruction as to the law of the case."

State v. Paige, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (quoting *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied and appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984)) (citation omitted); *accord 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).

In opening remarks, counsel are permitted a limited preview of the evidence and allowed to state the "legal claim or defense in basic terms." *Paige*, 316 N.C. at 648, 343 S.E.2d at 859 (permissible for counsel in opening statement to state that the defendant "would rely on the presumption of innocence"). "[I]n previewing the evidence, counsel generally should not (1) refer to inadmissible evidence, (2) 'exaggerate or overstate' the evidence, or (3) discuss evidence he expects the other party to introduce." *State v. Freeman*, 93 N.C. App. 380, 389, 378 S.E.2d 545, 551 (citations omitted), *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989). We conclude that the remark of the prosecutor did not violate any of these principles. The prosecutor's statement did not go beyond the proper scope and function of an opening statement. Therefore, the trial court did not err in overruling defendant's objection. This assignment of error is overruled.

We next consider defendant's motions for appropriate relief. On 2 March 1994, defendant filed a motion for appropriate relief with this Court. On 11 May 1994, this Court remanded the case to the Superior Court, Polk County, for an evidentiary hearing. In December 1994, the

Honorable James D. Llewellyn held an evidentiary hearing. Defendant then filed a supplemental motion for appropriate relief in the Superior Court, Polk County, on 7 February 1995. By order dated 12 June 1995, Judge Llewellyn denied defendant's motion for appropriate relief and supplemental motion for appropriate relief. On 22 June 1995, this Court granted defendant's motion for supplemental briefing.

[17] In his supplemental brief, defendant contends that the prosecutor denied his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution by failing to disclose sentencing concessions made to prosecution witnesses Stanley Shane Smith and Curtis David Barker in exchange for their cooperation and testimony against defendant.

The trial court made the following pertinent findings of fact regarding codefendant Stanley Shane Smith:

> 14. There was no explicit or implicit agreement between the State of North Carolina, any law enforcement officer or governmental agency and Stanley Shane Smith, that in return for his testimony against Mr. Jaynes, he would be given any quasi immunity, full immunity or any sentencing concessions.
>
> 15. That at no time did Mr. Leonard [the prosecutor] counsel the witness Smith to commit perjury during his testimony against Mr. Jaynes.
>
> 16. That in regard to the witness Smith, Mr. Leonard did not conceal anything of an evidentiary nature which should have been revealed to Mr. Jaynes' attorneys during discovery or at the trial of Mr. Jaynes.

The trial court also made the following pertinent findings of fact regarding witness Curtis David Barker:

> 27. Mr. Leonard did not make any promises to Mr. Barker in return for his testimony against Mr. Jaynes.
>
> . . . .
>
> 29. Mr. Leonard did not permit Mr. Barker to commit perjury or to testify in a false light.
>
> 30. Mr. Leonard did not enter into any sentencing agreement expressed or implied with Mr. Barker before his testimony in the Jaynes trial.

The trial court then concluded as a matter of law:

1. That perhaps not the wisest course of action was taken by Mr. Leonard, but he at no time engaged in conduct which was in violation of any of the defendant James Edward Jaynes' rights under the United States or North Carolina Constitutions or any of the General Statutes of North Carolina.

2. That at no time prior to his testimony against the defendant Jaynes was there any plea or sentencing concessions made to Stanley Shane Smith by Mr. Alan G. Leonard or any other individual representing the State of North Carolina or any other governmental agency.

3. That at no time prior to his testimony against the defendant Jaynes was there any plea or sentencing concessions made to Curtis David Barker by Mr. Alan G. Leonard or any other individual representing the State of North Carolina or any other governmental agency.

It is well established that when a trial court's findings of fact are supported by competent evidence, even though conflicting, such findings are binding on appeal. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985); *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983). There was substantial evidence to support the findings of fact made by the trial court; therefore, they are binding on this Court. Further, the findings of fact compelled the trial court's conclusions of law. Accordingly, defendant's motion for appropriate relief, as originally filed and later supplemented, must be denied, and Judge Llewellyn's order of 12 June 1995 is affirmed.

[18] We conclude for the foregoing reasons that defendant's trial was free of prejudicial error. Thus, we now turn to defendant's assignments of error relating to the separate capital sentencing proceeding conducted in this case. Defendant contends that the trial court erred by instructing the jury that it was for the jury to decide whether any statutory mitigating circumstances it found to exist had mitigating value. We agree.

In response to a juror's question about the meaning of mitigation and whether a particular nonstatutory circumstance was mitigating, the trial court twice instructed the jurors to decide whether any of the thirty-seven mitigating circumstances had mitigating value. Specifically, the trial court instructed as follows:

> A number of mitigating circumstances listed on the form have been submitted to the jury for its consideration; the same being (1) through and including (37). Now as to these listed circumstances, it is for you to determine from the circumstances and the facts in this case whether or not *any listed circumstance* has mitigating effect. And if one or more of you should determine by a preponderance of the evidence that the mitigating circumstance listed exists and that it has mitigating value, then you would find that it existed and answer so. If none of you finds that, then you would indicate, no, as to that.

(Emphasis added.) Shortly thereafter, the trial court instructed the jury:

> I'm not able to answer your question any more clearly than to say that it is for you to determine as a juror whether or not the listed circumstance has mitigating value or effect.

This Court has held that as to a proffered nonstatutory mitigating circumstance—unlike statutory ones—the jurors must first find whether the proffered circumstance exists factually. Jurors who find that such a nonstatutory mitigating circumstance exists must then consider whether it should be given any mitigating weight. *State v. Hill*, 331 N.C. at 418, 417 S.E.2d at 780; *State v. Huff*, 325 N.C. 1, 58-61, 381 S.E.2d 635, 668-70 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Thus, a juror may find that a nonstatutory mitigating circumstance exists but may give that circumstance no mitigating value. *State v. Green*, 336 N.C. at 173, 443 S.E.2d at 32; *State v. Mahaley*, 332 N.C. 583, 598, 423 S.E.2d 58, 67 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995).

If a juror determines that a statutory mitigating circumstance exists, however, the juror must give that circumstance mitigating value. *Mahaley*, 332 N.C. at 598, 423 S.E.2d at 67; *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990) (*Fullwood I*). The General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value. *State v. Fullwood*, 329 N.C. 233, 238, 404 S.E.2d 842, 845 (1991); *State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988); *see* N.C.G.S. § 15A-2000(f) (1988). Therefore, jurors must give them some weight in mitigation. Nevertheless, the amount of weight any particular statutory mitigating circumstance is to be given is a decision entirely for the jury. *Fullwood I*, 323 N.C. at 395, 373 S.E.2d at 533.

The trial court, in its instructions in the present case, told jurors that they could elect to give no weight to statutory mitigating circumstances they found to exist. This was contrary to the intent of the statute and settled case precedent. As it is impossible for us to determine whether the jurors found some of the statutory mitigating circumstances submitted to exist but decided to give them no mitigating weight, we are unable to say that the trial court's error was harmless. *See Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. Accordingly, we vacate defendant's sentence of death and remand the first-degree murder case against him to the Superior Court, Polk County, for a new capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

In conclusion, our holdings on appeal in the present case are the following:

No. 90CRS1096—First-Degree Murder—No error in the trial; death sentence vacated and case remanded for new capital sentencing proceeding.

No. 90CRS1097, First-Degree Arson—No error.

No. 90CRS1118, First-Degree Burglary—No error.

No. 91CRS466, Robbery with a dangerous weapon—No error.

No. 91CRS467, Felonious larceny—Judgment arrested.

No. 91CRS468, Felonious larceny—Judgment arrested.

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

GWATHMEY v. STATE OF NORTH CAROLINA

[342 N.C. 287 (1995)]

RICHARD BARBEE GWATHMEY, JR., AND WIFE, GWENDOLYN BROWN GWATHMEY, ROBERT F. CAMERON AND WIFE, ELIZABETH BECK CAMERON, AND ELIZABETH BECK CAMERON, LOUISE DER. SMITH, ROBERT Y. KELLY AND WIFE, ELSIE W. KELLY, AND IN THE MATTER OF: WACHOVIA BANK OF NORTH CAROLINA, N.A., EDITH R. MERRILL AND BARBARA M. WALSER, TRUSTEES UNDER THE WILL OF LESLIE M. MERRILL v. THE STATE OF NORTH CAROLINA, ACTING THROUGH ITS AGENCY, THE DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, ACTING THROUGH ITS SECRETARY, WILLIAM W. COBEY, JR., AND THE DIVISION OF MARINE FISHERIES, ACTING THROUGH ITS DIRECTOR, DR. WILLIAM T. HOGARTH, AND THE SUBMERGED LANDS PROGRAM, ACTING THROUGH ITS DIRECTOR, P.A. WOJCIECHOWSKI

No. 74PA94

(Filed 8 December 1995)

1. Common Law § 1 (NCI4th)— common law of England—applicability

The common law referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence, and the term "common law" has been stated to refer to the common law of England and not of any particular state. However, that statement is incomplete and may be misleading because, at least since 1715, the common law of England was applicable in North Carolina only to the extent it was deemed "compatible with our way of living." Further, the express wording of N.C.G.S. § 4-1 makes it clear that only those parts of the English common law which had been "in force and use" in North Carolina and which were not contrary to the freedom and independence of North Carolina are to be applied. Much of the common law that is in force by virtue of N.C.G.S. § 4-1 may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment.

Am Jur 2d, Common Law §§ 1, 2, 4, 13.

2. Waters and Watercourses § 55 (NCI4th)— navigability—lunar tides test

The lunar tides test for determining navigability was never part of the English common law applied in North Carolina before or after the Revolution, is therefore not a part of the common law of North Carolina, and is inapplicable to the conditions of the waters within the state.

Am Jur 2d, Waters §§ 59-73.

3. Waters and Watercourses § 55 (NCI4th)— navigability—relationship to public trust doctrine—test

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is that if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact, and therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine.

Am Jur 2d, Waters §§ 59-73.

4. Waters and Watercourses § 56 (NCI4th)— lands beneath navigable waters—conveyance by State—public trust doctrine

No constitutional provision throughout the history of North Carolina has expressly or impliedly precluded the General Assembly from conveying lands beneath navigable waters by special grant in fee simple and free of any rights arising from the public trust doctrine, which is a common law doctrine and cannot, in the absence of a constitutional basis for the doctrine, be used to invalidate acts of the legislature which are not proscribed by our Constitution. The public trust doctrine in North Carolina thus operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights; however, this presumption is overcome by a special grant from the General Assembly expressly conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights.

Am Jur 2d, Waters §§ 74-81.

5. Waters and Watercourses § 67 (NCI4th)— marshlands and swamplands—conveyance by State Board of Education—public trust rights

Either the Board of the Literacy Fund or the State Board of Education as its successor in interest was at all times vested with title to the vacant marshlands and swamplands in the State after an 1825 act, and title to those lands continued to be held by the SBE until our statutes regarding the control and disposition of all State lands were amended in 1959. However, in no statute enacted by the General Assembly from 1825 to the present has that body ever expressly stated that it was granting the Literacy

Fund or the SBE fee simple title to the marshlands free of all public trust rights whatsoever, and the presumption arising under the public trust doctrine has not been rebutted and prevails. The General Assembly did not convey the marshlands covered by navigable waters to the SBE free of any applicable public trust rights and therefore the SBE could not convey such lands to the plaintiffs' predecessor in title free of such public trust rights.

Am Jur 2d, Waters §§ 378 et seq.

6. Waters and Watercourses § 67 (NCI4th)— marshlands—public trust rights—application of N.C.G.S. § 146-20.1

Applying N.C.G.S. § 146-20.1 in this case to impose public trust rights on any parts of marshlands not covered by navigable waters and which are therefore free of public trust rights would be contrary to N.C.G.S. § 146-83, which provides that no provision of chapter 146 shall be applied or construed to the detriment of vested rights or interests acquired prior to June 2, 1959.

Am Jur 2d, Waters §§ 378 et seq.

7. Trial § 146 (NCI4th)— title to marshlands—stipulation—contrary allegation added to complaint—no error

The trial court did not err in an action involving the title to marshlands by expanding one complaint to add an allegation inconsistent with a stipulated fact. Even though stipulations are encouraged by the courts, they will be restricted to the intent manifested by the parties in the agreement. The trial court here properly concluded that the plaintiff did not intend to admit anything other than what the deed said and did not intend to waive any rights concerning her claim to this marshland.

Am Jur 2d, Stipulations §§ 1, 7, 8, 12.

8. Waters and Watercourses § 55 (NCI4th)— marshlands—conveyed by State—public trust—navigability

An action seeking a determination of the quality of plaintiffs' titles to marshland originally obtained from the State was remanded where the trial court correctly rejected the lunar tides test and accepted the navigability in fact test in determining whether the waters in question in this case are navigable in law, but may have decided the issue of navigability in fact solely on the basis of whether the waters at issue were actually being used for or had historically been used for navigation, rather than on

the proper basis of whether the waters were such that navigation by pleasure or commercial watercraft was possible even if no watercraft had ever actually navigated on them. Although evidence of present or past actual navigation of the waters in question is evidence tending to support a finding that the waters are navigable in fact, such evidence will not be needed in every case in order to establish navigability in fact. Additionally, certain findings and conclusions of the trial court appear to be unclear, including, for example, the material facts found from stipulations and set forth in the judgment in respect to the properties conveyed.

Am Jur 2d, Waters §§ 59-73.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a judgment for the plaintiffs entered by Llewellyn, J., on 12 August 1993 in Superior Court, New Hanover County. Heard in the Supreme Court 11 January 1995.

Stephens, McGhee, Morgan, Lennon & O'Quinn, by Janet R. Coleman and Darren S. Hart, for plaintiff-appellees.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn and J. Allen Jernigan, Special Deputy Attorneys General, and David W. Berry, Associate Attorney General, for defendant-appellant.

Thompson & Godwin, L.L.P., by Billy R. Godwin, Jr., and by Robert Kerry Kehoe, counsel, on behalf of Coastal States Organization, Inc., amicus curiae.

MITCHELL, Chief Justice.

The parties stipulated at trial that the lands claimed by each of the plaintiffs that comprise the subject of this litigation are marshlands located between the high and low water marks in the Middle Sound area of New Hanover County. Title to the lands in question was conveyed by the State Board of Education (SBE) to the original purchasers of the marshlands between 1926 and 1945. Each of the deeds from the SBE to the original purchasers purports to convey a tract of "marshland" in the "Middle Sound" area to the purchasers, their "heirs and assigns in fee simple forever."[1] The parties stipulated that each of

1. The quoted language appears in each of the deeds except for the SBE deed to Paul Rogge through which the plaintiffs Cameron claim a portion of their land. The Rogge deed uses the word "land" instead of "marshland." That deed also has the words

the plaintiffs could establish a chain of title linking their deeds to the source deeds from the SBE, with one exception.[2]

In 1965, the General Assembly enacted N.C.G.S. § 113-205, which required individuals who claimed any part of the bed lying beneath navigable waters of any coastal county to register their claims with the Secretary of the Department of Natural Resources by 1 January 1970, or their claims would be null and void. The plaintiffs in this case, or their predecessors in interest, registered their claims in compliance with this statute. The parties stipulated that the plaintiffs' submerged lands claims, as originally filed, included both marshlands lying between the mean high and mean low water marks of Middle Sound and lands beyond the mean low water mark that lie beneath the open waters of Middle Sound or Howe Creek. In 1987, the Submerged Lands Program, which was established to assess the validity of the claims of title previously registered pursuant to N.C.G.S. § 113-205, came under the administration of the Division of Marine Fisheries. In assessing the plaintiffs' claims, the Division of Marine Fisheries issued resolution letters concluding that the plaintiffs had valid titles to the marshlands between the mean high and mean low water marks. However, pursuant to N.C.G.S. § 146-20.1(b), the resolution letters purporting to validate the plaintiffs' titles to the marshlands were accompanied in each case by a purported reservation of public trust rights in those same marshlands. The plaintiffs responded by filing separate complaints against the State between 26 February 1991 and 31 May 1991, in Superior Court, New Hanover County, seeking a determination of the quality of their titles to the marshlands and other relief. The plaintiffs' actions were consolidated by consent of all the parties following filing of the State's answer.

The State made a motion in the Superior Court for summary judgment on the ground that waters covering the lands in question are subject to the ebb and flow of the tides and are, thus, navigable as a matter of law. The State argued that, as the waters are navigable in law, title to the land beneath those waters is governed by the public trust doctrine, and such land is not subject to fee simple ownership by the plaintiffs. Judge G.K. Butterfield, Jr., denied the motion in an order concluding that the test for determining navigability in law in North Carolina is "navigability in fact."

"heirs and assigns" and later states that Rogge receives the land "in fee simple." The other deeds use the language "heirs and assigns in fee simple forever," all in one sentence.

2. We deal with the status of plaintiff Louise deRosset Smith's chain of title below in our discussion of the relevant issue presented by this appeal.

This case then came on for trial without a jury in the Superior Court, New Hanover County, before Judge James D. Llewellyn. The trial court entered judgment for the plaintiffs on 12 August 1993.

The trial court found from substantial evidence before it that at low tide no boat of any size could navigate in the marshlands claimed by the plaintiffs, except in dredged channels. The trial court also found that "as to the marshlands claimed by Plaintiffs, at high tide the area covered by marsh grass is not navigable." Based upon its findings, the trial court concluded as a matter of law that no part of the marshlands on Middle Sound within the boundaries of the plaintiffs' deeds is covered by waters navigable in fact; therefore, those lands are not covered by waters that are navigable in law. The trial court further found that the open waters of Howe Creek are navigable in fact based upon actual current and historical use and, therefore, concluded that those open waters are navigable as a matter of law. The trial court also concluded that no public trust rights existed in the marshlands claimed by the plaintiffs and that the SBE had conveyed fee simple title to those lands to the plaintiffs' predecessors in title without reservation of any public trust rights. However, the trial court concluded that as to the land lying beneath the open waters of Howe Creek, the SBE had conveyed title subject to public trust rights. The trial court further concluded that "the 'Declaration of Final Resolution' recorded by the Defendant is a cloud upon each Plaintiff's title and is ineffective as a recognition of any right, title or interest of the public in the marshlands." The trial court then concluded that as the plaintiffs' marshlands were not beneath waters navigable in law, N.C.G.S. § 146-20.1(b) is "invalid as it purports to impress upon the marshlands owned by Plaintiffs public trust rights which did not exist in said lands at the time they were conveyed to Plaintiffs' predecessors in title."

Based upon its findings and conclusions, the trial court ordered, adjudged, and decreed that the plaintiffs were owners in fee simple absolute without any reservation of public trust rights of the "certain tract of marshlands described" in each of their deeds. With regard to the claims of the plaintiffs Richard and Gwendolyn Gwathmey, however, the trial court adjudged and decreed that "those areas of deeded bottom lying beneath the open waters of Howe Creek and within the boundaries of Plaintiffs' [Gwathmey] deed are owned in fee simple subject to the public trust."

The defendant State of North Carolina gave notice of appeal. On 7 April 1994, this Court allowed the defendant's petition for discretionary review prior to a determination by the Court of Appeals.

Before addressing the specific issues raised on this appeal, we will briefly discuss the public trust doctrine and the operation of the entry laws in North Carolina. A brief introductory review of these two areas of the law at this point will facilitate an understanding of the issues raised on this appeal.

This Court has long recognized that after the Revolutionary War, the State became the owner of lands beneath navigable waters but that the General Assembly has the power to dispose of such lands if it does so expressly by special grant. *E.g.*, *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 524, 44 S.E. 39, 41 (1903). However, "[l]ooming over any discussion of the ownership of estuarine marshes is the 'public trust' doctrine—a tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters." Monica Kivel Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. Rev. 565, 572 (1986) [hereinafter *Battle to Preserve N.C.'s Estuarine Marshes*].

In *Tatum v. Sawyer*, 9 N.C. 226 (1822), this Court recognized the importance of navigable waters as common highways and held: "Lands covered by navigable waters are not subject to entry under the entry law of 1777, not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature." *Id.* at 229. Thus, this Court has recognized the public interests inherent in navigable waters and qualified the State's ability to part with title to lands submerged by navigable waters with a *presumption* that legislative enactments do not indicate a legislative intent to authorize the conveyance of lands beneath navigable waters. *Atlantic & N.C. R.R. Co. v. Way*, 172 N.C. 774, 776-78, 90 S.E. 937, 938-40 (1916). The practical significance of this presumption under the public trust doctrine is that it can operate to invalidate claims to lands submerged by navigable waters. The issue of navigability is controlling because the public trust doctrine is not an issue in cases where the land involved is above water or where

the body of water regularly covering the land involved is not navigable in law. The public trust doctrine is discussed in more detail at other points in this opinion where we deal directly with the assignments of error.

This Court's discussions of navigability have arisen most often in cases where the parties claimed title to contested lands under grants obtained pursuant to the general entry laws. In 1777, the General Assembly enacted the entry laws,[3] also known as the "general entry laws." These laws established a system whereby the people of North Carolina could acquire the State's unappropriated vacant lands. The entry laws provided for the election of "entry-takers" and surveyors in every county. An individual who wished to acquire State land was first required to pay the statutory amount set for the quantity of land purchased in addition to the fees authorized by the laws. Subsequently, the surveyor was required to enter the lands claimed and survey them. The entry laws also provided that if part of the survey was made on any navigable water, the water was to form one boundary of the land surveyed. The law prescribed the manner in which the individual received a grant from the State for the land surveyed and in which that grant would be registered in the county in which the land was located.

By an assignment of error, defendant, the State of North Carolina, contends that the trial court erred in concluding that no public trust rights exist in the lands claimed by the plaintiffs. The State says this is so because those lands were not covered by waters "navigable in fact." More specifically, the State contends that the proper test for determining navigability in law where tidal waters are concerned is the "lunar tides" test, also known as the "ebb and flow" test. Under this test, "navigable waters are distinguished from others, by the ebbing and flowing of the tides." *Wilson v. Forbes*, 13 N.C. 30, 34 (1828) (Henderson, J.). We do not agree.

The evidence adduced at trial tended to show that the marshlands claimed by the plaintiffs are located in the Middle Sound area. The waters of Middle Sound are subject to the ebb and flow of the lunar tide. The marshlands in question are covered by the waters of the sound at certain stages of the tides. The depth of the water over any specific portion of the marshlands claimed by the plaintiffs varies

3. The summary of the entry laws at this point in this opinion is developed with particular reference to chapter 1 of the November 1777 Session Laws of North Carolina.

according to the level of the tide in the sound. The State argues that because the marshlands are covered at regular intervals by waters subject to the ebb and flow of the tides, they are covered by navigable waters under the lunar tides test and are not subject to private appropriation. Based on an extensive review of the law of this State regarding the test for "navigability in law" as that term applies to the public trust doctrine, we conclude that the State's argument must fail because it is premised on the applicability of the lunar tides test.

Under the common law as applied in England, the navigability of waters was determined by whether they were subject to the ebb and flow of the tides. This common law rule "developed from the fact that England does not have to any great extent nontidal waters which are navigable." *Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 68, 197 S.E. 714, 717 (1938).

[1] In one of this Court's earliest decisions dealing with the test to be applied for determining navigability in law, however, we expressly stated:

> It is clear that by the [lunar tides] rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides. But this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths. By that rule Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property.

Wilson v. Forbes, 13 N.C. at 34-35. Justice Hall concurred in a separate opinion, stating:

> I think that part [the lunar tides test] of the English law is not applicable to the waters and streams of this State. But few of them could be marked by such a distinction. There can be no essential difference for the purposes of navigation, whether the water be salt or fresh, or whether the tides regularly flow and ebb or not. *And of this opinion the legislature seems to have been, when they passed the [general entry laws of 1715 and 1777].*

Id. at 38 (Hall, J.) (emphasis added).

N.C.G.S. § 4-1 provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not

> destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). The "common law" referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence. *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). In *State ex rel. Bruton v. Flying "W" Enters.*, 273 N.C. 399, 412, 160 S.E.2d 482, 491 (1968), we stated that the term "common law" as used in the statute "refers to the common law of England and not of any particular state." Although technically not erroneous, that statement is incomplete and may be misleading. At least after 1715, the common law of England was applicable in North Carolina only to the extent it was deemed "compatible with our way of living." *State v. Willis*, 255 N.C. 473, 474, 121 S.E.2d 854, 854 (1961); *see also State v. Lackey*, 271 N.C. 171, 155 S.E.2d 465 (1967). Further, the express wording of N.C.G.S. § 4-1 makes it clear that only those parts of the English common law which had been "in force and use" *in North Carolina* and which were not contrary to the freedom and independence of North Carolina are to be applied. Thus, the statement from *Bruton* quoted above is correct only if it is understood to mean that the "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4-1. Further, much of the common law that is in force by virtue of N.C.G.S. § 4-1 may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment. *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932).

[2] In *Wilson*, this Court made it clear that the lunar tides test had never been part of the English common law applied in this State before or after the Revolution. *Wilson*, 13 N.C. 30. Therefore, it is not a part of the common law to be applied in North Carolina. Additionally, we indicated in *Wilson* that the lunar tides test was "obsolete," as it was inapplicable to the conditions of the waters within this State. *Id.* For both of these reasons, the lunar tides test is

not a part of the common law as it applies in North Carolina. *See* N.C.G.S. § 4-1.

In *Collins v. Benbury*, 25 N.C. 277 (1842), this Court emphasized that "whether there was any tide or not in the [Albemarle] Sound, when this patent issued, we do not think material; for we concur in the opinion of his Honor that this is 'a navigable water,' in the sense of our [entry] statutes." *Id.* at 282. Thus, this Court reaffirmed its earlier conclusion in *Wilson* that the lunar tides test does not control when determining the navigability of waters in this State for purposes of applying the public trust doctrine.

There are two cases in which this Court erroneously applied the lunar tides test to determine the navigability in law of waters of this State. In the first, *Hatfield v. Grimstead*, 29 N.C. 139 (1846), the plaintiff's grant from the State included land covered by the waters of Currituck Sound near Currituck Inlet. Currituck Inlet had closed prior to the plaintiff's obtaining title from the State in 1839. A revisal of the general entry laws in 1836 left out the language in earlier versions of those statutes which had required that the water form one of the boundaries of property conveyed under the entry laws and lying along navigable water.[4] From this omission, this Court decided in *Hatfield* that the navigability of the water involved in that case must be determined by the English common law lunar tides test. The Court concluded that the plaintiff held valid title to the submerged lands in that case because, under the English common law, only waters affected by the ebb and flow of the tides were navigable. Since the plaintiff's land was not affected by the ebb and flow of the tides because of the closing of the inlet, this Court concluded that the entry laws in effect at the time of the grant did not proscribe the plaintiff's grant.

Assuming *arguendo* that the omission of the language in question from the revised entry laws concerning boundaries of lands on navigable bodies of water required that this Court look to the common law for its decision in *Hatfield*, it nevertheless was improper to apply the lunar tides test in that case. As discussed previously, this Court already had unequivocally indicated that the lunar tides test had never been a part of the common law to be applied for determining navigability in North Carolina. *Wilson*, 13 N.C. 30. Therefore, the

4. The general entry laws were again revised prior to this Court's decision in *Hatfield*, and the revised law reinstated the omitted provisions referred to in *Hatfield*. *Hatfield*, 29 N.C. at 140.

application of that test in *Hatfield* was error. In light of the foregoing, we expressly disavow the language in this Court's opinion in *Hatfield* to the extent it indicates that the lunar tides test was ever a part of the common law as applied in North Carolina.

In *Resort Dev. Co. v. Parmele*, 235 N.C. 689, 71 S.E.2d 474 (1952), the source of title for a portion of the disputed land originated in an entry law grant from the State in 1841. In that case, we held that the lunar tides test of the English common law must be applied to determine whether the waters covering that portion of the disputed land represented by the 1841 grant were navigable. This part of our decision was based on our prior erroneous interpretation of the law in *Hatfield* and also is hereby expressly disavowed.

Next, although the State has acknowledged this Court's clear rejection of the English lunar tides test in *Wilson* and in *Collins*, the State nevertheless argues that our summary of North Carolina law in *State v. Glen*, 52 N.C. 321 (1859), established a dual test for determining navigability in law in North Carolina. Its argument is based on the following language from *Glen*:

> 1. *All the bays and inlets on our coast, where the tide from the sea ebbs and flows*, and *all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels*, are called navigable, in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free. *Collins v. Benbury*, 25 N.C.[]277, and the other cases to which we have referred on this point.

Glen, 52 N.C. at 333 (emphasis added). The State essentially argues that by using the words "where the sea ebbs and flows" to describe "[a]ll the bays and inlets on our coast," this Court indicated in *Glen* that the lunar tides test was a proper test for determining navigability, but not the sole and exclusive test. The State reads the remainder of the italicized language in the above quotation to mean that only the issue of the navigability of waters which are unaffected by the lunar tides is to be determined by whether they are navigable in fact. Accordingly, the State would have us hold that waters which meet either the test of navigability in fact or the lunar tides test are navigable in law. However, we are convinced that the language in *Glen* that refers to the ebb and flow of the tides is merely a phrase descriptive of all of the bays and inlets of the open ocean along our coast and has no independent legal significance.

The portion of the *Glen* opinion from which the above quotation was taken is but a summarization of cases previously reviewed in that opinion. Earlier in *Glen*, this Court stated that in England, navigability in law was ascertained by the ebb and flow of the tide. *Id.* at 325. We then said that the lunar tides or ebb and flow test

> has been held by our courts not to be applicable to the watercourses of North Carolina, and has been long since repudiated. We *hold* that *any waters*, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not the subject of entry and grant under our entry law, and the rights of fishing in which are, under our common and statute law, open and common to all the citizens of the State.

Id. (emphasis added). *Glen* is not to be read to mean that there is a dual test for navigability which includes the lunar tides test when, in that opinion, this Court so clearly rejected the lunar tides test and expressly held that the test of navigability in fact controls in North Carolina. Additionally, in cases subsequent to this Court's decision in *Glen*, the lunar tides test was clearly rejected as an anachronistic tool, inapplicable to North Carolina's waters. *See, e.g., Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714; *Staton v. Wimberly*, 122 N.C. 107, 29 S.E. 63 (1898); *State v. Eason*, 114 N.C. 787, 19 S.E. 88 (1894).

[3] This Court was required to further explain the navigability in fact test in three cases near the beginning of the twentieth century. *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); *State v. Baum*, 128 N.C. 600, 38 S.E. 900 (1901); *State v. Narrows Island Club*, 100 N.C. 477, 5 S.E. 411 (1888). Each of those cases involved criminal prosecutions on indictments charging the defendants with obstructing public navigation. In each case, the evidence showed that the waters of the sound in question were frequently navigated by boats of varying sizes. The defendants argued that a right existed to obstruct travel over the waters involved because the land covered by those waters was privately owned in fee pursuant to general entry law grants from the State.

In *Narrows Island Club*, this Court essentially assumed *arguendo* that the defendant's title to the land submerged by the water in question was valid. *Narrows Island Club*, 100 N.C. at 480, 5 S.E. at 412. In determining whether the public trust doctrine applied, the Court focused on the capacity of the waters for navigation by any "useful vessels" and concluded:

> Navigable waters are natural highways, so recognized by government and the people, and hence it seems to be accepted as a part of the common law of this country arising out of public necessity, convenience and common consent, that the public have the right to use rivers, lakes, sounds and parts of them, though not strictly public waters, if they be navigable, in fact, for the purposes of a highway and navigation, employed in travel, trade and commerce. Such waters are treated as *publici juris*, in so far as they may be properly used for such purposes, in their natural state. The public right arises only in case of their navigability. Whether they are navigable or not depends upon their capacity for substantial use as indicated.

Id. at 481, 5 S.E. at 412.

In *State v. Baum*, 128 N.C. 600, 38 S.E. 900, this Court again reviewed the development of the common law of navigability and noted that much of it was inconsistent and inapplicable to conditions in the United States. The Court went on to say:

> The rule now most generally adopted, and that which seems best fitted to our own domestic conditions, is that all watercourses are regarded as navigable in law that are navigable in fact. That is, that the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.

Id. at 604, 38 S.E. at 901. Thus, this Court reiterated its holding in *Narrows Island Club* that navigability in fact by useful vessels, including small craft used for pleasure, constitutes navigability in law.

In *State v. Twiford*, 136 N.C. 603, 48 S.E. 586, this Court reemphasized that "[i]f a stream is 'navigable *in fact* . . . it is navigable in *law*.' The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use." *Id.* at 606, 48 S.E. at 587 (citations omitted). By applying the foregoing test, we determined that the waters covering the land in question were navigable. *Id.* at 608, 48 S.E. at 588. As in *Narrows Island Club* and *Baum*, the basis for the defendants' claim in *Twiford* that they had a right to obstruct the waters was an assertion of fee simple ownership of the underlying land free of public trust rights. In *Narrows Island Club*, we had explicitly found it unnecessary to decide whether the title to the underlying land was

affected by our determination that the waters were navigable. Significantly, we addressed this issue in *Twiford*. Our decision that the defendants had illegally obstructed the water in question in *Twiford* was based in part, if not entirely, on our conclusion that the land was not subject to entry and grant to a private party by the State under the general entry laws because it was covered by navigable waters. *Id.* at 607, 48 S.E. at 587.

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: " 'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " *Id.* at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. For the foregoing reasons, the State's assignment of error is without merit.

[4] By another assignment of error, the State contends that the SBE was never vested with title to the marshlands free of public trust rights and, as a result, could not convey such title to the plaintiffs' predecessors in interest.

The State's first argument in support of this assignment of error is based on the assumption that the lands at issue are submerged by navigable waters governed by the public trust doctrine and that, as a result, the legislature could do nothing which would impair public trust interests in them. It is true that lands submerged by waters which are determined to be navigable in law are subject to the public trust doctrine. However, the assumption that such lands may not be conveyed by the General Assembly without reservation of public trust rights is incorrect.

The State's argument that the public trust doctrine prevents the State from conveying lands beneath navigable waters without reserving public trust rights is based principally on two cases. The first is *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39, which involved competing claims to waterfront property in Morehead City based on general entry law grants. The defendant's property consisted of dry land on the shore of Bogue Sound. The land claimed by

the plaintiff was submerged by the navigable waters of Bogue Sound and was located directly in front of the defendant's waterfront property. Before reaching its ultimate conclusion, this Court quoted the following language from a United States Supreme Court case: " 'The control of the State for the purposes of the [public] trust can never be lost except as to such parcels as [1] are used in promoting the interests of the public therein or [2] can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.' " *Id.* at 527, 44 S.E. at 42 (quoting *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453, 36 L. Ed. 1018, 1042 (1892), *aff'd sub nom. United States v. Illinois Cent. R. Co.*, 154 U.S. 225, 38 L. Ed. 971 (1894)).[5]

The State contends that the validity of any conveyance of land encumbered with the public trust must be judged with reference to the principles enunciated in *Shepard's Point Land Co.* That case is not controlling. The quoted statement was *obiter dictum* in *Shepard's Point Land Co.* because in that case the plaintiff's claim of title was based on the general entry laws. This Court based its decision to reject the plaintiff's claim on the well-established principle that lands submerged by navigable waters are not subject to entry *under the general entry laws.* We reject the above statement in *Shepard's Point Land Co.* to the extent that it implies that the public trust doctrine completely prohibits the General Assembly from conveying lands beneath navigable waters to private parties without reserving public trust rights. That position is without authority in either our statutes or our Constitution.

In *State v. Twiford*, 136 N.C. 603, 48 S.E. 586, this Court said: "Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet." *Id.* at 609, 48 S.E. at 588. To the extent that this statement in *Twiford* can be read expansively to indicate that the General Assembly does not have the power to convey lands underlying navigable waters in fee, it too was mere *obiter dictum*, unsupported by our laws or our Constitution, and is hereby expressly disapproved.

In *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988), this Court said:

5. It is worth noting that the Supreme Court in *Illinois Central* admitted that no authority supported its position. *Illinois Cent. R. Co.*, 146 U.S. at 455, 36 L. Ed. at 1043. More importantly, that case did not involve North Carolina law.

> Navigable waters, then, are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void.

Id. at 527, 369 S.E.2d at 828 (citing *Shepard's Point Land Co.*, 132 N.C. 517, 44 S.E. 39). The first sentence is entirely consistent with our opinion in this case. The second sentence is true in the sense that a land grant in fee *pursuant to the general entry laws* and conveying such submerged lands is void. However, we hereby expressly reject any construction of the second sentence in the above quotation from *Credle* that would support the proposition that the General Assembly is powerless to convey lands lying beneath navigable waters free of public trust rights when it does so by special legislative grant. To construe the second sentence so broadly would conflict with the long-established rule of *Ward v. Willis*, 51 N.C. 183 (1858) (per curiam), that fee simple conveyances—without reserving rights to the people under the public trust doctrine—of lands beneath navigable waters pursuant to special legislative grants are valid. Further, our construction of the second sentence recognizes that in *Rohrer* this Court relied on cases involving grants under the general entry laws to support its statement in the second sentence. Thus, we are only limiting the statement there to the precedent established in those cases.

In *Credle*, we also quoted with approval *dictum* from our decision in *Twiford* to the effect that lands under navigable waters can never be conveyed in fee simple. *Credle*, 322 N.C. at 534, 369 S.E.2d at 832 (quoting *Twiford*, 136 N.C. at 609, 48 S.E. at 588). For reasons previously discussed in our analysis of *Twiford* in this opinion, we expressly disavow any such statements.

In *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970), this Court restated the long-established principle that " 'under our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.' " *Id.* at 41, 175 S.E.2d at 671 (quoting *Thomas v. Sandlin*, 173 N.C. 329, 332, 91 S.E. 1028, 1029 (1917)). Similarly, in *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989), we emphasized that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless pro-

hibited by that Constitution." *Id.* at 448-49, 385 S.E.2d at 478 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

No constitutional provision throughout the history of our State has expressly or impliedly precluded the General Assembly from conveying lands beneath navigable waters by special grant in fee simple and free of any rights arising from the public trust doctrine. *See Battle to Preserve N.C.'s Estuarine Marshes*, 64 N.C. L. Rev. at 576-77. The public trust doctrine is a common law doctrine. In the absence of a constitutional basis for the public trust doctrine, it cannot be used to invalidate acts of the legislature which are not proscribed by our Constitution. Thus, in North Carolina, the public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights. "Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights." *RJR Technical Co. v. Pratt*, 339 N.C. 588, 590, 453 S.E.2d 147, 149 (1995). However, this presumption is overcome by a special grant from the General Assembly *expressly* conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights. *See Ward v. Willis*, 51 N.C. at 185-86.

For the foregoing reasons, we conclude that the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.

[5] The State also argues in support of this assignment of error that the General Assembly has never conveyed any marshlands covered by navigable waters to the SBE free of public trust rights and, therefore, that the SBE could not convey any such lands free of such public trust rights. The 1825 General Assembly passed an act to "create a fund for the establishment of Common Schools." Act of Jan. 4, 1826, Ch. I, 1825 N.C. Sess. Laws 3. This act created a "body corporate and politic, under the name of the President and Directors of the Literary Fund" and named the Governor as President of the Board which was

to administer the Literary Fund. Ch. I, sec. II, 1825 N.C. Sess. Laws at 3-4. The fund consisted of the appropriations made by the legislature and included, *inter alia*, "all the vacant and unappropriated Swamp lands in this State." Ch. I, sec. I, 1825 N.C. Sess. Laws at 3. In 1833, the legislature passed a resolution which made it clear that it had originally conveyed title to all vacant marshlands to the Literary Fund by the 1825 act. The resolution stated: "[A]ll the vacant and unappropriated *marsh and swamp lands* in this State were, by the law passed in 1825, actually transferred, and do now belong to the Literary Fund of this State." Resolution of the Committee on Education and the Literary Fund, 1833 Leg. Docs., No. 15 (emphasis added), *quoted in* Kenneth B. Pomeroy & James G. Yoho, *North Carolina Lands: Ownership, Use, and Management of Forest and Related Lands* 98 (1964) [hereinafter *N.C. Lands*].

In 1837, the legislature reorganized the Board of the Literary Fund. *See* David A. Rice, *Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C. L. Rev. 779, 787 (1968); *see also N.C. Lands* at 99. In the 1837 enactment, the legislature stated that "all the swamp lands of this State, not heretofore duly entered and granted to individuals, shall be vested in the [Literary Fund]." Act of Jan. 20, 1837, ch. XXIII, sec. 3, 1836-37 N.C. Sess. Laws 131, 131-32 (an act to drain swamplands and create Literary Fund). The act then gave the Board "full power and authority to adopt all necessary ways and means, for causing so much of the swamp lands aforesaid to be surveyed, as they may think capable of being reclaimed." Ch. XXIII, sec. 5, 1836-37 N.C. Sess. Laws at 132. Finally, the law empowered the Board to "sell and convey any part of the lands, which may be reclaimed, for the best price that can be obtained for the same; and the title of the purchaser or purchasers, shall be good and valid in law and in equity." Ch. XXIII, sec. 11, 1836-37 N.C. Sess. Laws at 134. Thus, the legislature reiterated its grant of the marshlands and swamplands within the State to the Literary Fund and authorized the Board to set up a system whereby those lands would be surveyed and sold by the Board.

The Constitution of 1868 provided that the SBE "shall succeed to all the powers and trusts of the President and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to . . . the Educational fund of the State." N.C. Const. of 1868, art. IX, § 9. Thus, title to the State's vacant marshlands and swamplands was vested in

the newly created SBE. *See Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. at 70, 197 S.E. at 719.

In 1891, the General Assembly reaffirmed what it had said previously by its resolution in 1833: "[T]he words 'swamp lands' employed in the statutes creating the literary fund and literary board of North Carolina and the state board of education of North Carolina, or in any act in relation thereto, shall be construed to include all those lands which have been or may now be known and called 'swamp' or 'marsh' lands . . . ." Act of Mar. 4, 1891, ch. 302, 1891 N.C. Sess. Laws 254. This enactment did not amend the previous statutes to reflect a change in the law, but merely restated the legislative intent concerning a term within them. Thus, either the Board of the Literary Fund or the SBE as its successor in interest was at all times vested with title to the vacant marshlands and swamplands in the State after the 1825 act. Title to those lands continued to be held by the SBE until our statutes regarding the control and disposition of all state lands were amended in 1959. *See* N.C.G.S. §§ 146-1 to -83 (1959).

The State contends in support of this assignment of error, however, that even if the legislature conveyed title to the marshlands at issue to the SBE, it did not convey to the SBE any of those marshlands covered by navigable waters in fee simple without reservation of public trust rights for the people of this State. The State further contends that since the SBE never received title to such lands free of the public trust rights of the people, it could not convey title free of those public trust rights to the plaintiffs' predecessors in interest. We agree.

In addressing these contentions by the State, we must consider the statutes concerning the authority of the Board of the Literary Fund and the SBE with regard to the marshlands. Our review of the laws governing the sale of vacant swamplands and marshlands reveals that each of the relevant statutes in effect between 1837 and 1959 contained the following language or its equivalent:

> The state board of education is invested with full power to adopt all necessary ways and means for causing so much of the swamp lands to be surveyed as it may deem capable of being reclaimed, and shall cause to be constructed such canals, ditches, roads, and other necessary works of improvement as it may deem proper and necessary.

N.C.G.S. § 146-78 (1943); *see also* 2 N.C. Cons. Stat. § 7605 (1919); 2 N.C. Rev. § 4036 (1905); 2 N.C. Code § 2508 (1883); 1854 Rev. Code, Ch. 66, § 5; Ch. XXIII, sec. 5, 1836-37 N.C. Sess. Laws at 132. Further, in the statutes the legislature authorized the sale of the marshlands by the following language or its equivalent:

> The state board of education is authorized and directed to sell and convey the swamp lands [including marshlands] at public or private sale at such times, for such prices, in such portions, and on such terms as to it may seem proper . . . . The proceeds, as also money received on entries of vacant land, shall become a part of the state literary fund.

N.C.G.S. § 146-94 (1943); *see also* 2 N.C. Cons. Stat. § 7621 (1919); 2 N.C. Rev. § 4049 (1905); 2 N.C. Code § 2514 (1883); 1854 Rev. Code, ch. 66, § 11; Ch. XXIII, sec. 11, 1836-37 N.C. Sess. Laws at 134.

In no statute enacted by the General Assembly from 1825 to the present has that body ever expressly stated that it was granting the Literary Fund or the SBE fee simple title to the marshlands free of all public trust rights whatsoever. Therefore, the presumption arising under the public trust doctrine that the General Assembly did not convey title free of public trust rights has not been rebutted and prevails in this case. Applying that presumption, we must conclude that the General Assembly did not convey the marshlands covered by navigable waters to the SBE free of any applicable public trust rights and, therefore, that the SBE could not convey such lands to the plaintiffs' predecessors in title free of such public trust rights. Thus, we conclude that to the extent, if any, the marshlands at issue in this case are covered by navigable waters, the people of North Carolina retain their full public trust rights.

[6] By other assignments of error, the State contends that the trial court erred in holding that N.C.G.S. § 146-20.1(b) "is invalid as it purports to impress upon the marshlands owned by Plaintiffs public trust rights which did not exist in said lands at the time they were conveyed to Plaintiffs' predecessors in title." We need not address the precise contention presented here. It appears that the trial court based this holding on its conclusion that the marshlands within the boundaries of the plaintiffs' deeds were never covered by navigable waters, and therefore no public trust rights exist in them. If this is so, N.C.G.S. § 146-20.1(b) simply does not apply to these plaintiffs' claims. The General Assembly has provided: "No provision of this Chapter [146] shall be applied or construed to the detriment of vested

rights [or] interests . . . acquired prior to June 2, 1959." N.C.G.S. § 146-83 (1991). Thus, to apply N.C.G.S. § 146-20.1 to impose public trust rights on any parts of the plaintiffs' marshlands not covered by navigable waters and which therefore are free of public trust rights in this case would be contrary to N.C.G.S. § 146-83.

[7] By another assignment of error, the State contends that the trial court erred as a matter of law when it expanded plaintiff Louise deR. Smith's complaint to add an allegation inconsistent with a stipulated fact. We disagree.

Prior to trial, the parties entered certain stipulations of fact to narrow the issues. The State contends that the parties stipulated to the boundaries of the various tracts of submerged lands and to the plaintiffs' chains of title. Moreover, the State contends that the judgment of the trial court adopted stipulations saying (1) the mean low water mark of Middle Sound is the landward boundary of the 1926 deed from the SBE to J.F. Roache and wife, the sole source of title asserted by the plaintiff Smith; and (2) Smith lacked a connected chain of title to that deed for the lands between the mean high and low water marks.

The trial court adopted the following relevant stipulated facts:

> GG. Louise deR. Smith has linked her chain of title for that portion of said submerged land lying waterward (in southeasterly direction) of the mean low water mark of Middle Sound and landward of the western right-of-way line of the Intracoastal Waterway to a deed from the State Board of Education to J.F. Roache . . . and wife, Edith M. Roache dated April 26, 1926 and recorded in Book 173 at Page 309.
>
> HH. Louise deR. Smith has not linked her chain of title for the marshland lying between the mean high and mean low water marks at the western shoreline of Middle Sound to the Roache Board of Education deed. The western (landward) boundary of the Roache Board of Education deed is the mean low water mark at the western shoreline of Middle Sound; therefore, the Roache deed does not describe the marshland located to the west (landward) of the mean low water mark of Middle Sound.

Taken in the context of the entire judgment of the trial court, we conclude that the stipulation and the foregoing findings of the trial court that the plaintiff Smith "has not linked her chain of title for the marshland lying between mean high and mean low water marks . . . to

the deed from the SBE to the Roaches" was not truly a stipulation that there was any break in Smith's chain of title; instead, it was a stipulation that the description of the property in the deed from the SBE to the Roaches did not include a metes and bounds description that included "the marshland lying between the mean high and mean low water marks at the western shoreline of Middle Sound."

The stipulations, although unartfully drawn, were stipulations as to the description contained within the SBE deed to the Roaches and were not stipulations concerning the accuracy of the description contained therein or concerning any gap in the chain of title. The parties could only stipulate to the facts which were contained in the deed itself. However, what the boundaries of a deed are is a question of law for the court; where they are is a question of fact for the jury. *Moore v. Whitley*, 234 N.C. 150, 66 S.E.2d 785 (1951); *Tatem v. Paine*, 11 N.C. 64 (1825).

Even though stipulations are encouraged by the courts, they will be restricted to the intent manifested by the parties in the agreement. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972). "[I]n ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished." *Outer Banks Contractors v. Forbes*, 302 N.C. 599, 604-05, 276 S.E.2d 375, 380 (1981) (citing *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79). The trial court, in construing the stipulations entered into by plaintiff Smith, properly concluded that plaintiff Smith did not intend to admit anything other than what the deed said and did not intend to waive any rights concerning her claim to marshland located between the high and low water marks of Middle Sound.

The trial court recognized that "a mistake or apparent inconsistency in a deed description shall not be permitted to defeat the intent of the parties if the intent appears in the deed." *Miller v. Miller*, 34 N.C. App. 209, 211, 237 S.E.2d 552, 554 (1977). The Roache deed contains the following description:

> BEGINNING at an iron pipe near the high water mark of Middle Sound, said iron pipe being O.T. Wallace's southeast corner and the northeast corner of the sub-division known as "Queene Point", and running thence:

1. South 42 degrees 55 minutes east with the line of O.T. Wallace's [m]arsh land about four-thousand nine-hundred (4900) feet to the center of the Banks Channel.

2. Thence in a southwesterly direction with the center of said Banks Channel, taking in and including all the marsh land two-thousand four-hundred (2400) feet to a corner in the center of said Banks Channel.

3. Thence north 42 degrees 30 minutes west five-thousand one-hundred (5100) feet to an iron pipe in the center of Barren Inlet Creek. ([I]f the southeast end of this line be extended it will pass through a point "D" shown on the attached map, said point "D" can be accurately located, as it is tied to the mainland by triangulation from the U.S. Coast Survey Triangulations Stations. Said point "D" is also located in approximately the center of the property line that divided the Banks land owned by George H. Hutaff and Chas. B. Parmele. The next course ties the northwest end of this line so that the line can be definately [sic] located[.])

4. Thence north 37 degrees east five-hundred (500) feet to a concrete monument located near the high water mark on "Queene Point".

5. Thence in a northeasterly direction along the low water mark of the main land one-thousand eight-hundred (1800) feet to the beginning.

The trial court found that the intent of the parties in the SBE deed to the Roaches was to convey those lands between the mean high water mark and the mean low water mark of Middle Sound. We agree that a careful reading of the Roache deed manifests this intent, as the beginning point of the deed is the high water mark of Middle Sound, and the description returns to this point, but then says "along the *low* water mark . . . to the beginning." (Emphasis added.) The trial court did not err in concluding that the use of the word "low" rather than "high" was a mere clerical error in the deed description and correcting that error in its judgment. Accordingly, this assignment of error is without merit.

[8] In conclusion, we must vacate the judgment of the trial court and remand this case to the trial court for its further consideration. The trial court correctly rejected the lunar tides test and accepted the navigability in fact test in determining whether waters in question in this case are navigable in law. However, it appears that the trial court may

have decided the issue of navigability in fact in this case solely on the basis of whether the waters at issue were actually being used for or had historically actually been used for navigation, rather than on the proper basis of whether the waters were such that navigation on them by watercraft was possible even if no watercraft had ever actually navigated on them. As we have indicated in this opinion, whether waters are navigable in fact is to be determined by their capacity to support watercraft used for pleasure or commercial purposes, not by whether they ever have actually been used for purposes of navigation. In this connection, although evidence of present or past actual navigation of the waters in question is evidence tending to support a finding that the waters are navigable in fact, such evidence will not be needed in every case in order to establish navigability in fact.

Additionally, certain findings and conclusions of the trial court appear to be unclear. For example, the trial court found upon stipulations that the lands at issue in this case were marshlands between the high water mark and the low water mark of the sound. Further, the trial court found that at the time the SBE conveyed the lands in question to the plaintiffs' predecessors in title, those lands were comprised entirely of marshlands. Nevertheless, in addition to settling the status of the plaintiffs' titles to marshlands, the trial court's judgment also purports to settle questions of title with regard to lands underlying the open and navigable waters of Howe Creek.

We imply no criticism here of the able trial court. As we have indicated throughout this opinion, the law involving the public trust doctrine has been recognized by this and other courts as having become unnecessarily complex and at times conflicting. However, the material facts found from the stipulations of the parties and set forth in the judgment leave us in a sufficient state of apparent inconsistency and conflict in respect to the properties conveyed that we cannot safely reach a final resolution as to the rights of the parties before us on appeal. In such situations, it is necessary to vacate the judgment of the trial court and remand to the trial court in order that it may have the opportunity to determine the facts presented for decision accurately and truly upon a proper interpretation of the applicable law. *Lackey v. Hamlet City Bd. of Educ.*, 257 N.C. 78, 125 S.E.2d 343 (1962); see generally 1 Strong's North Carolina Index 4th *Appeal and Error* § 517 (1990), and cases cited therein. Accordingly, the judgment in this case is vacated, and this case is remanded to Superior Court, New Hanover County, for such further proceedings, not inconsistent with this opinion, "as to justice appertains and the rights of the par-

ties may require." *Calaway v. Harris*, 229 N.C. 117, 120, 47 S.E.2d 796, 798 (1948).

JUDGMENT VACATED AND CASE REMANDED.

STATE OF NORTH CAROLINA v. DESMOND KEITH CARTER

No. 319A93

(Filed 8 December 1995)

1. Criminal Law § 1337 (NCI4th)— capital sentencing—prior violent felony—instruction—personal violence by defendant—supporting evidence—absence of prejudice

The trial court's isolated reference to defendant's personal threat or use of violence in its instruction on the prior conviction of a violent felony aggravating circumstance did not require the jury to find that defendant personally threatened or used violence during a prior robbery in order to find the existence of this circumstance where language in other portions of the instruction and on the issues and recommendation form properly referred to a "felony involving the use or threat of violence to the person." However, evidence that defendant had a gun and inflicted physical violence on the robbery victim was sufficient to support this aggravator even under an instruction requiring personal violence or threats by defendant, and the instruction, even if incorrect, had no probable impact on the jury's sentence recommendation. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law § 680 (NCI4th)— capital sentencing—mitigating circumstance—peremptory instruction

The trial court did not err by giving the pattern peremptory instruction that the jury should find a mitigating circumstance "if one or more of you finds the facts to be as all the evidence tends to show" rather than giving defendant's proposed instruction that "all of the evidence shows that this is true." The court's instruction properly left the credibility determination to the jury and permitted individual jurors to disbelieve the evidence if they so chose.

Am Jur 2d, Trial § 1441.

3. Criminal Law § 1341 (NCI4th)— capital sentencing—pecuniary gain aggravating circumstance—sufficiency of evidence

The State's evidence was sufficient to support the trial court's submission of the pecuniary gain aggravating circumstance in a capital sentencing proceeding where it tended to show that, although defendant said he initially asked the victim to "lend him money," defendant then stabbed the victim when she refused to give him money, and after killing her, he stepped over her dead body, took fifteen dollars the victim had placed beside a telephone, and went to buy cocaine. N.C.G.S. § 15A-2000 (e)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

4. Criminal Law § 1313 (NCI4th)— capital sentencing—question by prosecutor—no insinuation of parole possibility

The prosecutor's question in a capital sentencing proceeding during cross-examination of defendant's counselor while he was in a New York prison asking if she had an opinion as to whether defendant would be able, "if given some opportunity at some point, to abide by the law" did not improperly insinuate that defendant might later be released from prison on parole where the question was directed toward defendant's ability to adapt to prison life if given a life sentence. Further, the court's sustaining of defendant's objection to the question advised jurors that they should not consider the question.

Am Jur 2d, Trial §§ 575, 576.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 ALR5th 700.

5. Criminal Law § 680 (NCI4th)— capital sentencing—mitigating circumstance—uncontradicted evidence—peremptory instruction

In a capital sentencing proceeding, when submitting to the jury uncontradicted evidence supporting a mitigating circumstance, the appropriate device is a peremptory instruction rather than a directed verdict. Therefore, the trial court did not err in giving a peremptory instruction on two statutory mitigating circumstances rather than defendant's proposed "directed verdict peremptory instruction."

Am Jur 2d, Trial § 1441.

6. Criminal Law § 680 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—peremptory instruction—mitigating value—insufficient evidence

The trial court did not err by refusing to give defendant's proposed peremptory instruction on the nonstatutory mitigating circumstances that he responds well to a structured environment such as prison and relates well to jail and prison staff where the proposed instruction required jurors to assign mitigating value to nonstatutory mitigating circumstances. Further, the evidence to support these mitigating circumstances was not uncontradicted and thus would not have entitled defendant to a peremptory instruction where there was evidence that, while defendant was in prison in New York, it was not until defendant realized that good behavior and participation in prison programs would expedite his release that he began conforming to the requirements of the system, and a county jailer testified that while defendant was awaiting trial on the current charges, he was assigned to move defendant to another cell, defendant refused to comply and told the jailer he would need more deputies, and defendant acquiesced only after the jailer called for help.

Am Jur 2d, Trial § 1441.

7. Criminal Law § 1373 (NCI4th)— death sentence not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in other cases, considering both the crime and the defendant, where the jury convicted defendant under both the felony murder rule and the theory of malice, premeditation, and

deliberation; the victim was killed in her own living room in the middle of the night; defendant chose to kill a person who had treated him with kindness and compassion, for whom he had done yard work in the past, and who had been his neighbor for quite some time; defendant stabbed the victim over thirteen times with an eight-inch butcher knife; one of the stab wounds penetrated to a depth of six inches, and at least three others were four inches deep or more; the victim was a seventy-one-year-old woman who suffered from cancer and arthritis, and defendant was a healthy twenty-four-year-old man; and defendant killed the victim for fifteen dollars to enable him to buy crack cocaine which he smoked while she lay dead on her living room floor.

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 McHugh, J., at the 21 June 1993 Criminal Session of Superior Court, Rockingham County, on a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for robbery with a dangerous weapon was allowed 27 September 1994. Heard in the Supreme Court 12 September 1995.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder and robbery with a dangerous weapon of Helen Purdy, his neighbor. The jury found defendant guilty on both charges and recommended a sentence of death for the first-degree murder. The trial court sentenced accordingly on the murder charge and sentenced defendant to forty years in prison for the robbery, to begin at the expiration of the murder sentence or "any judgment in place of" it. 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:

The victim, Helen Purdy, was a seventy-one-year-old resident of Eden, North Carolina. She lived alone beside the home of defendant,

his grandmother, and his uncle. Because of her fragile health, friends and family members took turns looking after and checking in on her. On 9 March 1992 Gchuther Morris, Mrs. Purdy's sister-in-law, tried calling Mrs. Purdy all day and became concerned when she did not get an answer. Around 9:15 p.m. Linda Purdy, Shirley Gray, and Ralph Carter went to Mrs. Purdy's house. They found her dead on her living room floor, lying in a pool of blood. Aside from the front door being unlocked, everything in the house generally appeared in order; there was no sign of a struggle. In Mrs. Purdy's bedroom the bed covers were turned back to one side, as if someone had been lying on the bed, and Mrs. Purdy's purse was lying open on the bed.

Dr. Robert L. Thompson, the forensic pathologist who performed the autopsy, found thirteen cut and stab wounds as well as numerous minor cuts and abrasions to Mrs. Purdy's hands, neck, and face. The significant findings included: (1) two incised or cut wounds in the victim's right chest, both with depths of 4¾ inches, one penetrating the pericardium sac and the other the liver; (2) two incised or cut wounds in the left chest with depths of 4½ inches and 6 inches, again penetrating the pericardium sac and liver; (3) two incised or cut wounds in the left armpit with depths of 6 inches and 3½ inches; (4) wounds to the back of the left arm, two of which went completely through the arm; (5) a small abrasion of the lower lip; (6) a superficial one-inch-long cut in the area of the left ear and a one-half inch cut below the angle of the jaw on the left side; (7) scratches and cuts on both wrists; (8) a 5⅛ inch cut on the left first finger, described as a defensive wound; and (9) a large incised wound in the left side of the neck measuring 4 inches down to the bone. Dr. Thompson opined that death was caused by the wounds to the chest, none of which would have been instantly fatal. It would have taken several minutes for death to occur.

Nadine Carter, defendant's grandmother, testified that on the morning of 9 March 1992, defendant had called her into his room and told her he needed to go to the hospital. He said he had been accosted by four young white males at the car wash when he was coming home the night before and had been stabbed in the leg. Defendant had a towel wrapped around his leg. When Mrs. Carter looked at defendant, she knew something was not right, but she believed his story and did not question him further. She then drove defendant to Morehead Hospital.

Mary Hertle, an emergency room employee of Morehead Hospital, was on duty on 9 March 1992. Defendant came to the emergency room around 8:30 a.m. reporting a puncture wound two or three inches deep to the left inner thigh. Defendant said four white men had assaulted him at the car wash the previous night. Although defendant smelled of alcohol and said he did not come earlier because he was too drunk, Hertle observed that defendant did not appear intoxicated or in pain, his speech was not slurred, and he gave what appeared to be appropriate answers to questions.

Mark Joyce, an Eden police officer, also saw defendant at Morehead Hospital that morning. Defendant told him essentially the same story about his leg wound. In Joyce's opinion, although defendant had been drinking and there was a strong odor of alcohol about him, defendant was not impaired.

Greg Moore, an Eden Police Department detective, was assigned to investigate the murder. He had seen defendant on crutches on 9 March 1992 at the magistrate's office and knew defendant was reporting a knife wound to his leg. Detective Moore also knew defendant lived beside the victim. At approximately 8:40 a.m. on 10 March 1992, Detective Moore and SBI Agent James Bowman interviewed defendant at the Rockingham County jail. At that time, defendant was incarcerated on another charge for which he had been arrested on 9 March 1992. In substance, defendant initially gave these officers the following version of the events leading to his leg wound. Defendant said three white men had jumped him on Monday, 9 March 1992, about 4:30 or 5:00 a.m. He had been riding around and drinking with his friends, Quentin Broadnax and Jamel Price. After Broadnax dropped him off, defendant walked around before stopping at the corner of Henry and Early Streets. Defendant said he "threw up" at this time. Defendant then sat on the steps at the YMCA for a few hours. He said he may have dozed off.

According to defendant, he had been drinking beer and liquor for most of the day and evening. After leaving the YMCA steps, defendant walked up Monroe Street towards home and was in the car wash parking lot when he saw some people getting into a truck. He could tell they were white males. The truck was directly across the street from Mrs. Purdy's house. He said he tried to cut through the lot to avoid them, but they pulled toward him and began shouting obscenities. When defendant hollered back, the men stopped the truck and began chasing him. Defendant tried to run, but they caught him, and

he was too drunk to defend himself. As one man came up on his left side, defendant tried to kick him but got stabbed in the left leg in the process.

In the course of this interview, Detective Moore was advised that defendant had a doctor's appointment at 9:45 a.m. Prior to leaving for the appointment, defendant signed a consent to have a blood sample drawn. Following the doctor's appointment, Moore and Bowman again interviewed defendant. Prior to commencing the second interview, defendant was told a butcher knife had been found in the lot near his residence. Thereafter, defendant confessed to the officers and gave a new statement. Detective Moore testified that defendant told the officers he went to the home of Helen Purdy in the early morning hours of 9 March 1992. He had been drinking and using cocaine and wanted to borrow money from Mrs. Purdy. Mrs. Purdy let defendant into her home and initially told him he could borrow five dollars. She then changed her mind and said he could not have any money. Mrs. Purdy then went towards the telephone, whereupon defendant asked her not to call his grandmother. Defendant stated that at that point Mrs. Purdy noticed defendant had a knife, and she became excited. She tried to push defendant, and in the process the knife went in her. Defendant pulled the knife out and stuck it in his own leg. Defendant said he did not know what happened after he cut himself and did not know how many times he stabbed Mrs. Purdy. Prior to going home defendant took fifteen dollars that Mrs. Purdy had placed near the telephone and used it to buy cocaine. He then threw the knife into a field next to his house. Agent Bowman testified that blood drawn from defendant the day after the murder was not tested for alcohol or drug content.

The State introduced a knife found across the street from the murder scene. Lieutenant Walter Johnson testified that the knife was found on the grass in plain view and that no effort had been made to hide it. Blood of Mrs. Purdy's type was found on the knife. Mrs. Carter identified the knife as one from her kitchen.

Denise Smith, a girlfriend of defendant's at the time of the murder, testified that in the summer of 1991, she asked defendant if he used cocaine or any other drug. Defendant said "no" but told her that if a person is arrested, he should say he was under the influence of drugs and he would get a lighter sentence. After defendant was arrested for Mrs. Purdy's murder, Ms. Smith visited defendant in jail. While in the presence of another detainee, defendant commented he

had been to a mental health appointment. When the other detainee mimicked *The Twilight Zone* tune, defendant stated, "Man, I'm not crazy."

Defendant also presented evidence. Jamel Price, defendant's friend, testified that he and defendant spent the day together on 8 March 1992. Defendant began drinking at approximately 12:30 p.m. that day. Price and defendant visited various establishments in Reidsville; and Price watched defendant consume more than one hundred ounces of beer, some wine, and some liquor. Price did not see defendant take drugs, but he was not with him all the time.

Another companion, Quentin Broadnax, gave a similar account. On cross-examination Broadnax said that they went to defendant's house before going to Reidsville and that he believed defendant got five dollars from Mrs. Carter.

Defendant testified in his own behalf. He said he spent the day on 8 March drinking beer, wine, and bootleg whiskey. He also consumed a twenty-five dollar bag of powder cocaine, a twenty dollar rock of crack cocaine, and two pills which he identified as "Zannex." During the early morning hours of 9 March, he had wanted to buy cocaine. Although he had fifty or sixty dollars on him, he wanted to borrow more so he could get as much cocaine as possible. Mrs. Purdy's light was on, so he went to her door to ask for money. The remainder of defendant's testimony corresponded with the confession he had given to Detective Moore and Agent Bowman.

Defendant presented other evidence tending to show that he was mentally impaired at the time of the murder and that he had had a tumultuous childhood. Dr. John Warren, a clinical psychologist who examined defendant after his arrest, testified that defendant had a low average IQ and suffered from a borderline personality disorder as well as a substance-abuse problem. He opined that defendant's mental capacity was diminished at the time of the offense, making it very unlikely that he could make and carry out a plan to kill.

During the sentencing phase, the State introduced evidence concerning the facts and circumstances of defendant's prior conviction for second-degree robbery. Darwin Neely, the victim of that robbery, testified that in March 1986 defendant and three other men abducted him, forced him into a car at gunpoint, stole his money and personal items, and temporarily held him hostage. All four men had guns. The State introduced a certified copy of a judgment from Nassau County

Court, State of New York, which had been entered upon defendant's plea of guilty to second-degree robbery. Defendant served four years in prison for that offense.

Defendant's penalty-phase evidence tended to show that he was well behaved, kind, and loving. Dr. Warren testified that defendant was under the influence of emotional disturbance at the time of the crime and that his ability to appreciate the criminality of his conduct was impaired. Dr. Warren found that defendant would benefit from a structured environment, had done well in prison before, and did not have disciplinary problems. Lucy Moriello, a counselor with the New York Department of Corrections for eleven years, characterized defendant's time in prison in New York as good conduct, with appropriate behavior and no disciplinary problems.

On rebuttal, the State presented evidence of defendant's insolence while being held pretrial at the Rockingham County jail.

Prior to the presentation of any evidence, counsel for defendant conceded that defendant had stabbed and killed Mrs. Purdy, but contended that it was second-degree murder, not first. The jury found defendant guilty of first-degree murder on the theories of premeditation and deliberation and felony murder. It also found him guilty of robbery with a dangerous weapon. At the capital sentencing proceeding, the jury found as aggravating circumstances that the crime was committed for pecuniary gain and that defendant had been previously convicted of a felony involving the use or threat of violence. The jury rejected all proposed statutory mitigating circumstances and found three of the eleven nonstatutory mitigating circumstances submitted. It unanimously recommended a sentence of death, which the trial court accordingly imposed.

[1] Defendant's assignments of error all pertain to the sentencing phase. First, defendant argues that the trial court erred in submitting the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3) (Supp. 1994), because the evidence did not support the circumstance as it was submitted to the jury. The trial court instructed the jury, in pertinent part:

> If you find from the evidence, . . . beyond a reasonable doubt that on or about March 9th, 1992, the defendant had been convicted of second degree robbery and that the defendant threatened to use violence to the person in order to accomplish his criminal act and that the defendant killed Helen Moore Purdy after he committed

the second degree robbery, you would find this aggravating circumstance . . . .

Defendant contends that this instruction required the jury to find that defendant personally threatened or used violence during the prior robbery, and he argues that the evidence did not support such a finding.

The aggravating circumstance reads as follows: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3). Defendant concedes that this Court has previously interpreted this circumstance to require only that "the felony for which he was convicted involved the 'use or threat of violence to the person.' " *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979). He argues, though, that the trial court's instruction changed the theory of the circumstance by requiring a more exact showing that defendant himself threatened or used violence during the earlier robbery. We disagree.

Defendant did not object to the instruction at trial, so we review for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This instruction, taken as a whole, would not have been viewed by a reasonable juror as limiting the aggravating circumstance so as to require a showing that defendant personally used or threatened violence. Early in the instructions, the court told the jury the issue was, "had the defendant been previously convicted of a felony *involving* the use or threat of violence to the person." (Emphasis added.) The issue was identically worded on the issues and recommendation form. A reasonable juror thus would not likely have interpreted an isolated reference to defendant's personal threat or use of violence as limiting the circumstance contrary to the clear wording in other portions of the instructions and on the forms submitted to the jury.

If the instruction could have been reasonably so construed, defendant is still not entitled to relief. The State presented substantial evidence that defendant did in fact threaten and use violence during the commission of the robbery. Darwin Neely, the victim of the robbery, testified that in 1986 four men, one of whom was defendant, seized him as he walked down a street in New York. They forced him into a car at gunpoint and told him he was going to be held overnight so he could not testify before a grand jury regarding a crime he had witnessed. Prior to his release, Neely's abductors stole several hundred dollars from his person, as well as his wallet and personal items

in his gym bag. Each of his abductors had a gun. Detective Gary Ferrucci, who investigated the Neely robbery, testified that defendant stated to him that he was holding a "BB type of gun" when Neely was abducted, that he "grabbed the guy and put him in the rear seat," and that he "tied [Neely's] hands behind his back." The physical violence defendant inflicted on the victim, along with the threat the presence of a gun created, was sufficient to support the aggravator even under the instruction defendant challenges. We thus cannot conclude that the instruction, if indeed incorrect, had a probable impact on the jury's sentence recommendation. This assignment of error is overruled.

[2] Next, defendant argues that the trial court erred in using the pattern peremptory instruction rather than defendant's proposed instruction regarding two statutory mitigating circumstances. Defendant's requested instruction read: "If you find the [described mitigating circumstance] exists, and I instruct you that all of the evidence shows that this is true, you would so indicate . . . ." The trial court's actual instruction was: "[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." Defendant contends the proposed instruction clearly calls the jury's attention to the fact that the court finds the evidence uncontradicted and substantial, whereas the instruction as given did not so alert the jury.

A peremptory instruction tells the jury that if it finds that the facts exist as all the evidence tends to show, it will answer the question put to it in the manner directed by the trial court. *Chisholm v. Hall*, 255 N.C. 374, 376, 121 S.E.2d 726, 728 (1961). Even when peremptorily instructed, however, jurors have the right to reject the evidence if they lack faith in its credibility. *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). The instant instruction properly left the credibility determination to the jury and permitted individual jurors to disbelieve the evidence if they so chose. Further, this Court has described the situation in which a peremptory instruction is appropriate in language virtually verbatim to that used here. *See State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). The instruction here is in conformity with that language and with the North Carolina Pattern Instructions relating to peremptory instructions for mitigating circumstances, and it fairly represents applicable legal principles. *See* N.C.P.I.—Crim. 150.10 (1995). Finally, "[n]either

statutory nor case law requires that the trial court's charge be given exactly in the words of the tendered request for instructions. It is sufficient if the trial court gives the requested instructions in substance." *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). The trial court here gave instructions in accord with the essence of defendant's request. This assignment of error is overruled.

[3] Defendant next argues that the State's evidence was insufficient to support submitting the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6). He contends that the essence of this circumstance is that the killing was for the purpose of getting money or something of value. Because he claims he intended only to borrow money, not to steal it, he asserts that the murder was not committed for pecuniary gain.

In determining whether there is sufficient evidence to submit an aggravating circumstance, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993). Applying these principles, the case is replete with evidence of defendant's intent to steal from Mrs. Purdy. The evidence showed that defendant was living on his grandmother's resources and wanted money prior to the murder. Although he said he initially asked Mrs. Purdy to "lend him money," the evidence shows that he stabbed her multiple times after she refused to give him any. After killing her, he stepped over her dead body, took her fifteen dollars from beside the telephone, and went to buy cocaine. This evidence clearly supported a finding that the murder was committed for the purpose of procuring money. Thus, the trial court properly submitted the pecuniary gain aggravating circumstance to the jury.

[4] Defendant next contends he was prejudiced by the prosecutor's questions insinuating that defendant might later be released from prison. During the penalty phase, defendant called Lucy Moriello as a witness to support his contention that he had adapted well to prison in New York and that he would also adapt well to prison if given a life sentence here. On cross-examination the prosecutor asked Moriello, "Do you have some opinion based on these occasions that you say you counseled with him as to whether or not he would be able to, if given some opportunity at some point, to abide by the law?" Defendant's counsel objected to the question. Although the objection was sustained, defendant nonetheless argues that the damage was

done because the possibility of release was communicated to the jury. We disagree.

A defendant's eligibility for parole is not a proper matter for the jury's consideration. *State v. Brown*, 320 N.C. 179, 201, 358 S.E.2d 1, 16, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). However, here, as in *Brown*, the word "parole" was never used, and there was no mention of the possibility that a life sentence could mean eventual release. Rather, the question was directed toward defendant's ability to adapt to prison life if given a life sentence. In the context of the surrounding questions, the prosecutor's point was that Moriello did not know and could not predict how defendant would adjust in the North Carolina Department of Correction if given a life sentence. Further, the sustaining of the objection advised the jurors that they should not consider the question. *State v. Greene*, 285 N.C. 482, 495, 206 S.E.2d 229, 237 (1974). We therefore overrule this assignment of error.

At the sentencing hearing, psychiatrist Dr. John Warren testified that defendant suffered from borderline personality disorder, a low IQ, and substance-abuse disorder. Based on these three conditions, he opined that defendant suffered from mental or emotional disturbance at the time of the offense and was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The trial court accordingly submitted to the jury, *inter alia*, the corresponding mitigating circumstances in N.C.G.S. § 15A-2000(f)(2) and (f)(6). The jury unanimously rejected both. Defendant now argues that the trial court erred in refusing to give a "directed verdict peremptory instruction" on these circumstances. He contends that he is entitled to "a directed verdict on a given statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible and uncontradicted" and that such is the case here.

[5] While defendant states that he was entitled to a "directed verdict peremptory instruction," his request was actually for a peremptory instruction. The burden of persuading the jury on the existence of a mitigating circumstance is upon the defendant, and the standard of proof is by a preponderance of the evidence. However, where "all of the evidence . . . , if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *Johnson*, 298 N.C. at 76, 257 S.E.2d at 618. It is true that when a criminal defendant argues that the evi-

dence supporting a mitigating circumstance is uncontradicted, "his position is *analogous* to that of a party with the burden of persuasion seeking a directed verdict." *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983) (emphasis added). He is essentially asking the trial court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979). While the evidentiary standard for a criminal defendant seeking a peremptory instruction may be the functional equivalent of the standard for a civil directed verdict, the two principles are distinct legal entities. In a capital sentencing proceeding, when submitting to the jury uncontradicted evidence supporting a mitigating circumstance, the appropriate device is a peremptory instruction.

Counsel for defendant made a timely written request for a peremptory instruction on the mitigating circumstances in N.C.G.S. § 15A-2000(f)(2) and (f)(6). Although not manifestly clear, it appears that while the trial court refused defendant's proposed instruction, it in fact agreed that defendant was entitled to a peremptory instruction on both circumstances. During the sentencing conference, in response to defense counsel's subsequent oral request for the instruction, the trial court stated, "I believe a [per]emptory instruction may be in order as to the two statutory factors which are being submitted. That is, committed while under the influence of mental or emotional disturbance and capacity to appreciate criminality of the conduct or conform his conduct." The trial court then stated that it would give the following instruction:

> The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence as previously explained to you and as to this mitigating circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you will answer yes to the mitigating circumstance on the issues and recommendations form.

This was not the language defendant requested. However, it embodied the substance of defendant's request and was a proper peremptory instruction. The jury's failure to find these statutory mitigating circumstances does not establish that the jury was prevented from considering or failed to consider them. To the contrary, these mitigating circumstances were submitted and properly instructed upon, and the jury thus was required to consider them.

[6] In a related assignment, defendant argues that the trial court erred in denying his request for a peremptory instruction on the nonstatutory mitigating circumstances that he responds well to a structured environment such as prison and relates well to jail and prison staff. The requested instruction for these nonstatutory mitigators was the same as that which defendant requested concerning statutory 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.

State v. Green, 336 N.C. 142, 173, 443 S.E.2d 14, 32, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Defendant's proposed instruction required jurors to assign mitigating value to nonstatutory mitigating circumstances. This is legally incorrect, and the trial court thus correctly refused to give the requested instruction.

Further, the evidence to support these proposed circumstances was not uncontradicted and thus would not have entitled defendant to a peremptory instruction if such was otherwise legally proper. Defendant's counselor, Moriello, described him as manipulative and as having come into prison with an arrogant attitude. Defendant's print shop instructor in prison noted that "inmate Carter has demonstrated a negative attitude in print shop." Another comment in defendant's prison records describes his attitude as belligerent. Defendant is quoted as stating that staying out of trouble in prison was hard for him. Prison records describe defendant as streetwise and jailwise and contain opinions that these traits may explain how he was able to avoid misbehavior reports. Dr. Warren testified that defendant was denied parole several times because he did not follow the recommendations and orders of the prison staff. Although defendant's records indicate that he showed improved behavior later, the thrust of the evidence was that it was not until defendant realized that good behavior and participation in prison programs would expedite his release that he began conforming to the requirements of the system. Consequently, there was evidence to contradict the proposed

nonstatutory mitigator that defendant was able to adapt well to the structured environment of a prison.

Rockingham County jailer William McClerken testified that while defendant was awaiting trial on the murder and robbery charges, McClerken was assigned to have him change cells. Defendant advised him that he would not comply and that if McClerken was going to move him, McClerken needed to get more deputies. It was only after McClerken called for help that defendant acquiesced. Therefore, the evidence that defendant related well to jail and prison staff likewise was not uncontradicted, and the trial court thus properly denied defendant's requested instruction. 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 using the word "satisfy" in its definition of the burden of proof applicable to mitigating circumstances; (2) the trial court erred by giving an unconstitutionally vague and overbroad instruction regarding the pecuniary gain aggravating circumstance; (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; and (4) the trial court erred by giving an improperly restrictive definition of mitigation. Defendant presents no compelling reason to overrule our precedents on these issues.

PROPORTIONALITY REVIEW

[7] 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 found him guilty of robbery with a dangerous weapon. At the capital sentencing proceeding the trial court submitted two aggravating circumstances, both of which the jury found: that defendant had been previously convicted of a violent

felony, N.C.G.S. § 15A-2000(e)(3); and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). We conclude that the evidence supports both circumstances. We further conclude 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 (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 (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." *Green*, 336 N.C. at 198, 443 S.E.2d at 47.

The trial court submitted four statutory mitigating circumstances: defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6); and defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). Notably, the jury found none of these to exist. The trial court also submitted the "catchall" circumstance, N.C.G.S. § 15A-2000(f)(9), and the jury answered it in the negative. The jury found only three nonstatutory mitigating circumstances—that defendant confessed his guilt and cooperated with law enforcement officers, that his parents had failed to provide him with a nurturing and supporting relationship, and that his grandmother had tried to get substance-abuse help for him just prior to the crime. The jury determined that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death.

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). Further, the victim was killed in her 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." *Brown*, 320 N.C. at 231, 358 S.E.2d at 34. Defendant chose to kill a person who had treated him with kindness and compassion, for whom he had done yard work in the past, and who had been his neighbor for quite some time. Additionally, the evidence indicated that defendant stabbed the victim over thirteen times with an eight-inch butcher knife. One of the stab wounds penetrated to a depth of six inches, and at least three others were four inches deep or more. Finally, the victim was a seventy-one-year-old woman who suffered from cancer and arthritis. At 5'2½" tall and 119 pounds, she was no match for defendant, a healthy twenty-four-year-old man. Defendant killed her for fifteen dollars to enable him to buy crack cocaine which he smoked while she lay dead on her living room floor. These features distinguish this case from those in which we have held the death penalty disproportionate.

Defendant contends that this case is disproportionate because other robbery- and burglary-murder cases resulted in life sentences rather than death sentences. While we cannot distinguish all of those cases from this one, "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 also contends this case is similar to *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), one of the cases in which we found a death sentence disproportionate, and that his sentence must therefore be vacated. We disagree. In *Young* the defendant, age nineteen, and two companions went to the victim's home and robbed and killed him. Defendant stabbed the victim twice, and one of his companions "finished him" by stabbing him five or six more times. The three young men then stole money and valuable coins and fled the scene. The defendant's two companions were not tried capitally because

they received a plea bargain in exchange for testifying against the defendant.

The defendant's crime in this case is readily distinguishable from that in *Young*. In *Young* the aggravating circumstances found were that the murder occurred during a robbery and was motivated by pecuniary gain. Pursuant to *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), these circumstances would now be held redundant, leaving only one aggravator as opposed to the two clearly discrete aggravators found here. The most obvious distinctions, however, are the ages of the defendants and their prior criminal histories. In *Young* there was no finding of a prior felony conviction, and the defendant was nineteen years old. Defendant here, by contrast, was twenty-four years old and had already served four years in prison for second-degree robbery. Additionally, the defendant in *Young* stabbed the victim twice, while the defendant here stabbed his victim more than thirteen times. These features distinguish this case from *Young* as well as from the six other cases wherein we have held the death sentence disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. 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. 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).

Considering this crime and this defendant, particularly the features noted above, we conclude that the death sentence is not excessive or disproportionate. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. GLENN EDWARD CHAPMAN

No. 569A94

(Filed 8 December 1995)

1. Constitutional Law § 343 (NCI4th)— first-degree murder—pretrial conference—defendant absent—no error

There was no error in a prosecution for two first-degree murders where defendant was absent from the pre-trial conference

required in capital cases by Rule 24 of the General Rules of Practice for the Superior and District Courts. A defendant's right to be present at all stages of his trial does not arise prior to the commencement of trial, and the Rule 24 conference, which takes place before the jury panel is selected and sworn, is not a stage of the trial. The pretrial conference is an administrative device intended to clarify the charges against the defendant and assist the prosecutor in determining whether any aggravating circumstances exist which justify seeking the death penalty. Defendant has not demonstrated that the Rule 24 pretrial conference implicated his confrontation rights or that his presence at the conference would have had a reasonably substantial relation to his opportunity to defend.

Am Jur 2d, Criminal Law §§ 695, 696, 910, 911.

2. Criminal Law § 1334 (NCI4th)— first-degree murder—aggravating circumstance—not mentioned at pretrial conference

There was no error in a prosecution for two first-degree murders where the prosecutor mentioned at the Rule 24 pretrial conference the aggravating circumstance of a previous conviction involving a violent felony and did not mention the course of conduct aggravating circumstance, but that circumstance was submitted to the jury. While Rule 24 requires the trial court and the parties to consider the existence of evidence of aggravating circumstances, nothing in the rule intimates that the prosecution must enumerate with finality all aggravating circumstances it will pursue at trial and a trial court cannot require the prosecution to declare which aggravating circumstances it will rely upon at the punishment phase.

Am Jur 2d, Criminal Law §§ 598, 599.

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

There was no error in a prosecution for two first-degree murders where the trial court denied defendant's motion to permit *voir dire* of potential jurors regarding their conceptions of parole eligibility. The jury here did not inquire about parole eligibility, the prosecutors did not argue future dangerousness to the jury, and defendant's contention that arguing the aggravating circumstances of a previous felony conviction involving violence and

course of conduct amount to arguing future dangerousness is unpersuasive. Defendant has not advanced any reason for the N.C. Supreme Court to reverse its precedents holding that prospective jurors should not be questioned about their opinions concerning a defendant's eligibility for parole upon conviction.

Am Jur 2d, Jury §§ 205 et seq.

4. Evidence and Witnesses § 1009 (NCI4th)— first-degree murder—unavailable witness—statement read to jury

There was no error in a prosecution for two first-degree murders where a fire inspector was allowed to read to the jury a statement from a vagrant who could not be located at the time of the trial and who had been living in a vacant house where one of the victims was found. The statement contained sufficient indicia of reliability to be admissible in that the vagrant had personal knowledge of the underlying event, there is no evidence that he had any reason to tell the fire inspector anything other than the truth, and there is no evidence that he ever recanted this statement. Even if the admission of this testimony was erroneous, defendant cannot show prejudice in light of his incriminating remarks to several others stating that he killed this victim.

Am Jur 2d, Evidence §§ 690-707.

5. Criminal Law § 300 (NCI4th)— first-degree murder—joinder of two charges against one defendant—no error

There was no error in the joinder of two first-degree murder charges where the facts incident to the two murders reveal a common *modus operandi* and a temporal proximity sufficient to establish a transactional connection, the defendant did not cite and the Court was not aware of any requirement that there be a commonality of witnesses, and, although defendant argued that he would not have been convicted of the Conley murder without the spillover of the stronger Ramseur evidence, there was substantial evidence from which the jury could determine that defendant killed Conley. Viewing the record as a whole, the offenses were not so separate in time and place and so distinct in circumstance that joinder was unjust and prejudicial to defendant. N.C.G.S. § 15A-926(a).

Am Jur 2d, Actions §§ 86 et seq.

6. Criminal Law § 1337 (NCI4th)— first-degree murder—aggravating circumstances—previous conviction involving violence

The record in a prosecution for two first-degree murders supported the aggravating circumstance of a previous felony conviction involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), in that defendant testified that he had been convicted of common law robbery within the last ten years, the State offered records illustrating the conviction, and the victim testified that defendant used violence during the robbery.

Am Jur 2d, Criminal Law §§ 598, 599.

7. Criminal Law § 1347 (NCI4th)— first-degree murder—aggravating circumstances—course of conduct

The record in a prosecution for two first-degree murders supported the aggravating circumstance of course of conduct, N.C.G.S. § 15A-2000(e)(11), where the two victims were young women with drug habits; defendant knew both and had smoked crack with each; their bodies were disposed of in virtually the same fashion and within two blocks of each other; both victims suffered blunt-force injuries to their heads; defendant was seen with, and had sex with, one victim shortly before her death; he made incriminating statements to three people about having killed the other victim; and defendant had a foreboding attitude toward women when he was smoking crack.

Am Jur 2d, Criminal Law §§ 598, 599.

8. Criminal Law § 1373 (NCI4th)— first-degree murder—sentencing—finding of aggravating circumstances and no mitigating circumstances—not evidence of passion or prejudice

There was nothing in the record to support the contention of a defendant convicted of two first-degree murders that the finding of both aggravating circumstances submitted and no mitigating circumstances was evidence of the jury's strong emotional or passionate feeling of prejudice toward defendant.

Am Jur 2d, Criminal Law §§ 625 et seq.

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

A sentence of death for two first-degree murders was not disproportionate where the jury found aggravating circumstances of

course of conduct and a previous felony conviction involving violence. In none of the seven cases in which the N.C. Supreme Court has found the death sentence disproportionate has the defendant been convicted of more than one murder; the two aggravating circumstances found here are among the four which have been held sufficient to justify a death sentence standing alone; none of the cases in which the death sentence was found disproportionate involved a second murder as the course of conduct; the victims here were vulnerable in that they were women who engaged in the high-risk lifestyle of regular drug use; defendant appears to have no remorse; and there is no discernible reason why defendant killed these two women.

Am Jur 2d, Criminal Law §§ 625 et seq.

Justice WEBB dissenting.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Ferrell, J., at the 31 October 1994 Criminal Session of Superior Court, Catawba County, upon two jury verdicts finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 October 1995.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

W. Thomas Portwood, Jr., and Robert W. Adams for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murders of Tenene Yvette Conley and Betty Jean Ramseur and sentenced to death for each murder. He appeals from his convictions and sentences. We conclude that defendant received a fair trial, free of prejudicial error, and that the sentences of death are not disproportionate.

The State's evidence tended to show that Conley was a young, black female who used crack cocaine daily and paid for her habit through prostitution. Conley's body, naked from the waist down, was found in the basement of a vacant house at 649 First Avenue, S.E., in Hickory on 15 August 1992. There was no sign of a forced entry into the house. Defendant, who had been hired in July 1992 to paint the

trim on the outside of the house, had been inside and knew how to get into the house.

Dr. Thomas Clark, a forensic pathologist who performed the autopsy, concluded Conley died as a result of manual strangulation. Dr. Clark opined that the abrasions found about Conley's head and forehead could have been made by contact with any type of blunt object, including the floor. He determined Conley had had sexual intercourse within twelve hours of her death, and DNA analysis of the sperm sample taken from her body matched a sample given by defendant.

Several persons saw defendant and Conley together during the early morning hours of 14 August 1992. Jamar Danner, who sold crack cocaine from his house, saw defendant and Conley together well before daylight. Danner testified that defendant and Conley had come to his house in search of cocaine; they left without purchasing any cocaine and walked toward the house where Conley's body was found. Howard Cowans, who lived within a block of the house in which Conley's body was found, testified that defendant, Conley, and Danny Blackburn came to his home around 3:00 a.m. on 14 August 1992. Defendant was trying to sell a lawn mower. The group smoked crack in Cowans' home. A few minutes after defendant, Conley, and Blackburn went outside, Cowans observed a man and a woman exit Blackburn's car and walk toward the house in which Conley's body was found. Cowans could not identify the man but implied it was defendant, stating that Blackburn did not "give up his old lady's car for anything or anybody." Blackburn testified that after the group finished smoking crack, he offered defendant the use of his car for ten dollars; defendant refused, saying, "she is getting out of the car, she knows what the hell she got to do, she knows what she has got to do." Conley got out of the car and began walking up the street, followed closely by defendant.

In a statement made to police on 18 September 1992, defendant acknowledged painting and cleaning the house in which Conley's body was found. However, he stated he went to Sunny Valley, not Cowans' house, on 14 August 1992. He also denied leaving Sunny Valley with Conley, insisting that when he left, Conley and Blackburn were together. Defendant's statement also noted: "When I smoked [sic] rock I don't want to be around women. They are always wanting something and bothering me and s—-."

Ramseur, who was white, had been dating Chris Walker for about three years before she died. Ramseur and Walker knew defendant, and the three formerly smoked crack together. Ramseur was on probation and was last seen by her probation officer on 11 June 1992 regarding a probation violation involving the use of controlled substances.

On the morning of 12 June 1992, a fire at 407 Highland Avenue, S.E., in Hickory was reported. Alvin Creasman, a vagrant who had been living in the house, told a fire inspector that he was asleep upstairs when he was awakened by smoke. He noticed a black male and a white female at the house that morning about daybreak. Thomas Rasmussen, an SBI fire investigator, determined that the fire had been caused by human hands, either accidentally or intentionally.

On 22 August 1992 Ramseur's badly decomposed, naked body was found under the house at 407 Highland Avenue. Dr. Brent Hall, the pathologist who performed the autopsy, determined Ramseur had died sometime in June 1992. Although he could not rule out the possibility that Ramseur had been strangled because her body was partially skeletonized, Hall opined Ramseur had died as a result of a blunt-trauma injury to the head consistent with having been struck with a brick.

Defendant told at least three people that he had killed Ramseur. Defendant's cousin, Nicole Cline, testified that in June 1992 defendant told her he had just killed Chris Walker's girlfriend by cracking her in the head with a brick. He pointed from Nicole's residence to the house at 407 Highland Avenue and said he had dragged the body under the house. Brian Cline, Nicole's brother, testified that he overheard this conversation. Following this conversation but before Ramseur's body was discovered, Brian and defendant were driving down Highland Avenue when defendant pointed to the house at 407 and said that if people continued to mess with him, they would "end up like that bitch that was under the house." Lavar Gilliman testified that during the summer of 1992, he overheard defendant say that he had killed someone, that the body was in the house on Highland Avenue, and that defendant was going to burn her body so that it could not be found.

Defendant testified that he knew Conley and had gotten high with her on one occasion. He knew Ramseur through Chris Walker. He admitted having sex with Conley on 13 August 1992 but denied going with her to Cowans' and Danner's houses. Defendant further denied

telling Nicole and Brian Cline that he had killed a woman, and he denied ever having seen Lavar Gilliman before Gilliman testified. He denied killing either woman.

At sentencing the State offered evidence that defendant had been previously convicted of common law robbery. The victim of this robbery testified to defendant's actions during the robbery.

Defendant offered evidence that he provided for Gwyn Anderson and their child and that he was helpful toward his friends and neighbors. His father testified that he always counted on defendant to take care of the house and to help with the other children as defendant was growing up.

Dr. Mark Worthing, a psychologist, testified defendant was of low average intelligence. Defendant had been diagnosed with alcohol and cocaine dependency. Dr. Worthing opined defendant could appreciate the criminality of his conduct unless he was very severely impaired. Because defendant denied committing the murders, Dr. Worthing was unable to ask specific questions about what drugs he had used at the time of the offenses and thus was unable to determine the extent of defendant's impairment at that time.

The jury found two aggravating circumstances for both murders: that defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the murder for which defendant stood convicted was part of a course of conduct in which defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. Although three statutory and sixteen nonstatutory mitigating circumstances were submitted to the jury, no juror found any mitigating circumstance.

[1] Defendant first assigns as error his absence from the pretrial conference required in capital cases by Rule 24 of the General Rules of Practice for the Superior and District Courts. He contends that his absence from the Rule 24 conference violated his right to be present at every stage of his trial.

The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution " 'guarantees an accused the right to be present in person at every stage of his trial.' " *State v. Daniels*, 337 N.C. 243, 256, 446 S.E.2d 298, 307 (1994) (quoting *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). This right to be present extends to all times dur-

ing the trial when anything is said or done which materially affects defendant as to the charge against him. *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991). A capital defendant may not waive his right to presence. *Daniels*, 337 N.C. at 257, 446 S.E.2d at 307. However, a defendant's right to be present at all stages of his trial does not arise prior to the commencement of trial. *State v. Rannels*, 333 N.C. 644, 653, 430 S.E.2d 254, 259 (1993) (citing *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992)).

Defendant contends his case must be distinguished from *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). In *Huff*, where the defendant was absent during a portion of the State's presentation of evidence at the request of defense counsel and with the defendant's agreement, this Court held that the trial court erred in permitting defendant to be absent during his capital trial. However, we found that the error was harmless beyond a reasonable doubt because the defendant was not prejudiced by his absence. *Id.* at 35-36, 381 S.E.2d at 654-55. Here, because defendant's attorney objected to his absence at the Rule 24 conference, defendant contends he is entitled to a new trial.

In *Huff* the defendant was absent in the midst of trial, while the State was presenting evidence. Here defendant was absent during the pretrial conference. We hold that the Rule 24 conference, which takes place before the jury panel is selected and sworn, is not a stage of the trial. *See State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990) (process of selecting and impaneling the jury is a stage of trial at which defendant has a right to be present); *State v. Rannels*, 333 N.C. at 652-54, 430 S.E.2d at 258-59 (private, unrecorded, side-bar conferences with jury pool members took place before commencement of defendant's trial; no right to presence); *State v. Cole*, 331 N.C. at 275, 415 S.E.2d at 717 (pretrial, off-the-record bench conferences with prospective petit jurors did not occur at a stage of defendant's trial; no right to presence). Therefore, defendant's right to be present at every stage of his trial was not implicated.

The language of Rule 24 does not offer defendant relief. Rule 24 provides that in capital cases, the superior court shall require "the prosecution and defense counsel" to appear at a pretrial conference to discuss, *inter alia*, the simplification and formulation of the issues and timely appointment of assistant counsel for an indigent defendant. Gen. R. Pract. Super. and Dist. Ct. 24, 1995 Ann. R. N.C. 18. The

pretrial conference is an administrative device intended to clarify the charges against the defendant and assist the prosecutor in determining whether any aggravating circumstances exist which justify seeking the death penalty. Capital defendants do not stand to lose or gain any rights at the conference. Defendant has not demonstrated that the Rule 24 pretrial conference implicated his confrontation rights or that his presence at the conference would have had a reasonably substantial relation to his opportunity to defend. *See State v. Buchanan*, 330 N.C. 202, 223-24, 410 S.E.2d 832, 845 (1991) (burden on defendant to show usefulness of his presence); *see also State v. Buckner*, 342 N.C. 198, —— S.E.2d —— (1995). This assignment of error is therefore overruled.

[2] By his next assignment of error, defendant contends the trial court erred in submitting to the jury the course of conduct aggravating circumstance because the prosecutor did not mention that circumstance at the Rule 24 pretrial conference. At the pretrial conference, the prosecutor indicated that an aggravating circumstance existed pursuant to N.C.G.S. § 15A-2000(e)(3), as defendant had been previously convicted of a violent felony, common law robbery. Defense counsel responded, "That is at least one," and later stipulated that at least one aggravating circumstance existed for both murders. Defendant now argues that the prosecutor "blindsided" him and lulled him into a false sense of security by failing to mention the presence of another aggravating circumstance, course of conduct, pursuant to N.C.G.S. § 15A-2000(e)(11). Because of his surprise, defendant contends, he was unable to rebut this circumstance at his sentencing proceeding.

While Rule 24 requires the trial court and the parties to consider the existence of evidence of aggravating circumstances, nothing in the rule intimates that the prosecution must enumerate with finality all aggravating circumstances it will pursue at trial. Moreover, "a defendant is not constitutionally entitled to an enumeration of aggravating factors to be used against him: statutory notice as contained in N.C.G.S. § 15A-2000(e) is sufficient." *State v. McLaughlin*, 323 N.C. 68, 84, 372 S.E.2d 49, 61 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). In fact, a trial court cannot require the prosecution to declare which aggravating circumstances it will rely upon at the punishment phase. *State v. Holden*, 321 N.C. 125, 153, 362 S.E.2d 513, 531 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). This assignment of error is therefore overruled.

[3] Defendant next contends that the trial court erred in denying his motion to permit *voir dire* of potential jurors regarding their conceptions of parole eligibility upon the entry of a life sentence. Because the prosecutor argued two aggravating circumstances to the jury—that defendant had previously been convicted of a felony involving the use or threat of violence to a person and that the murder for which defendant was convicted was part of a course of conduct in which defendant engaged—and because the jury found both aggravating circumstances, defendant asserts that the prosecutor placed defendant's future dangerousness at issue. In *Simmons v. South* Carolina, — U.S. —, —, 129 L. Ed. 2d 133, 138 (1994), the United States 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." Relying on *Simmons*, defendant contends that the trial court should have granted his motion to discuss potential jurors' conceptions about parole eligibility.

Defendant's reliance on *Simmons* is misplaced. In *Simmons*, after the prosecutor argued Simmons' potential for future dangerousness as a reason for imposing the death penalty, Simmons requested the trial court to instruct the jury on the meaning of life imprisonment under South Carolina law (no possibility of parole). The trial court refused Simmons' request, and the jury ultimately returned a verdict of death. In *State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224 (1995), this Court noted that "[t]he Court in *Simmons* ruled that South Carolina could 'not create a false dilemma by advancing generalized arguments regarding defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole.' " *Id.* at 762, 448 S.E.2d at 830-31 (quoting *Simmons*, — U.S. at —, 129 L. Ed. 2d at 147). Although the prosecutor in *Price* argued defendant's future dangerousness to the jury, this Court affirmed Price's death sentence, concluding that *Simmons* controlled only where life without possibility of parole was the alternative to a death sentence. *Id.* at 762-63, 448 S.E.2d at 831. As Price would have been parole eligible had he been sentenced to life imprisonment in North Carolina, N.C.G.S. § 15A-1371(a1) (1988), no "false dilemma" had been created. *See Price*, 337 N.C. at 762, 448 S.E.2d at 831. In addition, the jury in *Price* had not inquired about defendant's parole eligibility; the Court noted that without such an inquiry, parole eligibility is irrel-

evant and should not be considered in making a capital sentencing determination. *Id.* at 763, 448 S.E.2d at 831.

As in *Price*, the jury here did not inquire about defendant's parole eligibility. Defendant's case is actually less persuasive than that in *Price* because the prosecutors here did not argue future dangerousness to the jury; defendant's contention that arguing the aggravating circumstances amounted to arguing future dangerousness is unpersuasive. Therefore, *Simmons* provides no relief for defendant.

Further, this Court recently again followed its previous decisions and held that prospective jurors should not be questioned about their opinions concerning a defendant's eligibility for parole upon conviction. *State v. Moore*, 335 N.C. 567, 591, 440 S.E.2d 797, 811, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 174 (1994). Defendant has not advanced any reason why the Court should reverse this precedent. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in allowing Raymond Mitchell, a fire inspector with the Hickory Fire Department, to read into evidence the hearsay statement Alvin Creasman made to Mitchell on 12 June 1992. Although defendant acknowledges that the State gave notice, pursuant to Rule 804(b)(5) of the North Carolina Rules of Evidence, of its intention to use Creasman's hearsay statement, he argues that the statement was inadmissible under Rule 804(b)(5) because there was insufficient indicia of the statement's reliability. The statement read to the jury is as follows:

> There was a fire in the living room. There was clothing found in the area of the living room. I was in the hallway asleep upstairs. The smoke woke me up. I notice[d] a black male and a white female there this morning about day break. I stayed all night here. I am a smoker.

Before Mitchell read Creasman's statement to the jury, the trial court conducted a hearing on the admissibility of the statement. Following that hearing the trial court concluded, pursuant to requirements this Court set forth in *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986), that the State had unsuccessfully attempted to locate Creasman, that the statement was trustworthy, that the statement was material and more probative on the issue than any other evidence which the prosecution could secure through reasonable means, and that justice would be served by admission of the statement. Mitchell

subsequently read the statement to the jury, pursuant to Rule 804(b)(5).

In *Triplett*, this Court reiterated the factors which a trial court must consider in determining whether a hearsay statement sought to be admitted under Rule 804(b)(5) is trustworthy: (1) whether the declarant had personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. *Id.* at 10-11, 340 S.E.2d at 742. Applying these factors, we conclude that Creasman's statement contained sufficient indicia of reliability to be admissible. Creasman had personal knowledge of the underlying event, for he stated that he noticed the black male and the white female at the Highland Avenue house about daybreak. There is no evidence that Creasman had any reason to tell Mitchell anything other than the truth about this matter. Nor is there any evidence that Creasman ever recanted this statement. Finally, the trial court determined that Creasman could not be found at the time of trial. Even if the trial court erred in admitting the testimony, defendant cannot show he was prejudiced by its admission in light of his incriminating remarks to several others stating that he killed Ramseur. This assignment of error is therefore overruled.

[5] In his next assignment of error, defendant contends that joinder of the two murder charges violated N.C.G.S. § 15A-926(a) and deprived him of the due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 18 and 19 of the North Carolina Constitution. Defendant objected to the State's written motion for joinder, but the trial court granted the motion following arguments by the parties. Defendant argues joinder was improper because the charges were not transactionally related, in that none of the witnesses testified concerning both the Ramseur and Conley murders, and the murders occurred approximately two months apart. In fact, defendant contends, the only connection in the two cases is that he is charged with both crimes. For the following reasons, we reject defendant's contentions.

N.C.G.S. § 15A-926(a) provides, in pertinent part, that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based . . . on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Once it has been deter-

mined that offenses have a transactional connection, trial courts have discretion to consolidate them for trial. *State v. Huff*, 325 N.C. at 22-23, 381 S.E.2d at 647. Whether offenses are transactionally related is a question of law fully reviewable on appeal. *Id.* at 22, 381 S.E.2d at 647.

> A mere finding of the transactional connection required by the statute is not enough, however. . . . [T]he trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated.

State v. Silva, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981).

The facts incident to the two murders here reveal a common *modus operandi* and a temporal proximity sufficient to establish a transactional connection. Both victims were young women with drug habits; defendant knew both and had smoked crack with each. One victim was nude when found, and the other was nude from the waist down. Both victims suffered blunt-force injuries to their heads; Conley died as a result of strangulation, and the pathologist could not rule out the possibility that Ramseur had also been strangled. The women were killed within two months of each other, and their bodies were found in the lowest part of vacant houses within two blocks of each other. Defendant was seen with and had sex with Conley shortly before her death, and he made incriminating statements to three people about having killed Ramseur. Defendant also made several statements in which he exhibited a misogynistic attitude toward women, including his statement to Brian Cline that "[i]f people keep f——— with me they [will] end up like that bitch that was under the house." Defendant has not cited to, and we are unaware of, any requirement that there be a commonality of witnesses where two murder cases have been joined for trial.

Defendant argues that he was denied a fair hearing as a result of the joinder. Specifically, he contends that the strength of the evidence against him in the Ramseur murder "spilled over" into the deliberations on the Conley murder and that he would not have been convicted of the Conley murder without that spillover effect.

Contrary to defendant's argument, there was substantial evidence adduced from which the jury could determine that defendant killed Conley. Like Ramseur, Conley had sustained a blunt-force injury to

the forehead. Conley had had sexual intercourse within twenty-four hours of her death, and DNA testing of the semen found demonstrated a match with defendant. Jamar Danner, Howard Cowans, and Danny Blackburn all saw defendant with Conley in the early morning hours of the day before her body was discovered. After defendant, Conley, and Blackburn left Cowans' home, Cowans had observed a man and a woman get out of Blackburn's car and walk toward the house in which Conley's body was found. Blackburn stated that after the group finished smoking crack, Conley and then defendant got out of Blackburn's car and began walking up the street.

In light of this evidence, we conclude that defendant has failed to show that the trial court abused its discretion in allowing the charges to be consolidated for trial. Viewing the record as a whole, we hold that the offenses were not so separate in time and place and so distinct in circumstance that joinder was unjust and prejudicial to defendant. *See State v. Bracey*, 303 N.C. 112, 118, 277 S.E.2d 390, 394 (1981).

Having found no statutory violation, we now turn to defendant's contention that consolidation of these two murder charges for trial violated his federal and state constitutional due process rights. Defendant merely asserts that the dissimilar facts surrounding the murders hindered a fair determination of his guilt or innocence, which, he asserts, deprived him of due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Sections 18 and 19 of Article I of the North Carolina Constitution. As defendant makes no argument or explanation of how consolidation of the offenses for trial violated any of these provisions, we decline to address his assertions. *Huff*, 325 N.C. at 26, 381 S.E.2d at 649.

[6] Finally, defendant argues, pursuant to N.C.G.S. § 15A-2000(d)(2), that the record does not support the aggravating circumstances found by the jury; that the sentence was imposed under the influence of passion, prejudice, or some other arbitrary factor; and that the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

The jury found two aggravating circumstances for each offense: that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3) (Supp. 1994); and that the murder for which defendant stood convicted was part of a course of conduct in which defendant engaged

and which included the commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The record supports the jury's finding of the (e)(3) aggravating circumstance. Defendant testified he had been convicted of common law robbery within the last ten years, and the State offered Catawba County criminal records illustrating the conviction. The robbery victim there testified that defendant used violence in the commission of the robbery. Thus, there was substantial evidence that defendant had been convicted of a felony which involved the use or threat of violence to the person and that the felony occurred prior to the murders at issue in this case. *See State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979).

[7] The record also supports the jury's finding of the (e)(11) aggravating circumstance. Some connection between the violent events is generally required to support this circumstance. Even events remote from each other in time may be connected by *modus operandi* or motivation. *See State v. Cummings*, 332 N.C. 487, 507-12, 422 S.E.2d 692, 703-06 (1992) (course of conduct circumstance properly submitted to jury where two murders took place twenty-six months apart but common *modus operandi* and motivation were present); *State v. Price*, 326 N.C. 56, 81-83, 388 S.E.2d 84, 98-99 (course of conduct circumstance properly submitted to jury where other crimes of violence, arson and hostage-taking, occurred five days after murder at issue and common *modus operandi* and motivation were present), *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). In order to permit a finding of a course of conduct, a court must "consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together." *Cummings*, 332 N.C. at 510, 422 S.E.2d at 705.

As noted above, several similarities tie the instant murders together and suggest a common motivation or *modus operandi*. The victims were young women with drug habits; defendant knew both and had smoked crack with each. Their bodies were disposed of in virtually the same fashion and within two blocks of each other. Both victims suffered blunt-force injuries to their heads. Defendant was seen with, and had sex with, Conley shortly before her death; he made incriminating statements to three people about having killed Ramseur. Defendant had a foreboding attitude toward women when he was smoking crack. These similarities supported the finding of a transactional connection for purposes of joinder, and, considering the

evidence in the light most favorable to the State, they also supported the submission and finding of the course of conduct aggravating circumstance. *See State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 355-56 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994).

[8] Further, nothing in the record supports defendant's contention that the jury's finding both aggravating circumstances and no mitigating circumstances is evidence of the jury's "strong emotional or passionate feeling . . . of prejudice toward the defendant" or "clear aversion toward the defendant." 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 rejected a similar argument, stating: "We cannot hold that because the jury did not find that the defendant's evidence had mitigating value . . . [,] the jury was acting under passion, prejudice, or any other arbitrary factor." *Id.* at 737, 448 S.E.2d at 820. Defendant's argument is meritless.

[9] Nor do we find that defendant's death sentence is disproportionate. Proportionality review is intended to "eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury." *State v. Lee*, 335 N.C. 244, 294, 439 S.E.2d 547, 573, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994). It is also intended 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 (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 (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).

Since 1 June 1977, the effective date of our capital punishment statute, this Court has found death sentences disproportionate in only seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312

N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In none of those cases was the defendant convicted of more than one murder. *State v. Conaway*, 339 N.C. 487, 541, 453 S.E.2d 824, 858 (1995). Indeed, the fact that defendant is a multiple killer is " 'a heavy factor against [him].' " *State v. McHone*, 334 N.C. 627, 648, 435 S.E.2d 296, 308 (1993) (quoting *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)), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994). Defendant argues that the most damning evidence against him in the Ramseur murder was Creasman's hearsay testimony and that this Court should therefore not consider this to be a case of multiple homicide. The evidence belies this argument. In addition to Creasman's testimony, which we have found admissible because it possessed substantial guarantees of trustworthiness, defendant told at least three people that he killed Ramseur.

The aggravating circumstances the jury found in this case were also found in *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), where this Court affirmed the defendant's death sentence even though the jury found three statutory and two nonstatutory mitigating circumstances. The Court noted that these two aggravators are found in many cases that result in death sentences. *Id.* at 63, 446 S.E.2d at 287. There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences; these two are among them. *State v. Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. None of the cases in which this Court has determined the death penalty to be disproportionate has included the (e)(3) aggravator. *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995). In only two cases in which this Court has found the death penalty disproportionate did the jury find the (e)(11) aggravating circumstance: *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713, and *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. In neither *Rogers* nor *Bondurant* did the course of conduct involve a second murder, as it did here. In summary, defendant's case is not comparable to any case in which this Court has held the death sentence disproportionate.

Several additional characteristics of this case support the determination that imposition of the death sentence was not disproportionate. The victims in this case were vulnerable, in that they were women who engaged in the high-risk lifestyle of regular drug use. *Cf.*

State v. Moseley, 336 N.C. 710, 729, 445 S.E.2d 906, 917 (1994) (female victim was alone and vulnerable), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 802 (1995). In addition, defendant appears to have no remorse for his conduct. *See State v. Robinson*, 336 N.C. 78, 137, 443 S.E.2d 306, 336 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). Finally, there is no discernible reason why defendant killed these two women; the murders appear to be "the product of pure meanness." *State v. Jones*, 339 N.C. 114, 171, 451 S.E.2d 826, 858 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995).

Considering the foregoing, as well as the crime and defendant, we conclude that the death sentence was not excessive or disproportionate. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

Justice WEBB dissenting.

I dissent from the majority opinion. I believe it was error to consolidate the two cases for trial. N.C.G.S. § 15A-926(a) says:

> Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

I do not believe the two crimes were based on a series of acts or transactions connected together or constituting parts of a single scheme or plan. The murders occurred two months apart. I can see nothing in the record that indicates that the defendant was scheming to kill another person at the time the first murder was committed. The fact that the two crimes had a common *modus operandi* does not show a continuing scheme or plan. I believe that without more of a showing of one scheme to murder two persons it was error to consolidate the cases for trial.

I vote to grant new trials on the two charges.

NATHANIA T. POOLE v. GENEANE RENEE MILLER

No. 525PA94

(Filed 8 December 1995)

Judgments § 115 (NCI4th)— award of costs—judgment defined

Plaintiff was not required to bear the costs incurred after the date an offer of judgment was tendered under N.C.G.S. § 1A-1, Rule 68 in an action arising from an automobile collision where defendant tendered an offer of judgment for $6,000 together with costs accrued; plaintiff and defendant agree that as of the date of the offer $420.03 had been incurred in prejudgment interest as well as $401.40 in costs, so that the offer of judgment equaled $6,821.43; the jury returned a verdict of $5,721.73; and the judgment entered, which included post-offer costs, totalled $9,058.21. Rule 68 provides that an offeree who does not accept an offer of judgment must bear the costs incurred from the date of the offer when the "judgment finally obtained" is not more favorable than the amount of the offer, but does not define "judgment." While the word "verdict" means the decision of the jury, "judgment" means the final decision of the court, and it is plain that only a court and not a jury renders a judgment. "Verdict" does not appear in Rule 68 and the inclusion of the words "finally obtained" is another signal that the legislature intended "judgment finally obtained" to mean more than the amount awarded by the jury since a final judgment is often not entered in the exact amount of the jury's verdict.

Am Jur 2d, Costs §§ 90 et seq.

Justice PARKER dissenting.

Justice WHICHARD joins in this dissenting opinion.

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. 435, 448 S.E.2d 123 (1994), reversing a portion of the judgment in favor of plaintiff and reversing the order denying defendant's motion to tax costs against plaintiff entered by Hight, J., on 15 June 1993 in Superior Court, Durham County, and filed 12 July 1993. Heard in the Supreme Court 14 September 1995.

Michaels Jones Martin & Parris Law Offices, P.A., by E. Spencer Parris, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr. and John J. Padilla, for defendant-appellee.

LAKE, Justice.

Plaintiff filed a complaint alleging she was damaged by defendant's negligence in an automobile collision. Defendant answered denying negligence. On 13 April 1992, defendant tendered to plaintiff an offer of judgment in the amount of $6,000, together with costs accrued, pursuant to the provisions of Rule 68 of the North Carolina Rules of Civil Procedure, which offer plaintiff failed to accept. The case proceeded to trial before a jury, Judge Henry W. Hight, Jr., presiding, during the 24 May 1993 Civil Session of Superior Court, Durham County. The jury returned a verdict against defendant and awarded plaintiff the sum of $5,721.73. Prior to the entering of judgment, plaintiff filed a motion for reasonable attorney's fees, portions of which were incurred after the offer of judgment was tendered, pursuant to N.C.G.S. § 6-21.1. Plaintiff also submitted a bill of costs to be paid by defendant, which included the attorney's fees as well as expert witness's fees incurred after the filing of the offer of judgment and interest from the date of the filing of the complaint. Defendant contended in opposition to the award of attorney's fees that the jury verdict was less than the offer of judgment, and thus, plaintiff was precluded under Rule 68 from recovering costs incurred after the offer of judgment. Defendant also moved to tax costs against plaintiff.

The trial court made findings of fact, including that plaintiff's counsel charged an hourly rate of $100 and had recorded at least twenty hours of billable time. The trial court further found as fact that an attorney's fee of $2,000 was reasonable and fair. The trial court then concluded as a matter of law that "judgment finally obtained" under Rule 68 meant the judgment obtained, not the amount of the jury verdict. The judgment obtained in this case, which included interest and costs, amounted to more than defendant's $6,000 offer of judgment. Thus, the trial court granted plaintiff's motion for reasonable attorney's fees in the amount of $2,000 and denied defendant's motion to tax costs against plaintiff. The trial court then entered judgment in favor of plaintiff for the sum of $9,058.21, which sum was composed of the jury's verdict of $5,721.73 and the taxing of $3,336.48

in costs and interest against defendant, portions of which were incurred after the tendered offer of judgment.

Defendant appealed to the Court of Appeals from the order granting plaintiff's motion for attorney's fees and denying defendant's motion to tax costs to plaintiff and from the entry of the final judgment and bill of costs. The Court of Appeals determined that this case was controlled by this Court's decision in *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459 (1982), and found that final judgment under Rule 68 was equivalent to the jury's verdict. *See Poole v. Miller*, 116 N.C. App. 435, 437, 448 S.E.2d 123, 124 (1994). The Court of Appeals then reasoned that because "judgment finally obtained" under Rule 68 should be construed as the jury's verdict of $5,721.73, which was less than defendant's offer of judgment for $6,000, Rule 68 required all of the court costs, attorney's fees, expert witness's fees and interest incurred after the date the offer of judgment was made to be borne by plaintiff. *Id.* at 438, 448 S.E.2d at 125. Thus, the Court of Appeals unanimously reversed that portion of the judgment awarding plaintiff the costs incurred after defendant tendered an offer of judgment and the trial court's denial of defendant's motion to tax costs against plaintiff. This Court granted plaintiff's petition for discretionary review on 29 December 1994. For the reasons discussed herein, we reverse the Court of Appeals.

The issue presented for resolution is whether the Court of Appeals erred in concluding that "judgment finally obtained" under Rule 68 means the jury's verdict. Plaintiff argues that the Court of Appeals' decision to equate "judgment finally obtained" with the jury's verdict ignores the plain meaning of the words chosen by the legislature and employed in Rule 68. We agree with plaintiff's contention in this regard.

In resolving issues of statutory construction, this Court must first ascertain legislative intent to assure that both the purpose and the intent of the legislation are carried out. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). In undertaking this task, we look first to the language of the statute itself. *Id.* at 656, 403 S.E.2d at 294. When language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977). Bearing these well-established principles in mind, we note that Rule 68, in pertinent part, provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the *judgment finally obtained* by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C.G.S. § 1A-1, Rule 68(a) (1990) (emphasis added). Thus, an offeree who does not accept an offer of judgment must bear those costs incurred from the date the offer of judgment was tendered only when the "judgment finally obtained" is not more favorable than the amount of the offer.

The word "judgment" is undefined in Rule 68. As this word is unambiguous, we shall accord it its plain meaning. Judgment means "[t]he final decision of the *court* resolving the dispute and determining the rights and obligations of the parties," and "[t]he law's last word in a judicial controversy." *Black's Law Dictionary* 841-42 (6th ed. 1990) (emphasis added). Further, this Court has stated before that " '[t]he rendering of a judgment is a judicial act, *to be done by the court only.*' " *Eborn v. Ellis*, 225 N.C. 386, 389, 35 S.E.2d 238, 240 (1945) (emphasis added) (quoting *Mathews v. Moore*, 6 N.C. 181, 182 (1812)). In contrast, the word "verdict" means "[t]he formal decision or finding made by a *jury*." *Black's Law Dictionary* 1559 (emphasis added). Thus, it is plain that only a court, and not a jury, renders a judgment. Accordingly, we are of the view that within the strictures of Rule 68, "judgment finally obtained" does not mean a jury's verdict.

Another strong indication that the legislature did not intend "judgment finally obtained" to mean the jury's verdict is the fact that the word "verdict" does not appear in Rule 68. We must assume that had the legislature chosen to equate "judgment finally obtained" with the jury's verdict, it would have done so within the confines of the rule. Further, the inclusion by the legislature of the words "finally obtained" to modify "judgment" we interpret as another signal that the legislature intended for "judgment finally obtained" to mean more than the amount awarded by the jury. *See Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion [of a statute] to be given full effect and did not intend any provision to be mere surplusage"). Often, as is the case here, a final judgment is not entered in

the exact amount of the jury's verdict. Rather, the verdict amount is modified to reflect applicable adjustments. It is this final resulting sum which is then entered by the court to stand as the final judgment in the particular case. Thus, we construe the legislature's choice of the phrase "judgment finally obtained" as indicative of the legislature's intent that it is the amount ultimately and *finally* obtained by the plaintiff from the court which serves as the measuring stick for purposes of Rule 68. For these reasons, we conclude that, within the confines of Rule 68, "judgment finally obtained" means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict.

Plaintiff further contends that in addition to disregarding the plain meaning of Rule 68, the Court of Appeals inappropriately relied upon this Court's decision in *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459. We agree.

In *Purdy*, the defendant made an offer of judgment for the amount of $5,001, together with costs accrued, except attorney's fees. The plaintiff did not respond to the offer, and the case went to trial. The jury returned a verdict awarding plaintiff only $3,500, but the trial court ordered defendant to shoulder $1,200 in plaintiff's reasonable attorney's fees and $325 in expert witness's fees. *Id.* at 98, 296 S.E.2d at 463. This Court held that because defendant's offer of judgment in the amount of $5,001 was in excess of the jury's verdict of $3,500, and therefore not more favorable than the offer of judgment, the defendant was entitled to the protections afforded him by Rule 68. Accordingly, under Rule 68, plaintiff properly bore the burden of costs incurred after the date the offer of judgment was made. *Id.* The Court of Appeals, in the instant case, used this reasoning as support for its determination that "judgment finally obtained" meant the jury's verdict. *See Poole*, 116 N.C. App. at 437-38, 448 S.E.2d at 124-25.

In the case *sub judice*, plaintiff argues the Court of Appeals erred by relying upon our decision in *Purdy* because *Purdy* did not specifically address the issue currently presented: whether "judgment finally obtained" pursuant to Rule 68 is equivalent to the jury's verdict. We agree with plaintiff's contention in this regard. As noted in our opinion in *Purdy*, the issue to be resolved by the Court in that case was "whether an offer of judgment for $5,001, together with all

costs accrued *except attorney's fees*, complies with the requirements for a valid offer under Rule 68 of the Rules of Civil Procedure." *Purdy*, 307 N.C. at 94, 296 S.E.2d at 461. More specifically, the Court determined that while Rule 68 allows a party defending a claim to make an offer of judgment "with costs then accrued," the defendant's particular offer of judgment, which excluded attorney's fees, was not fatally defective because it sought to exclude certain "costs then accrued." The Court reached this decision by concluding "that attorney's fees were not part of the 'costs then accrued' when defendant made his offer to plaintiff because attorney's fees could not properly have been taxed against defendant at that time." *Id.* at 96, 296 S.E.2d at 462. Thus, this Court in *Purdy* was not confronted, as we are here, with an explicit issue of statutory construction regarding the meaning of "judgment finally obtained" pursuant to Rule 68. Accordingly, the Court of Appeals' reliance upon *Purdy* in this instance was misplaced.

Having determined that "judgment finally obtained" for purposes of Rule 68 is the final judgment entered by the court, we turn to application in the present case. As stated above, defendant tendered a valid offer of judgment pursuant to Rule 68 for $6,000, together with costs accrued, which offer plaintiff failed to accept. The case proceeded to trial, and the jury returned a verdict in favor of plaintiff for $5,721.73. The trial court granted plaintiff's motion for recovery of reasonable attorney's fees in the amount of $2,000 and additionally taxed as costs against defendant filing and service fees, expert witness's fees and interest from the date of filing. Final judgment was then entered in plaintiff's favor for the sum of $9,058.21, portions of which reflect costs accrued after the offer of judgment. The "judgment finally obtained" then, in this case, is the final judgment of $9,058.21 entered by the trial court. It is this sum, pursuant to the dictates of Rule 68, which must be compared to the amount of the offer of judgment to determine whether plaintiff is required to pay the costs incurred after the date the offer of judgment was tendered.

Defendant's offer of judgment tendered on 13 April 1992 was for "the amount of $6,000 together with cost[s] accrued." Obviously, costs then accrued refers to those costs which had accumulated as of the date the offer was made to plaintiff. 2 G. Gray Wilson, *North Carolina Civil Procedure* § 68-2, at 456 (1989). Accordingly, we shall adjust the offer in order to make a more accurate comparison of the "judgment finally obtained" with the offer of judgment. Both plaintiff and defendant agree in their briefs on this point that as of the date of

the offer of judgment, $420.03 had been incurred in prejudgment interest as well as $401.40 in costs, amounting to a total of $821.43 of costs then accrued. Thus, the total offer of judgment equals $6,821.43. The "judgment finally obtained" by plaintiff in this matter was $9,058.21, which is more favorable than the $6,821.43 offer of judgment. Pursuant to Rule 68, because the plaintiff's "judgment finally obtained" was more favorable than the offer of judgment, plaintiff was not required to shoulder those costs incurred after the date the offer of judgment was tendered. We therefore conclude the Court of Appeals erred in reversing that portion of the judgment awarding plaintiff costs incurred after 13 April 1992 and the trial court's denial of defendant's motion to tax costs against plaintiff.

For the reasons stated herein, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Durham County, for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

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

Justice PARKER dissenting.

I respectfully dissent from the majority opinion. Rule 68(a) of the North Carolina Rules of Civil Procedure provides: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." N.C.G.S. § 1A-1, Rule 68(a) (1990). In this case defendant, more than a year before trial, made an offer of judgment "in the amount of $6,000.00 together with cost accrued."

While I agree with the majority that "judgment finally obtained" does not mean "the verdict" obtained, the majority's construction of the Rule, in my view, undermines the intent of the legislature in adopting Rule 68(a). The objective of the Rule is to encourage settlements.

Rule 68(a) of the North Carolina Rules of Civil Procedure in relevant part is almost identical to Rule 68 of the Federal Rules of Civil Procedure. Although this Court is not bound in deciding the proper interpretation of the North Carolina rules by federal court decisions interpreting the federal rules, we may look to federal court decisions

for guidance. *See Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989). In the present case *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993) is instructive. In *Marryshow* the defendants made an offer of judgment "for a total sum, to include all costs now accrued and attorney's fees, of $20,000." *Id.* at 691. Although *Marryshow* deals with a lump sum offer, this factual difference is immaterial to the methodology adopted for comparing the judgment finally obtained with the offer of judgment to determine if the judgment finally obtained is more favorable. In *Marryshow* the court stated:

> Rule 68 requires that a comparison be made between an offer of judgment that includes "costs then accrued" and the "judgment finally obtained." . . . To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated. Because the offer includes costs then accrued, to determine whether the judgment obtained is "more favorable," as the rule requires, the judgment must be defined on the same basis—verdict plus costs incurred as of the time of the offer of judgment. The post-offer costs—the very costs at issue by virtue of the rule's application—should not, however, also be included in the comparison and thereby become the vehicle to defeat the rule's purpose.

Id. at 692.

Applying this analysis where the offeror has, as defendant did in the present case, made an offer of a sum certain together with costs accrued, the trial court would add the costs accrued at the time of the offer of judgment to the amount of the verdict to determine whether the judgment finally obtained is more favorable than the offer of judgment.

Based on the figures conceded by plaintiff in her brief, this analysis shows the following comparison. The total offer of judgment was $6,000 plus accrued costs consisting of $61.00 filing and service fees, $340.40 attorney's fees, and $420.03 pre-judgment interest or $6,821.43; after trial the jury verdict was $5,721.73 which added to the costs accrued at the time of the offer, $821.43, is $6,543.16. The final judgment which included both pre-offer and post-offer costs was $9,058.21. As this case illustrates, post-offer costs not infrequently are greater than the costs accrued at the time of the offer of judgment. Hence, using the $9,058.21 figure for comparison with the offer to

determine if the judgment finally obtained was more favorable permits post-offer costs to defeat the Rule's purpose.

The majority appears to read Rule 68(a) to require the judgment finally obtained to be "greater than" the offer of judgment to avoid post-offer costs shifting. The language of the Rule, however, requires the judgment finally obtained to be more favorable than the offer of judgment to avoid post-offer costs shifting. In this case, the judgment finally obtained after trial was not more favorable for plaintiff. The dollar amount of the judgment finally obtained was greater than the offer, but the difference was entirely attributable to post-offer costs.

For the foregoing reasons, I vote to affirm.

Justice Whichard joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RICHARD TALMADGE KING

No. 82A95

(Filed 8 December 1995)

1. Evidence and Witnesses § 742 (NCI4th); Homicide § 250 (NCI4th)— noncapital first-degree murder—earlier altercation—events subsequent to—admission not prejudicial

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court admitted evidence that, following an altercation between the victim and defendant four years before this shooting, the victim's wife had asked for surveillance of their house by the sheriff's department and that a slow-moving vehicle had passed their house. Assuming error in the admission of the testimony, there was no prejudice because there was substantial other evidence to support a finding of premeditation and deliberation, the only real issue in the case, in that a bartender and several patrons witnessed defendant shooting the victim, these witnesses described defendant's aiming his gun at the victim's back and, with no provocation, firing three shots, other testimony showed that defendant went into the bar looking for the victim, defendant stated after the shooting, " I told you I'd kill you," and ill will had existed between the parties since a 1989 beating of defendant by the victim.

Am Jur 2d, Appellate Review §§ 713, 753.

2. Criminal Law § 886 (NCI4th); Appeal and Error § 158 (NCI4th)— noncapital first-degree murder—jury instruction—no objection at trial—plain error not alleged—appellate review waived

Appellate review of the trial court's instructions on jury questions was waived where defendant did not object at trial and did not allege plain error. However, the question was reviewed in the exercise of the Supreme Court's discretion.

Am Jur 2d, Appellate Review §§ 614, 615.

3. Criminal Law § 867 (NCI4th)— jury questions—instruction that all jurors agree on questions—not plain error

There was no plain error in a noncapital first-degree murder prosecution where the trial court instructed the jury that any question addressed to the court had to be that of the entire panel rather than of an individual juror. While that instruction was error, it did not rise to the level of plain error because nothing in the record suggests any irregularity in the jury's deliberations; when polled, no juror voiced disagreement with the verdict; and, in light of the substantial evidence supporting the verdict, it is improbable that the jury would have reached a different result had the trial court not given this instruction.

Am Jur 2d, Trial § 1121.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by McLelland, J., at the 19 September 1994 Criminal Session of Superior Court, Orange County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 10 October 1995.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Indicted for the first-degree murder of Johnnie Wayne Medlin (victim) in violation of N.C.G.S. § 14-17, defendant was tried noncap-

itally and found guilty as charged on the theory of premeditation and deliberation. The trial court sentenced defendant to life imprisonment.

At trial the evidence tended to show that on 11 July 1993, defendant told Frank Parrish, with whom defendant shared a trailer, that he was going down to "West End." That afternoon as Arnold "Sonny" Turner was walking out of West End Billiards in Hillsborough, he heard defendant call out to him. Defendant asked Turner if the victim was in the bar, and Turner told defendant that he was. Turner then got into his car and left. Defendant returned to his trailer and within a few minutes said to Parrish, "Wayne's at West End. I'm going down there," and left.

Larry Medlin was tending bar at West End Billiards on the afternoon of 11 July 1993. The victim was seated at the second or third barstool from the door and was watching an automobile race on television with several other patrons. Medlin heard a bang and turned around to see defendant shooting the victim in the back. Defendant fired three shots at the victim. Two shots hit the victim in the back, and one shot hit the victim in the left leg. One of the other patrons, John David Wagner, asked defendant what he was doing and told defendant to give him the gun. Wagner got the gun and handed it to Medlin; Medlin laid the gun on a rag on the bar. Witnesses testified that defendant made a statement to the effect, "I told you I'd kill you," or "I told him I'd get him." Other witnesses testified that they did not hear defendant say anything. Defendant then turned and walked out the door of the bar.

Defendant returned to his trailer and said to Parrish, "I did it." Parrish asked defendant whether he "gave him a touch up" or "popped" him. Defendant told Parrish that he had "popped" the victim three times. Parrish went down the hall and then heard defendant yell, "There's the law."

After obtaining information about the suspect in the shooting, Officer David Lineberry of the Hillsborough Police Department went to defendant's trailer. At approximately 3:00 p.m., Officer Lineberry entered the trailer with his gun drawn; and defendant asked him, "Why do you have that gun out?" When Officer Lineberry asked defendant where the gun was, defendant replied, "What gun?" Officer Lineberry asked defendant several times where the gun was; and defendant responded, "What gun?" and "What's going on?" While

Officer Lineberry was handcuffing defendant, defendant stated, "Yeah, I shot him."

After arresting defendant, Officer Lineberry took defendant first to West End Billiards and then to the police station. In response to questioning by Officer Lineberry and Detective Ross Fredrick, also of the Hillsborough Police Department, defendant stated that he saw the victim's truck and that the next thing he remembered was sitting in a patrol car at West End Billiards. When defendant began to look ill around 4:00 p.m., Officer Lineberry asked defendant whether he was on medication. Defendant indicated that he was on insulin, Prozac, "Terezenol [sic]," and Zantac and that he did not know when he had last taken his medications. Officer Lineberry called the rescue squad to check on defendant and also gave him a "honey bun" and a soft drink.

Other evidence presented at trial revealed that in 1989 defendant was severely beaten by the victim when the victim accused defendant of stealing some money. Officer Phillip White of the Hillsborough Police Department went with the victim and Larry Medlin to defendant's trailer shortly after the incident. Defendant refused to press charges against the victim and stated that he would take care of the matter himself. As a result of this beating, defendant suffered fractures around his eyes, nose, and mandible; bruises over his body; five or six fractured or broken ribs; and a closed head injury. Defendant was hospitalized approximately one week.

The victim's wife, Wendy Medlin, testified that after the 1989 fight between defendant and her husband, she called the Caswell County Sheriff's Department and arranged for a deputy to watch her house. Mark Currin of the Caswell County Sheriff's Department testified that he was assigned to surveillance of the Medlin house for a week in 1989. Mark Stanfield testified that at some time after the 1989 altercation, he and the victim and the victim's son, Pete, were standing in the victim's yard when a slow-moving vehicle approached; Stanfield grabbed Pete, and they both ducked. In response to questioning by Officer Lineberry about the 1989 altercation, defendant stated that if the police had done their job four years ago, the victim would have been arrested and the shooting never would have happened.

Defendant presented evidence that he suffered from various medical conditions. Dr. Billy W. Royal, a forensic psychiatrist, testified that he had examined defendant and diagnosed him as having major depression, organic brain disorder, and alcohol addiction; that

defendant suffered from both high and low glucose and that a low glucose level can cause a person to be confused and disoriented; and that defendant was having difficulty controlling his diabetes even in a controlled hospital setting. Dr. Royal further testified that, in his opinion, defendant was under the influence of mental or emotional disturbance at the time of the shooting and could not appreciate the criminality of his conduct. Dr. Royal also testified that defendant could not form the intent to kill but rather that defendant had responded reflexively when he saw the victim's truck.

Dr. Robert Conder, Jr., a clinical neuropsychologist, testified that defendant suffered from alcoholism, major depression, passive dependent personality disorder, organic brain syndrome, and preexisting learning disability. Dr. Conder testified that defendant's feelings "kind of come out of nowhere and grab him, and interrupt this sort of logical thinking that most of us have." Defendant's niece testified that several months before the shooting, she was at defendant's house talking with him when defendant stopped talking and stared straight ahead with his eyes open and not blinking for approximately five minutes.

Dr. John D. Butts, Chief Medical Examiner for the State of North Carolina, performed an autopsy on the victim. The autopsy revealed that the victim had suffered from three gunshot wounds. One bullet entered in the left back area and passed through the victim's spleen, aorta, and part of the liver. A second bullet entered in the right back, struck one of the victim's ribs, and came to rest in the tissue of the side. A third bullet entered just above the knee cap, traveled underneath the skin, and then exited the body on the middle side of the leg. Dr. Butts testified that the victim died as a result of the gunshot wound to the left back which passed through the victim's spleen, aorta, and liver.

[1] Defendant first challenges the admission of testimony pertaining to the altercation between defendant and the victim which occurred four years prior to the murder of the victim. Specifically, defendant contends that the testimony concerning the surveillance of the victim's home by the Caswell County Sheriff's Department and the testimony concerning the slow-moving vehicle which passed the victim's home were irrelevant and inadmissible. Defendant argues that the State failed to present any evidence that the victim's wife contacted the Sheriff's Department as the result of anything defendant had done. Likewise, the State failed to show that defendant was con-

nected in any way to the slow-moving vehicle. Without any preliminary evidence linking him to these events, defendant argues the testimony is irrelevant and inadmissible.

Moreover, the admission of this testimony was prejudicial since this evidence was submitted to show premeditation and deliberation, which was the only real issue in the case. Defendant contends that the State's evidence as to the existence of premeditation and deliberation was not otherwise convincing in that all the other evidence on this issue concerned the time frame immediately before, during, and after the killing; and defendant presented evidence that during this same time period, he was in a trance-like state, was unaware of his actions, and was thus incapable of premeditation and deliberation.

Assuming *arguendo* that admission of this testimony was error, we do not find that such error was prejudicial. Defendant is entitled to relief only if he can show a reasonable possibility that the outcome of the trial would have been different had the evidence been excluded. N.C.G.S. § 15A-1443(a) (1988). "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

> Among the circumstances which may be considered as tending to show premeditation and deliberation are: (1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner. *See State v. Calloway*, [305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982)]; *State v. Potter*, 295 N.C. 126, [130-31,] 244 S.E.2d 397[, 401] (1978); *State v. Thomas*, 294 N.C. 105, [119,] 240 S.E.2d 426[, 436] (1978).

State v. Myers, 309 N.C. 78, 84, 305 S.E.2d 506, 510 (1983). In *State v. Battle*, 322 N.C. 69, 366 S.E.2d 454, *cert. denied*, 487 U.S. 1220, 101 L. Ed. 2d 911 (1988), this Court specifically stated that "evidence of the manner in which the killing occurred, the defendant's pointing a shotgun at [the victim's] back and shooting him, should support a finding that the killing was with premeditation and deliberation." *Id.* at 72-73, 366 S.E.2d at 456-57.

In the present case substantial evidence supports a finding of premeditation and deliberation even without the testimony regarding the police surveillance and the reported slow-moving vehicle. The testimony reveals that the bartender and several patrons of West End Billiards witnessed defendant shooting the victim. These witnesses described defendant's aiming his gun at the victim's back and, with no provocation whatsoever, firing three shots. Further, other testimony showed that defendant went into the bar looking for the victim; that after shooting the victim, defendant stated, "I told you I'd kill you"; and that ill will had existed between the parties since the 1989 beating.

In light of this evidence which taken together overwhelmingly supports a finding of premeditation and deliberation, we cannot say that a reasonable possibility exists that without the testimony objected to by defendant, the result at trial would have been different. N.C.G.S. § 15A-1443(a); *see State v. Angel*, 330 N.C. 85, 93, 408 S.E.2d 724, 728-29 (1991); *State v. Austin*, 320 N.C. 276, 285, 357 S.E.2d 641, 647, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). These assignments of error are overruled.

[2] Defendant next contends that the trial court committed reversible error by instructing the jury that any question addressed to the court could not be that of an individual juror but had to be that of the entire panel. In giving the jury instructions, the court instructed the jury:

> [I]f in the course of your deliberation you think it necessary to ask me to explain something that I've said, you may come back and ask that. Or if you think any other question ought to be directed to the Court, you may come back and do that.
>
> But please bear in mind your request or question needs to be the request or question of the jury, not of a juror. You decide in advance whether you want to state it. And then you remember that you must state it in the courtroom.

Defendant contends it is both likely and reasonable that the jurors would have understood this instruction to mean that no questions could be asked of the court absent a consensus among the twelve jurors that the question should be asked. Defendant argues that this instruction impermissibly prevented individual jurors from seeking needed clarification about the applicable law directly from the court

in the absence of agreement among all the jurors that such clarification was necessary.

According to defendant the trial judge thus coerced a verdict, thereby violating defendant's due process rights under both the federal and state Constitutions. However, having failed to raise the alleged constitutional issues before the trial court, defendant has waived these constitutional arguments. *State v. Bussey*, 321 N.C. 92, 361 S.E.2d 564 (1987).

Similarly, in that defendant failed to timely object to this instruction at trial, this error would normally be deemed waived pursuant to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, which provides:

> *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2). However, in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), we held that the "plain error" rule was applicable to matters concerning jury instructions. Under the plain error rule, errors or defects affecting substantial rights may be addressed even though they were not previously brought to the attention of the court. *Id.* at 660, 300 S.E.2d at 378. A review of the record reveals that defendant does not allege plain error. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure provides:

> *Assigning Plain Error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4). In the present case because defendant has failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, defendant has waived any appellate review. *State v. Hamilton*, 338 N.C. 193, 449 S.E.2d 402 (1994). Nevertheless, in the exercise of our discretion under Rule 2 of the

Rules of Appellate Procedure, we elect to consider defendant's contention based on plain error.

[3] In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

We agree with defendant that the instruction given by the trial judge was error. North Carolina General Statutes section 15A-1234(a)(1) states that after the jury retires for deliberation, the judge may give additional instructions to "[r]espond to an inquiry *of the jury* made in open court." N.C.G.S. § 15A-1234(a)(1) (1988) (emphasis added). We agree with defendant that this statute does not mandate that all twelve jurors agree that a question be asked before it can be brought before the court. Rather, this statute merely requires that all communications between the court and the jury be conducted in open court with all members of the jury present. *Cf. State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) (holding that N.C.G.S. § 15A-1233(a), which pertains to a jury request during deliberation to review certain testimony or evidence, requires all jurors to be present in the courtroom when the request is made and when the trial court responds to the request).

Nonetheless, we find the trial court's instruction to the jury does not rise to the level of plain error. Defendant's hypothesis as to the effect of the instruction on the jury is nothing more than mere speculation. Nothing in the record suggests any irregularity in the jury's deliberations; and when polled, no juror voiced disagreement with the verdict. Moreover, in light of the substantial evidence in this case supporting the verdict, that the jury would have reached a different result had the trial court not given this instruction is improbable. Therefore, we overrule this assignment of error.

Having reviewed each of defendant's assignments of error brought forward on appeal, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. MARTIN THOMAS PLEASANT

No. 103A95

(Filed 8 December 1995)

1. Evidence and Witnesses § 1298 (NCI4th)— first-degree murder—defendant's inculpatory statements—mental condition of defendant

There was no error in a first-degree murder prosecution in the admission of defendant's incriminating statements where defendant drank an organophosphate pesticide and told a friend shortly before losing consciousness that he had killed his father, and described the killing to his family after he regained consciousness in the hospital. The trial court's findings that defendant was conscious, alert and appeared in control of his faculties at the time the statements were made, that the organophosphates had metabolized when he made the statement to his family, and that the drugs with which he was treated rendered him more coherent and rational were supported by the record. Furthermore, defendant's psychiatric expert testified that defendant was awake and able to communicate with the medical staff prior to the statement to his family, that defendant had appeared coherent and engaged in logical conversation with her, and that his medication was having a positive effect on his cognitive abilities. The very fact that defendant not only remembers making the statements but testified as to his motivation for making those statements belies any claim that the statements were not voluntary based on his mental capacity. Finally, defendant makes no claim of coercion by his friend or family members and therefore had no basis for suppression of his statements.

Am Jur 2d, Evidence § 744.

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

2. Criminal Law § 610 (NCI4th)— first-degree murder—motion to dismiss for insufficient evidence—incompetent evidence

It was noted that all evidence admitted, whether competent or incompetent, may be considered in ruling on a motion to dismiss for insufficiency of the evidence.

Am Jur 2d, Evidence § 1435.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Stephens (Ronald L.), J., at the 22 August 1994 Criminal Session of Superior Court, Harnett County, upon a verdict of guilty of first-degree murder in a case in which defendant was not tried capitally. Heard in the Supreme Court 17 November 1995.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

Patrick H. Pope for defendant-appellant.

FRYE, Justice.

In a proper indictment, defendant, Martin Thomas Pleasant, was charged with the murder of his father, Jerry Thomas Pleasant. Defendant was tried in a noncapital trial on the charge of murder after entering a plea of not guilty. Defendant appeals from a sentence of life imprisonment entered upon a jury verdict finding him guilty of first-degree murder on the theories of malice, premeditation, and deliberation and of lying in wait. We conclude that defendant received a fair trial free of prejudicial error.

Most of the evidence at trial was essentially uncontradicted. Defendant lived in a separate dwelling on his parents' farm. Defendant worked for his parents on their farm, which is located outside of Angier, North Carolina.

On 2 May 1993, Jerry Pleasant left home at approximately 9:00 p.m. to turn off the irrigation system on the farm. The victim watered his tobacco beds every night at dusk for about forty-five minutes to an hour using an irrigation system that pumped water from a pond located on his property. Defendant's apartment was located south of this pond.

At approximately 9:30 or 9:45 p.m., defendant called his parents' house and asked to speak to his father. Mrs. Pleasant told defendant that his father had gone to turn off the irrigation system. Defendant asked her to have his father call him about planting tobacco the next day.

After speaking with defendant, Mrs. Pleasant attempted to contact the victim on the telephone in his truck, but there was no answer.

Mrs. Pleasant did not find this unusual since the telephone often did not work close to the house. She attempted to telephone him two other times during the evening. Also during the evening, she went onto the front porch, where she noticed that the irrigation system had been turned off and that no lights were visible in the field. Mrs. Pleasant retired to bed at about 11:15 p.m., annoyed that her husband had not called but not worried because it was not unusual for the local farmers to sit and talk late into the night during this time of year.

At approximately 2:10 a.m. on 3 May 1993, Mrs. Pleasant awoke and realized that her husband was not in bed. Feeling that something was wrong, she looked outside and saw no lights in the field or in defendant's apartment. She got her flashlight and drove to the tobacco bed, where she found the victim's pickup truck parked. Mrs. Pleasant noticed that the truck door was open, the engine was not running, and the headlights were off. She found her husband lying on the ground on the backside of the irrigation pump, next to the pond. He was lying on his side, and his body was cold and motionless. Mrs. Pleasant noticed what appeared to be two bumps on her husband's head.

Mrs. Pleasant was shaking and was unable to figure out how to use the telephone in the truck. She drove to defendant's apartment to call for help. She knocked on the door, saying, "Mark, open the door. Your daddy is dead." Defendant was drunk and refused to allow her to use the telephone, saying, "Oh Mother, he's not dead." Mrs. Pleasant got back into her car, went home, and called for assistance. The police responded to the Pleasant residence at approximately 2:40 a.m. on 3 May 1993.

An agent from the State Bureau of Investigation interviewed Mrs. Pleasant and defendant. Defendant consented to a gunshot residue test on his hands after being interviewed. The investigators who searched the field where the victim's truck was found observed that the truck's engine was not running and that its headlights were off. The autopsy report revealed that the victim had died from multiple gunshot wounds.

On 3 May 1993, Mrs. Pleasant went to defendant's apartment with Robin and Steve Marks, defendant's sister and brother-in-law. Defendant had not visited his mother since his father's body was found that morning. Defendant was still drinking alcohol.

Mrs. Pleasant had defendant involuntarily committed to Dorothea Dix Hospital for substance abuse.

On 5 May 1993, defendant was released to attend his father's funeral. Before leaving for the funeral, defendant met with a friend, Kent Butterfield, at defendant's parents' residence. Defendant and Butterfield observed a law enforcement dive team searching for the murder weapon in a pond near the residence.

Defendant asked Butterfield to accompany him across the road to defendant's apartment. At the apartment, defendant excused himself, went into a downstairs bathroom, and emerged a few minutes later. Defendant was drinking a soft drink and spitting repeatedly. Butterfield and defendant then walked back across the road to the residence of defendant's parents. Defendant began vomiting and sat down on the ground. He then told Butterfield, "Kent, I killed my father. I want to die. Don't tell anybody."

Almost immediately after making this statement, defendant began to shake and sweat and was foaming from the mouth. After suffering convulsions, defendant lost consciousness. An ambulance transported defendant to Good Hope Hospital in Erwin, North Carolina, and he was transferred from there to Duke University Medical Center in Durham, North Carolina. At Duke University Medical Center, defendant was placed in the intensive care unit, where he was treated for organophosphate pesticide poisoning. Defendant remained unconscious and in critical condition for several days.

Butterfield reported to the police the statements defendant made to him. Defendant had taken out a $125,000 universal life insurance policy on his father for which he paid $100.00 per month. Defendant, prior to the death of his father, told another friend, Milton Godwin, that he did not like his mother having to work at a convenience store, that he had taken out an insurance policy on his father, and that he was going to kill his father or kill himself.

On 13 May 1993, a member of the dive team from Fort Bragg found a .25- or .22-caliber revolver belonging to the victim in the pond near defendant's apartment. The State Bureau of Investigation crime laboratory determined that this pistol was the murder weapon.

On 19 May 1993 at approximately 1:00 p.m., defendant was visited in his room at Duke University Medical Center by his mother; his sister, Robin Marks; and her husband, Stephen Marks. Defendant had not been able to talk before that date because he was on a ventilator

with a breathing tube inserted in his throat. During the visit, defendant, in response to a question from his mother, acknowledged that he had killed his father. Defendant then said, among other things, that he had taken a revolver from his parents' attic at about 2:30 p.m. on Sunday, 2 May 1993; that he had waited in a field for his father to come to turn off the irrigation pump; that when his father arrived, defendant shot him without being seen; that he had turned off the engine and the headlights of his father's pickup truck; and that he had thrown the gun in the pond.

At trial, defendant testified that he did not murder his father and that he believed that his uncle, Donnie Hunter, killed his father. Defendant testified that he drank the pesticide because he thought he was going to be blamed for the murder and had mentally "given up." Defendant admitted telling Kent Butterfield that he had killed his father, saying that he felt responsible and wanted to take the blame since he had taken his father's gun and attempted to sell it to Hunter. Despite the fact that defendant did not sell the gun to Hunter, defendant testified that he believed that Hunter then used that gun to kill his father. Defendant also admitted that while he was at Duke University Medical Center, he told his family members that he had killed his father. Defendant again testified that he felt responsible for the death and wanted to take the blame for it.

Defendant offered evidence at trial that he suffered from alcohol dependency and a "schizoid personality disorder." Defendant had a history of alcohol abuse. Further, defendant offered some evidence that he was suffering from a memory impairment and depression. Defendant's expert witness concluded that, based on defendant's alcohol dependency, his alcohol consumption on 2 May 1993, and his personality disorder, defendant's ability to make and carry out plans could have been affected.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress certain incriminating statements made by him to his friend and his relatives. Defendant made two confessions: (1) to Kent Butterfield after ingesting the poison that caused his hospitalization, and (2) to family members in the hospital when he regained consciousness. Defendant does not argue that he did not make the statements but instead contends that those statements were not given freely, voluntarily, and understandingly by him. Defendant argues that the State did not meet its burden of proof as to either alleged confession.

Prior to ruling on the motion to suppress, the trial court held an extensive *voir dire*. At the suppression hearing, defendant presented evidence that he had ingested organophosphate pesticide poison on 5 May 1993. Within seconds, the poison took effect, causing him to become very sick and lose consciousness. Defendant argues that it was only after the pesticide began to take effect that he made the statement to Butterfield that he had killed his father. Those were his last words before he lapsed into unconsciousness. Therefore, defendant contends that the statements were a product of the effects of the poisonous chemical and were not made by him voluntarily and understandingly.

Likewise, defendant argues that the statements made by him to his mother, sister, and brother-in-law in the hospital were not voluntarily and understandingly made due to the medications defendant was taking; defendant's depression, alcohol dependency, organophosphate pesticide poisoning, anoxia, and insult to the brain; and the effects of all the foregoing on defendant's ability to think and remember.

Following the hearing, the trial court found as fact that "[a]t the time [defendant] made this statement to Butterfield, defendant was conscious, alert and appeared to be in control of his mental faculties. He made the statement spontaneously to Butterfield, addressing him by name." The court also found that "[a]lmost immediately after making this statement, defendant began suffering convulsions and lost consciousness."

As to the statements made to his family at the hospital, the trial court found as fact that "[a]t the time [defendant] made these statements to his mother, sister, and brother-in-law, defendant's voice was weak, but he was conscious and alert and in control of his mental faculties. His response[s] to questions propounded by these same family members were coherent and rational." The court further found that although defendant had been treated with a number of drugs during his stay in the hospital, "[w]ithin the twenty-four hours preceding these statements, defendant had received haldol, an anti-psychotic drug, and ativan, an anti-anxiety drug, within prescribed and medically acceptable dosages. The effect of these drugs was to render defendant more coherent and rational than he likely would have been without these drugs," and "[a]ny organophosphate herbicides defendant may have consumed on May 5, 1993 had been metabolized and eliminated by his body by May 19, 1993." The trial court concluded as

a matter of law that "[e]ach of defendant's statements was made knowingly, willfully and voluntarily at a time when defendant was rational and coherent."

In *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986), this Court said:

> The trial court's findings of fact following a *voir dire* hearing on the voluntariness of a confession are conclusive on appeal if they are supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983); *see also State v. [Rook]*, 304 N.C. 201, 283 S.E.2d 732 (1981). "No reviewing court may properly set aside or modify those findings if so supported. This is true even though the evidence is conflicting." *State v. Jackson*, 308 N.C. at 569, 304 S.E.2d at 145. Thus, we must determine whether the findings are supported by the record.

In the instant case, the trial court's findings of fact are supported by the record and, therefore, are conclusive on this appeal. The evidence indicates that defendant, of his own free will, admitted his participation in the shooting to Butterfield and to his family without coercion from them. Defendant testified on direct examination that he told Butterfield, "I killed him, I killed my father," and that he may have said, "I want to die." He further testified that he made those statements to Butterfield because he felt responsible and wanted to take the blame for his father's death.

Furthermore, defendant's expert witness in psychiatry, Dr. Valerie Holmes, testified on cross-examination that defendant was awake and able to communicate with the medical staff prior to 19 May 1993. Dr. Holmes confirmed that all of the drugs administered to defendant, other than Haldol, Ativan, and Benadryl, were out of defendant's system by 19 May 1993. She further testified that she talked with defendant on 19 May 1993 about his suicide attempt and that he appeared coherent and engaged in logical conversation, giving appropriate answers to questions. Dr. Holmes testified that defendant's medication was having a positive effect on his cognitive abilities and that she could not say that defendant's cognitive abilities were impaired to the extent that he did not understand or appreciate what he was saying when he talked to his family on 19 May 1993. Additionally, defendant testified on direct examination that he remembered making the statements to his family while in the hospital. The State argues that the very fact that defendant not only remembers making the statements, but testified as to his motivation for making those statements, belies

any claim that the statements were not voluntary based on defendant's mental capacity. We agree.

Furthermore, "[a]s a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure." *State v. Boykin*, 298 N.C. 687, 696, 259 S.E.2d 883, 889 (1979). Defendant makes no claim of coercion by his friend or his family members. Therefore, defendant had no basis for suppression of his statements to Butterfield or to his family members. The trial court was correct in denying defendant's motion to suppress these statements. Accordingly, we reject defendant's first assignment of error.

Defendant next assigns as error the trial court's excluding from evidence statements by third parties, taken by law enforcement officers, implicating a person other than defendant as the perpetrator of the murder of Jerry Pleasant. Defendant expressly abandoned this assignment of error.

[2] Defendant further assigns as error the trial court's denial of his motion to dismiss at the close of the State's evidence and at the close of all the evidence. After the denial of his motion to dismiss at the close of the State's evidence, defendant proceeded to offer evidence, thereby waiving his motion to dismiss at the close of the State's evidence. *State v. Lane*, 328 N.C. 598, 403 S.E.2d 267, *cert. denied*, 502 U.S. 915, 116 L.Ed.2d 261 (1991); *State v. Saunders*, 317 N.C. 308, 345 S.E.2d 212 (1986); *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed.2d 227 (1980). We, therefore, consider only defendant's motion to dismiss made at the close of all the evidence.

As to the denial of his motion to dismiss at the close of all the evidence, defendant argues that without the statements made by him to Butterfield and to his family members, the State did not have sufficient evidence to submit the matter to the jury on the issue of first-degree murder. Since we have held that the statements made by defendant to Butterfield and his family members were properly admitted into evidence, we conclude that there was sufficient evidence for the jury to find defendant guilty of first-degree murder. We note, however, that, in ruling on a motion to dismiss for insufficiency of the evidence, all evidence actually admitted, whether competent or incompetent, may be considered. *State v. Stone*, 323 N.C. 447, 373 S.E.2d 430 (1988). Defendant admits that if the statements made by him to Butterfield and to his family are included, the evidence is suf-

ficient to go to the jury. Accordingly, this assignment of error is without merit.

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

NO ERROR.

JOHN R. SEXTON & CO. v. BETSY Y. JUSTUS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE

No. 523PA94

(Filed 8 December 1995)

Taxation § 173 (NCI4th)— soft-drink excise tax—exemption—registration of product

Plaintiff was not entitled to a refund of taxes paid under protest pursuant to the Soft Drink Tax Act where the taxes were assessed against plaintiff for sales of specific concentrated juice products from 1 May 1985 through 30 September 1988. While the N.C. Supreme Court held in *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, that the Legislature had intended to grant an exemption for concentrated products, the Court was of the opinion that the taxation of any concentrated product necessarily depended upon whether that product would be taxed when sold bottled and did not intend to imply that the Act granted an unqualified total exemption for concentrated products or any other type of soft drink ingredient. A registration requirement was implicit in *Institutional Food House*, the Soft Drink Tax Act, and the Administrative Code, and the legislative history of the 1991 amendments to the Act establish that the change was enacted as a clarification of existing law requiring registration and was not meant to impose a new substantive registration requirement for concentrated products. N.C.G.S. § 105-113.47.

Am Jur 2d, State and Local Taxation §§ 28-30.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 116 N.C. App. 293, 447 S.E.2d 808 (1994), affirming summary judgment entered in favor of plaintiff by Walker, J., on 23 July 1993, in Superior Court, Guilford County. Heard in the Supreme Court 9 October 1995.

Smith Helms Mulliss & Moore, L.L.P., by Mack D. Pridgen, III, and Bruce P. Ashley, for plaintiff-appellee.

Michael F. Easley, Attorney General, by Kay Linn Miller Hobart, Assistant Attorney General, for defendant-appellant.

MITCHELL, Chief Justice.

The issue presented in this appeal is whether the Department of Revenue ("Department") must refund taxes paid under protest pursuant to the Soft Drink Tax Act, N.C.G.S. §§ 105-113.41 to .43 (Supp. 1994), .44 to .47 (1992), by John R. Sexton & Co. ("Sexton"), a Delaware corporation doing business in North Carolina. For the reasons that follow, we conclude that the Department properly assessed the excise taxes and that Sexton is not entitled to a tax refund.

On 30 November 1988, the Department conducted a Soft Drink Tax Audit of Sexton, a food service distribution company. Following the audit, the Department issued a Soft Drink Excise Tax Audit Report and a Notice of Tax Assessment to Sexton pursuant to N.C.G.S. § 105-241.1. By this notice, additional soft drink excise taxes were assessed against Sexton for sales of specific concentrated juice products covering the period from 1 May 1985 through 30 September 1988. Interest and penalties were also assessed against Sexton.

On 5 June 1992, Sexton filed an objection to the assessment and an application for a hearing with the Department. By this objection, Sexton sought rescission of the assessment with respect to the concentrated products sold by Sexton on the ground that such concentrated products were exempt from taxation pursuant to N.C.G.S. § 105-113.47. Sexton additionally contended that the Soft Drink Tax Act did not require registration of these concentrated products in order to receive an exemption from taxation. The Department denied Sexton's request for rescission of the assessment, and Sexton paid the taxes, interest, and penalties under protest.

On 14 July 1992, Sexton filed a claim for refund pursuant to N.C.G.S. § 105-267. The Department denied this claim on 10 August 1992. Thereafter, Sexton filed suit in Superior Court, Guilford County, seeking the return of the taxes assessed on its sales of concentrated products. The trial court granted summary judgment in favor of Sexton and denied summary judgment in favor of the Department. The Department then appealed to the Court of Appeals, alleging that the trial court had erred in ordering the refund. In a unanimous deci-

sion, the Court of Appeals affirmed the trial court. *John R. Sexton & Co. v. Justus*, 116 N.C. App. 293, 447 S.E.2d 808 (1994).

The Department contends that both the trial court and the Court of Appeals erred in ordering the refund. The Department argues that the concentrated products in question did not qualify for exemption without proper registration as required under the Soft Drink Tax Act ("Act"). In response, Sexton argues that the statute did not explicitly require registration of concentrated products and, thus, that no taxpayer was required to register a claim of exemption for concentrates in order to receive the tax exemption. Sexton also argues that the statute as interpreted by the Department is unconstitutionally vague.

We note that in 1991 the General Assembly amended the Act to make registration of concentrated products with the Department a prerequisite to receiving a tax exemption under the Act. *See* N.C.G.S. § 105-113.47(a)(3). This legislative clarification does not expressly apply to the dispute in the case *sub judice*, however, because the excise taxes at issue here were assessed against Sexton for sales of concentrated products during the period from 1 May 1985 through 30 September 1988. Thus, except where specifically noted otherwise, we refer to the 1985 version of the Act and administrative rules existing during the relevant taxation period as primary authority. N.C.G.S. ch. 105, art. 2B, §§ 105-113.41 to .67 (1985).

The Soft Drink Tax Act, enacted in 1969, imposes a tax "upon the sale, use, handling and distribution of all soft drinks, soft drink syrups and powders, base products," and other specified soft drink items. N.C.G.S. § 105-113.45(a). During the relevant taxation period, the statute defined "base products" to mean "hot chocolate flavored drink mix, flavored milk shake bases, concentrate products to which milk or other liquid is added to complete a soft drink, and all like items or products as herein defined which will be taxed as syrups." N.C.G.S. § 105-113.44(1). The Act also provided that:

> All bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice . . . are exempt from the excise tax imposed by this Article, except that this exemption shall not apply to any fruit or vegetable juice drink to which has been added any coloring, artificial flavoring or preservative.

N.C.G.S. § 105-113.47(a). In order to receive this exemption, however, a taxpayer was required to register with the Secretary of Revenue. The Act provided that "[n]o bottled soft drink shall be entitled to the

exemption until registration has been accomplished by the filing of an application for exemption on such form as may be prescribed by the Secretary." *Id.* § 105-113.47(b). Thus, while the 1985 version of the Act did not explicitly provide an exemption for *concentrated products*, it did provide that before any *bottled soft drink* was entitled to an exemption, it must be registered.

Despite the absence of specific statutory language providing an exemption for concentrated products, this Court concluded in *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E.2d 297 (1976) that the legislature had intended to grant an exemption for concentrated products. We held that concentrates, defined by the statute as a base product, are "taxable as such only when used to complete a soft drink which, if sold bottled, would be subject to the tax." *Id.* at 137, 221 S.E.2d at 306. In reaching this conclusion, we noted that the Act establishes a bifurcated scheme of taxation whereby "bottled soft drinks" were subject to a tax in one section, N.C.G.S. § 105-113.45(b), and "soft drink syrups," "soft drink powders," "simple syrups," and "base products" were subject to a tax in other sections, N.C.G.S. § 105-113.45(c), (d). *Id.* at 136, 221 S.E.2d at 305. We said:

> The effect of this scheme is to tax the sale or distribution of the soft drink itself when practical but tax the sale or distribution of the *ingredients* thereof when this would be impractical. . . . Accordingly, base products and other specified ingredients used to complete soft drinks intended for open-cup [fountain drink] sales are taxed in lieu of the open-cup drink itself. Since these *same soft drink ingredients* are excluded from taxation when used in the manufacture of "bottled soft drinks" . . . , the clear implication is that sales of these ingredients are taxable only when intended for use in a soft drink which, if sold "bottled," would be subject to the tax.

Id. at 138, 221 S.E.2d at 306 (citation omitted). Therefore, we concluded that because natural orange juice met the exemption requirement under the statute *when sold bottled*, "it follows that frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the Act." *Id.* This conclusion logically remedied the disparate treatment of concentrated fruit juices and bottled (ready-to-drink) fruit juices by extending the exemption provisions of N.C.G.S. § 105-113.47(a) to both.

Both Sexton and the Department argue that *Institutional Food House* is determinative to the outcome in the case *sub judice*, yet each party reads that case differently. Sexton argues that *Institutional Food House* grants a blanket exemption from taxation for concentrates and that because this Court did not mention a registration requirement in that case, no taxpayer had to register in order to receive an exemption for concentrates. Sexton's interpretation arises in part from the manner in which we posed and answered a question at the beginning of *Institutional Food House*: "Did the Legislature intend, by this statutory scheme, to treat frozen concentrated orange juice as either a 'base product' or a 'soft drink syrup' and impose the soft drink excise tax upon it? For the reasons which follow, the answer is no." *Id.* at 136, 221 S.E.2d at 305. We agree that this question and answer, read too broadly, would appear to provide a blanket tax exemption for Sexton's concentrated products. However, a complete examination of *Institutional Food House* reveals that we were of the opinion that the taxation of any concentrated product necessarily depended upon whether that product would be taxed *when sold bottled.* In other words, to receive an exemption for concentrated products or any other base product, the product had to meet the exemption requirements in its reconstituted form as a bottled drink. Because natural orange juice qualified for the statutory exemption when sold bottled, we concluded that the frozen concentrated orange juice at issue in *Institutional Food House* was also exempt. This Court did not intend to imply that the Act granted an unqualified total exemption for concentrated products or any other type of soft drink ingredient.

More important to the case *sub judice*, however, is Sexton's argument—adopted by the Court of Appeals—that because *Institutional Food House* did not mention a registration requirement for the concentrated orange juice that we found to be exempt, no registration requirement exists for such concentrated products. For the reasons that follow, we reject this argument. We conclude, instead, that a registration requirement was implicit in our decision in *Institutional Food House*, the Soft Drink Tax Act, and a relevant rule from the North Carolina Administrative Code.

The question for appellate review in *Institutional Food House* did not involve the registration requirement of the Act. Nevertheless, our holding in that case implicitly acknowledged that registration of a product that a taxpayer contends is exempt under the Act is a prerequisite to receiving an exemption for that product. Any other inter-

pretation creates a loophole in the Act, allowing a taxpayer to simply claim an exemption for concentrates without having to prove the content of the product to the Department. While the Court of Appeals interpreted *Institutional Food House* to create such a loophole, we find that court's reasoning unpersuasive.

Sexton does not dispute the fact that at the time of our decision in *Institutional Food House*, the Act required taxpayers to register bottled soft drinks and juices for which an exemption was claimed. *See* N.C.G.S. § 105-113.47(b). Those requirements were specific and detailed, providing that

> [n]o bottled soft drink shall be entitled to the exemption until registration has been accomplished by the filing of an application for exemption on such form as may be prescribed by the Secretary, which form shall include an affidavit setting forth the complete and itemized formula by volume of the drink therein referred to, and the failure to submit such affidavit shall be prima facie evidence that such bottled soft drink is not exempt. All bottled soft drinks which are not so registered and do not have affixed thereto the proper stamps or crowns shall be subject to confiscation. The Secretary or his duly authorized representative may at any time check the formulas or the manufacturing of such bottled soft drinks for which exemption is claimed under this section and in addition thereto, the Secretary or his duly authorized representative may at any time take samples of any product for which exemption has been claimed. . . . The sample shall be clearly marked for identification and such sample may be turned over to any registered chemist designated by the Secretary for the purpose of analysis.

Id. After we determined that an exemption for concentrated products depended upon whether the products would be exempt when sold in bottles, we contemplated that a taxpayer would adhere to these statutory instructions for registering bottled products. To find that this Court intended to allow taxpayers to claim an exemption for concentrates without registration in light of this detailed statutory registration process for bottled soft drinks is incongruous with our duty to read the various subsections of the Act as parts of a composite whole.

Moreover, our conclusion is supported by a relevant administrative rule in effect throughout the taxation period in question. The rule, entitled "Exemption of Concentrated Juices Determined," provided in part:

> *Registration of concentrated juice products shall be subject to the same regulations as for bottled (closed container) soft drinks under G.S. 105-113.47. Any concentrated frozen or unfrozen fruit or vegetable juice for which exemption is claimed shall be registered with the Secretary* on Form B-B-50, Application for Registration of Concentrated Frozen or Unfrozen Fruit or Vegetable Juice for Exemption from the Soft Drink Excise Tax. Three copies of the label which will be affixed to the product or sample of the physical package showing weight and content and supporting the claim for exemption must accompany each application.

17 NCAC 4D .0507 (July 1984) (emphasis added). The construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises. *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973). We have said that such construction is entitled to "due consideration," *Faizan v. Grain Dealers Mut. Ins. Co.*, 254 N.C. 47, 57, 118 S.E.2d 303, 310 (1961), and that it is "strongly persuasive," *Shealy v. Associated Transport, Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960), or even "*prima facie* correct," *In re Vanderbilt Univ.*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960). *See also* N.C.G.S. § 105-264 (Supp. 1994) ("An interpretation by the Secretary [of Revenue] is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation. . . ."). With these rules of statutory construction in mind, we conclude that implicit in the Department of Revenue's rule was the understanding that registration of concentrated products is a prerequisite to exemption. Not only did the rule give notice that concentrated juice products were subject to the same detailed regulations as bottled drinks under N.C.G.S. § 105-113.47, it specifically referred taxpayers wishing to claim an exemption for concentrates to Form B-B-50. Thus, the Department clearly intended that taxpayers register concentrated products, which this Court found eligible for exemption in *Institutional Food House*, before claiming an exemption from taxation under the Act.

We find additional evidence that Sexton was on notice that the Department required registration for concentrates in the legislative history of the 1991 amendments to the Act. Legislative history is one factor that may be given some weight in determining legislative intent. *State ex rel. N.C. Milk Comm'n v. National Food Stores*, 270

N.C. 323, 154 S.E.2d 548 (1967). "Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990); *accord Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951).

As previously noted, the General Assembly amended the Act in 1991 to expressly provide that registration of concentrated products with the Department is a prerequisite to receiving a tax exemption under the Act. *Compare* N.C.G.S. § 105-113.47 (1985) *with* N.C.G.S. § 105-113.47 (1992). The legislature stated:

> The Secretary of Revenue shall review the registrations of bottled soft drinks *and juice concentrates* made under G.S. 105-113.47 before the effective date of this Part. The Secretary shall notify those registrants who no longer appear to meet the exemption criteria that, for the bottled soft drink *or juice concentrate* to continue to be exempt from the excise tax imposed by [the Soft Drink Tax Act], *a new registration* application must be submitted. The excise tax imposed by [the Soft Drink Tax Act] applies to a *previously registered* bottled soft drink or juice *concentrate* unless the Secretary determines from the new application that the bottled soft drink or juice concentrate *continues* to meet the exemption criteria.

Act of July 13, 1991, ch. 689, sec. 288, 1991 N.C. Sess. Laws 2157 (emphasis added). These special instructions to the Secretary of Revenue from the legislature establish that the 1991 amendment to N.C.G.S. § 105-113.47 was enacted as a clarification of existing law requiring registration, and was not meant to impose a new substantive registration requirement for concentrated products. In other words, because section 288 clearly instructs the Department to review the registration applications for concentrates made by taxpayers under the Act prior to the amendment, the logical conclusion is that taxpayers previously had been required to register concentrated products in order to claim an exemption. Thus, we conclude that the legislature, through the 1991 amendment, simply clarified that the Act already required that taxpayers must register concentrated products, which this Court had held to be eligible for exemption in *Institutional Food House*, before being entitled to an exemption from taxation under the Act.

The Court of Appeals erroneously affirmed the decision of the trial court granting summary judgment in favor of Sexton and denying summary judgment in favor of the Department. Because the parties have stipulated to the nature and substance of the concentrated products and to all other material facts, we reverse the holding of the Court of Appeals and remand this case to that court for further remand to the trial court for entry of summary judgment in favor of the Department.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ALLEN WYLIN HAUSER

No. 350PA94

(Filed 8 December 1995)

Searches and Seizures § 14 (NCI4th)— cocaine—search of garbage—basis for search of home

There was no error in a prosecution for trafficking in cocaine, maintaining a building for the use and sale of controlled substances, and possession of drug paraphernalia where a detective advised a supervisor at the Winston-Salem Sanitation Department that the police department wanted a sanitation worker to collect the trash at defendant's residence and turn it over to the police; the person who normally collected defendant's garbage agreed; defendant's garbage was collected from the back of his residence and taken to the truck; this collection was routine in every way except that defendant's garbage was deposited into a separate container and turned over to the police; a search of the garbage uncovered cocaine residue; the detective applied for a search warrant for defendant's residence, citing the cocaine residue and reliable information from four informants; a warrant was issued; and more than a pound of cocaine was found in defendant's home. While defendant may have retained some expectation of privacy in garbage placed in his backyard out of the public's view so as to bar search and seizure by the police entering the property, a different result is dictated when the garbage is collected in its routine manner. Even assuming that the search violated the Fourth Amendment, the information supplied by the informants

provided a substantial basis for probable cause for the search warrant.

Am Jur 2d, Searches and Seizures §§ 36, 37.

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. 431, 445 S.E.2d 73 (1994), finding no error and affirming an order denying defendant's motion to suppress entered by Stephens (Donald W.), J., at the 15 March 1993 Criminal Session of Superior Court, Forsyth County. Heard in the Supreme Court 21 June 1995.

Michael F. Easley, Attorney General, by Daniel C. Oakley, Senior Deputy Attorney General, for the State.

Wright, Parrish, Newton & Rabil, by Carl F. Parrish and Nils E. Gerber, for defendant-appellant.

North Carolina Association of Police Attorneys, Ronald Hall, President, by Mary Claire McNaught, Public Safety Attorney, amicus curiae.

Deborah K. Ross on behalf of American Civil Liberties Union of North Carolina Legal Foundation; and Patterson, Harkavy & Lawrence, by Burton Craige, on behalf of the North Carolina Academy of Trial Lawyers, amici curiae.

LAKE, Justice.

On 13 July 1992, Detective T.L. Phelps of the Winston-Salem Police Department submitted an application for a warrant to search a single-family dwelling located at 5350 Sunrise Terrace in Winston-Salem, North Carolina. The application noted that the defendant, Allen Wylin Hauser, occupied the residence, and that Detective Phelps had probable cause to believe that illegal drugs and drug paraphernalia would be found in the residence. In support of the application, Detective Phelps stated that he had received reliable information regarding defendant's drug sale operation from four informants, and that he had found cocaine residue in a garbage bag that was obtained from defendant's premises on 10 July 1992. A warrant was issued; and during the ensuing search, more than a pound of cocaine was discovered in the defendant's home.

Several days before the defendant's garbage was obtained, Detective Phelps advised a supervisor at the Winston-Salem Sanitation Department that the police department wanted a sanitation worker to collect the trash at defendant's residence and turn it over to the police. On 10 July 1992, the supervisor introduced Detective Phelps and another detective to Nelson Dowd, who normally collected the trash from 5350 Sunrise Terrace. Detective Phelps told Dowd that he was a police officer and that he was conducting an investigation. Detective Phelps asked Dowd to collect the garbage from 5350 Sunrise Terrace and, if possible, to keep it separate from the garbage collected from other houses and turn it over to him. Dowd agreed to do so in the course of his normal route. Dowd testified that after collecting the garbage from the back of defendant's residence, he took it back to his truck, which was located in the street at the entrance of the defendant's driveway. Dowd further testified that this collection was routine in every way, except that he prevented the defendant's garbage from commingling with other garbage by depositing the defendant's garbage into his own container in the back of the truck instead of into the garbage truck's collection bin. Dowd then drove the truck to the next corner and gave the container holding the defendant's garbage to the detectives. A search of the defendant's garbage uncovered material containing cocaine residue. This evidence was then used as a basis for obtaining the search warrant which ultimately led to the defendant's arrest.

Defendant was indicted on 8 September 1992 for trafficking in cocaine, for maintaining a building for the use and sale of controlled substances and for possession of drug paraphernalia. At a pretrial hearing, the trial court denied the defendant's motion to suppress the evidence obtained from his garbage prior to the issuance of the search warrant and the evidence seized during the subsequent search of his residence. Thereafter, the defendant gave notice of appeal from the trial court's order denying the motion to suppress and entered a plea of guilty as to each charge. The defendant received a sentence of ten years' imprisonment and a $50,000 fine.

On appeal, the defendant argued that the evidence seized from his residence should have been suppressed because the warrant under which it was seized was based on an unconstitutional search and seizure of his garbage. The Court of Appeals found that the warrantless search and seizure of the garbage violated the defendant's Fourth Amendment right to be free from unreasonable searches. However, the Court of Appeals upheld the denial of defendant's motion to sup-

press, finding that the search warrant for defendant's residence was properly supported by credible information even without the evidence of cocaine residue found during the search of defendant's garbage. On 8 September 1994, this Court granted defendant's petition for discretionary review. We conclude that the search of the defendant's garbage did not violate the protections afforded individuals by the Fourth Amendment and therefore affirm, for different reasons, the decision of the Court of Appeals.

In *California v. Greenwood*, 486 U.S. 35, 100 L. Ed. 2d 30 (1988), the Supreme Court held that the Fourth Amendment does not prohibit a warrantless search and seizure of garbage left for collection outside the curtilage of the home. 486 U.S. at 37, 100 L. Ed. 2d at 34. As in the present case, police officers asked Greenwood's regular garbage collector to collect and turn over Greenwood's garbage. The police then proceeded to search Greenwood's garbage without a warrant. The Supreme Court noted that the warrantless search of Greenwood's garbage by the police would only violate the Fourth Amendment if (1) the defendant manifested a subjective expectation of privacy in the garbage, which (2) society would be willing to accept as objectively reasonable. *Id.* at 39, 100 L. Ed. 2d at 36. The Court held that the defendant, by leaving his garbage at the curb, sufficiently exposed his garbage to the public so as to defeat any reasonable expectation of privacy in the garbage. *Id.* at 40, 100 L. Ed. 2d at 36.

The defendant in the present case seeks to distinguish *Greenwood* based on the fact that his garbage was placed in his backyard, within the curtilage of his home and out of the public's view. The defendant argues that *Greenwood*'s holding is specifically limited to instances in which garbage is placed outside the curtilage of the home. When the garbage is within the curtilage of the home, the defendant contends that the police must have a warrant before conducting a search. We do not agree that *Greenwood*'s scope is so limited. After holding that no Fourth Amendment rights are retained with respect to garbage placed outside the curtilage of the home, the *Greenwood* Court also noted that:

> [Defendant] placed [his] refuse at the curb for the express purpose of *conveying it to a third party, the trash collector, who might himself have sorted through [defendant's] trash or permitted others, such as the police, to do so.* Accordingly, having deposited [his] garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for

> the express purpose of having strangers take it," [defendant] could have had no reasonable expectation of privacy in the inculpatory items that [he] discarded.

Id. at 40-41, 100 L. Ed. 2d at 37 (emphasis added) (citation omitted). Based upon this language and the cases discussed below, we believe that the better interpretation focuses not only on the location of the garbage but also the extent to which the garbage is exposed to the public or if out of the public's view, whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to the police.

For example, in *United States v. Hedrick*, 922 F.2d 396 (7th Cir.), *cert. denied*, 502 U.S. 847, 116 L. Ed. 2d 113 (1991), the defendant sought to suppress items seized by police during a warrantless search of garbage located eighteen to twenty feet within the curtilage of his home. Although within the curtilage of defendant's home, the garbage was placed in view of the public passing by on the sidewalk, the distance between the garbage and the sidewalk was short and there was no fence or other barrier preventing public access to the garbage. Unlike *Greenwood* and the case *sub judice*, the police actually trespassed onto the defendant's property and collected the garbage themselves. The Seventh Circuit Court of Appeals held that the defendant possessed no reasonable expectation of privacy in the garbage and, therefore, the warrantless search by the police did not violate the Fourth Amendment even though the garbage was located within the curtilage of the defendant's home. Citing *Greenwood*, which did not reject any notion of abandonment, the court in *Hedrick* stated, "[t]he obvious distinction between garbage cans and other containers is that it is 'common knowledge' that members of the public often sort through other people's garbage, and that the garbage is eventually removed by garbage collectors on a regular basis." *Hedrick*, 922 F.2d at 399 (citing *Greenwood*, 486 U.S. at 40, 100 L. Ed. 2d at 36). The court in *Hedrick* reasoned that because the garbage was so readily accessible to the public, it was exposed to the public for purposes of the Fourth Amendment. *Id.* at 400. The important implication of *Hedrick* is that a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage of a defendant's home. Therefore, the location of defendant Hauser's garbage within the curtilage of his home, in and of itself, does not automatically establish that he possessed a reasonable expectation of privacy in the garbage.

Our next inquiry must determine what effect placing his garbage in the rear of his house, out of the public's view, had with respect to the defendant's expectation of privacy. In *Hedrick*, the court indicated that, as a general rule, the reasonableness of the defendant's expectation of privacy will increase as the garbage gets closer to the house. *Id.* In *United States v. Certain Real Property Located at 987 Fisher Road*, 719 F. Supp. 1396, 1404-05 (E.D. Mich. 1989), cited with approval in *Hedrick*, the district court held that garbage bags placed against the back wall of a house, out of the public's view, were protected from warrantless searches. While these facts are similar to those in the instant case, again the location of the garbage within the curtilage alone is not determinative. In *Real Property*, the court based its decision on the fact that the police intentionally trespassed on the defendant's property with the express intent to seize the defendant's trash and search it for evidence of drug activity. *Id.* at 1405. The court specifically stated that its decision stood only for the proposition that "closed garbage bags, while within the curtilage of a backyard, are entitled to fourth amendment protection from police intrusion until they are either taken to the curbside or removed from the premises by the owner or collector." *Id.* at 1406. The court clearly indicated that the law enforcement officers could have had the regular garbage collector deliver the bags to them after they had been removed from the curtilage of the home without any resulting violation of the Fourth Amendment. *Id.* at 1407 n.8.

In *United States v. Biondich*, 652 F.2d 743 (8th Cir.), *cert. denied*, 454 U.S. 975, 70 L. Ed. 2d 395 (1981), a police officer approached an employee of the private garbage collection service that regularly collected trash from the defendant's house. As in the instant case, the officer made arrangements for the collector to pick up the defendant's trash, keep it separate and turn it over to the police. On the regular collection day, the collector picked up the defendant's trash in the usual manner, except that he placed the trash to one side of his collection bin to keep it separate from the garbage collected from other houses. Additionally, the collector did not compact the trash into his truck. The Eighth Circuit Court of Appeals, while recognizing that there may be a legitimate expectation of privacy in garbage while it remains within the curtilage of a residence, stated:

> When a person makes arrangements with a sanitation service to have the items picked up, however, and when the items are placed in the designated place for collection and the regular collector makes the pickup in the usual manner on the scheduled

> collection day, the person loses his or her legitimate expectation of privacy in the items at the time they are taken off his or her premises.

Id. at 745.

Based on *Greenwood*, *Real Property* and *Biondich*, it is clear that a warrantless search of garbage by police, after pickup by the regular collector in the normal manner, does not violate the Fourth Amendment.

It is apparent that all of these circumstances existed in the present case. Defendant Hauser's garbage was picked up by the regular garbage collector, in the usual manner and on the scheduled collection day. No one other than those authorized by defendant entered defendant's property, and no unusual procedures were followed other than to keep defendant's garbage separate. Only after the garbage was removed from defendant's premises did the police conduct their search. While the defendant may have retained some expectation of privacy in garbage placed in his backyard out of the public's view, so as to bar search and seizure by the police themselves entering his property, a different result is dictated when the garbage is collected in its routine manner. The clear intention to convey the garbage to a third party, so as to allow the trash collector to make such use and disposal of it as he desires, is a factor which merits substantial weight in considering any expectation of privacy. Under these conditions, we are persuaded that the defendant retained no legitimate expectation of privacy in his garbage once it left his yard in the usual manner.

Finally, even assuming, *arguendo*, that the search of defendant's garbage did violate the Fourth Amendment, we agree with the Court of Appeals that the information supplied by the informants, separate and apart from the search of defendant's garbage, provided a substantial basis for probable cause necessary to support the search warrant issued for defendant's residence.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

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

MARY C. STANFIELD v. N. JOHNSON TILGHMAN, G/A/L FOR ROBERT LOUIS STANFIELD

No. 16PA95

(Filed 8 December 1995)

Automobiles and Other Vehicles § 460 (NCI4th)— automobile accident—driver with learner's permit—liability of parent

The trial court erred by granting a directed verdict for defendant in an action arising from an automobile collision where plaintiff was the front seat passenger in a car driven by defendant, her son, who had a learner's permit and who was operating the car under her supervision; defendant had driven some four miles before the accident without incident; plaintiff had not been required to correct his driving over those four miles; defendant approached a left-hand curve on the rural, unpaved road and met a car travelling towards him at a fast rate of speed; and defendant, without warning, suddenly drove the car off the right side of the road, jumped a ditch, sped up and traveled approximately two hundred feet before the car struck a tree. Although N.C.G.S. § 20-11(b) establishes a presumption of the right to control on the part of the supervising adult, this presumption does not translate into an irrebuttable presumption of control so as to impute negligence or establish contributory negligence as a matter of law without regard for exigent circumstances or general negligence principles and it cannot be said upon the facts here that plaintiff's contributory negligence was so clearly established that no other reasonable inference can be drawn from the evidence such that defendant was entitled to a directed verdict.

Am Jur 2d, Automobiles and Highway Traffic §§ 568, 608, 635.

Automobile operator's inexperience or lack of skill as affecting his liability to passenger. 43 ALR2d 1155.

Liability, for personal injury or property damage, for negligence in teaching or supervision of learning driver. 5 ALR3d 271.

Student-driver's negligence as imputable to teacher-passenger. 90 ALR3d 1329.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 292, 450 S.E.2d 751 (1994), affirming a judgment granting defendant a directed verdict, entered by Cashwell, J., on 22 July 1993 in Superior Court, Harnett County. Heard in the Supreme Court 10 October 1995.

Bryan, Jones, Johnson & Snow, by James M. Johnson and Cecil B. Jones, for plaintiff-appellant.

Morgan & Reeves, by Robert B. Morgan, Margaret Morgan, and Eric M. Reeves, for defendant-appellee.

LAKE, Justice.

On 20 June 1992 at approximately 5:45 p.m., plaintiff, a licensed driver, was the front-seat passenger in a car owned by plaintiff's sister and driven by defendant, plaintiff's fifteen-year-old son. The only other passenger in the car, in addition to plaintiff and defendant, was plaintiff's minor daughter, who rode in the back seat. The defendant had been issued a valid learner's permit pursuant to N.C.G.S. § 20-11 and was operating the car under plaintiff's supervision as a licensed driver. As defendant approached a left-hand curve on a rural, unpaved road, he met a black car travelling towards him at a fast rate of speed. Defendant, without warning, suddenly drove the car off the right side of the road, jumped a ditch, sped up and traveled approximately two hundred feet before the car struck a tree. Plaintiff received serious injuries. Before the accident, defendant had driven some four miles without incident, properly observing all of the applicable rules of the road. Plaintiff, over the course of these four miles, was never required to correct defendant concerning his manner of driving.

Plaintiff filed a complaint on 2 December 1992 against her son, through his guardian *ad litem*, alleging she received personal injuries resulting from defendant's negligent operation of the car. In his answer, defendant asserted, in part, plaintiff's contributory negligence. This case was tried before a jury at the 12 July 1993 Civil Session of Superior Court, Harnett County, Judge Narley L. Cashwell presiding. At the close of plaintiff's evidence, defendant moved for a directed verdict on the ground that N.C.G.S. § 20-11(b) precluded, as a matter of law, plaintiff from maintaining her action against defendant. Judge Cashwell agreed and in a judgment entered 22 July 1993, directed a verdict in favor of defendant.

Plaintiff appealed to the Court of Appeals, which unanimously affirmed Judge Cashwell's grant of a directed verdict in favor of defendant. This Court granted plaintiff's petition for discretionary review on 9 February 1995, and for the reasons stated herein, we now reverse the Court of Appeals.

The sole issue presented to this Court is whether the negligence of a driver, operating an automobile under a valid learner's permit pursuant to N.C.G.S. § 20-11(b), must be imputed to the statutorily approved person who occupies the seat next to the permittee and who has the right to control and direct the permittee's operation of the car, thereby precluding, as a matter of law, the statutorily approved person from recovering damages for personal injuries sustained as a result of the permittee's sudden negligence. We answer this question in the negative.

In the case *sub judice*, the Court of Appeals affirmed the grant of the directed verdict in favor of defendant pursuant to N.C.G.S. § 20-11(b) and that court's case of *McFetters v. McFetters*, 98 N.C. App. 187, 390 S.E.2d 348, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). The applicable portions of N.C.G.S. § 20-11(b) in effect at the time of this accident provided:

> The limited learner's permit shall entitle the applicant, while having the permit in his immediate possession, to drive a motor vehicle of the specified type or class upon the highways while accompanied by a parent, guardian, or other person approved by the Division [of Motor Vehicles], who is licensed . . . to operate a motor vehicle . . . and who is actually occupying a seat beside the driver.

N.C.G.S. § 20-11(b) (1983).

In *McFetters*, the Court of Appeals held that N.C.G.S. § 20-11(b) "creates a presumption that the statutorily approved person occupying the front passenger seat has the right to control and direct the operation of the vehicle." *McFetters*, 98 N.C. App. at 194, 390 S.E.2d at 352. Thus, under such presumption, the court reasoned that any negligence of the permittee is to be imputed to the statutorily approved person occupying the seat next to the permittee.

McFetters presented the Court of Appeals with a fairly unusual fact situation. There, the plaintiff, who occupied the front seat of a car driven by her fifteen-year-old son pursuant to a learner's permit, was injured when the car was involved in an accident. She brought

suit alleging her injuries were the result of her son's negligent operation of the car. Plaintiff was in the front seat only because she had become carsick. Plaintiff's husband, the owner of the car, was seated in the back seat, and it was he who directed their son's driving. Defendants contended that any negligence imputed to the plaintiff would serve to bar her recovery; the Court of Appeals agreed, but held that under the facts of the case, the son's negligence could not be imputed to the plaintiff as a matter of law.

The court noted in *McFetters* that two irreconcilable presumptions, both of equal dignity, were implicated: first, that the plaintiff, as the occupant of the seat next to her son, was presumed under N.C.G.S. § 20-11(b) to have the right to control and direct the operation of the car; and second, that the father, as the owner of the car and as a passenger, was presumed under *Shoe v. Hood*, 251 N.C. 719, 112 S.E.2d 543 (1960), to also have the right to control and direct the operation of the car, unless he had relinquished that right. *McFetters*, 98 N.C. App. at 194, 390 S.E.2d at 352. Because both the plaintiff and the father had equal rights to control their son's driving, the court reconciled the conflicting presumptions by holding that the parent who actually exercised control should bear the responsibility for their son's driving. *Id.* Thus, because all the evidence showed it was the father who directed and controlled their son's driving, defendants were not entitled to a directed verdict against the plaintiff. *Id.*

Relying on *McFetters* in the present case, the Court of Appeals noted that in *McFetters*, but for the conflicting "presumption of control" created by the presence of the owner in the car, the negligence of the permittee would have been imputed to the plaintiff. *Stanfield v. Tilghman*, 117 N.C. App. 292, 294, 450 S.E.2d 751, 753 (1994). The Court of Appeals reasoned that the instant case presented only one presumption of control: that the plaintiff, as a parent seated in the front-passenger seat and the only person in the car statutorily approved by the State to control and direct, "had the legal right to control the manner in which the automobile was being operated." *Id.* at 295, 450 S.E.2d at 753. Accordingly, the Court of Appeals applied this presumption without regard to "whether plaintiff ever actually exercised that right" and imputed the negligence of the permittee to plaintiff, thereby affirming the trial court's grant of a directed verdict in favor of defendant. *Id.*

Plaintiff argues to this Court that the Court of Appeals erred in its interpretation and application of its decision in *McFetters* to the facts

of the present case. We agree with plaintiff's contention in this regard. Specifically, plaintiff contends that the Court of Appeals improperly expanded the presumption established in *McFetters*, that the statutorily approved person occupying the seat next to the permittee has the right to control and direct the permittee's operation of the vehicle, into an irrebuttable presumption of control such that the permittee's negligence is imputed to the statutorily approved person.

At the outset, we agree with the Court of Appeals' construction of N.C.G.S. § 20-11(b) as establishing a presumption of "the right to control" on the part of the supervising adult. However, we disagree with the application of such a presumption to the facts of this case as, in essence, an irrebuttable presumption that the supervising adult is contributorily negligent as a matter of law. First, we find no indication from the plain language of the statute itself that the legislature intended such a result. Further, we believe establishing a rule that the permittee's negligence is imputed to the supervising adult as a matter of law would be contrary to sound public policy considerations.

Through the provisions of N.C.G.S. § 20-11(b), certain minors can be provisionally licensed with a learner's permit before they apply for their driver's license. With this learner's permit, minors are allowed to "practice" driving while they are under the guidance and supervision of a licensed parent, guardian or other statutorily approved person. This period of practice driving is important so that permittees gain the driving experience necessary for them to safely operate a vehicle without supervision when they are awarded their driver's license. If the permittee's negligent operation of a vehicle was imputed, in all instances as a matter of law to the supervising adult, such adults, including driver education instructors, would be less inclined to serve as supervisors over a permittee's practice driving, thus militating against our public policy and practice regarding drivers' education.

This case, in essence, involves basic issues of tort law. Plaintiff alleged defendant negligently operated the vehicle, thereby proximately causing her personal injuries. Defendant answered by alleging plaintiff's contributory negligence as a bar to her recovery. The case was tried before a jury, and at the close of plaintiff's evidence, defendant moved for a directed verdict, which the trial court granted on the basis of N.C.G.S. § 20-11(b). While plaintiff is presumed, under this statute, to have "the right to control" the vehicle, this presumption does not translate into an irrebuttable presumption "of control" so as to impute negligence or establish contributory negligence, as a mat-

ter of law, without regard for exigent circumstances or general negligence principles. Obviously, the "legal right to control" is not "control." Assuming the "right to control" referred to here infers a "duty to control," the unexercised legal right or duty to control does not equate to negligence in the absence of a fair opportunity to exercise that right or duty. There must be a reasonable opportunity to exercise the right or duty coupled with a failure to do so. The question here, then, is whether plaintiff, having the "right to control," also had adequate time and opportunity to exercise her duty, but nevertheless failed to do so. Plaintiff may overcome the presumption against her through evidence demonstrating she was not negligent in her supervision of defendant's driving in that in light of defendant's sudden actions, she had no time or opportunity to exercise her duty or stop the negligent operation of the car. Of course, should defendant successfully show plaintiff was indeed contributorily negligent in her supervision of defendant's driving, she would be barred from recovering for her personal injuries as a matter of law.

This Court has stated many times that "[a] motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the evidence, considered in the light most favorable to the nonmovant, to take the case to the jury." *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Only when the evidence is insufficient to support a verdict in the nonmovant's favor should a motion for a directed verdict be granted. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979). It is seldom appropriate to direct a verdict in a negligence action. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987); 2 G. Gray Wilson, *North Carolina Civil Procedure* § 50-7, at 161 (1989). Indeed, a directed verdict on the ground of contributory negligence is only proper when the defense is clearly established such that no other reasonable inference can be drawn from the evidence. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978).

Viewing the evidence in the light most favorable to the plaintiff, as the nonmovant, and resolving all discrepancies in the plaintiff's favor, the evidence tends to show that defendant operated the car quite successfully for a stretch of several miles. Plaintiff had not been required to correct or reproach defendant concerning his driving. As defendant neared the left-hand curve and the other car approached, defendant, suddenly and without warning, drove the car he was operating off the right side of the road, jumped a ditch, sped up and traveled approximately two hundred feet before the car struck a tree,

seriously injuring plaintiff. This evidence does not establish that plaintiff, as a matter of law, was contributorily negligent in her supervision of defendant's driving.

Indeed, from the evidence that defendant successfully navigated his way down the rural, unpaved road before the accident, the jury could reasonably find that plaintiff aptly performed her oversight of defendant's driving. Also, from the evidence showing that defendant's departure from the road was sudden and without warning, the jury could reasonably conclude that plaintiff in fact had no opportunity to exercise her right to control defendant's manner of driving. We cannot say, upon these facts, that plaintiff's contributory negligence was so clearly established that no other reasonable inference can be drawn from the evidence such that defendant was entitled to a directed verdict. Whether the plaintiff negligently supervised defendant's driving performance is a factual question more properly left for the jury to resolve. We conclude, therefore, it was error for the trial court to grant defendant a directed verdict and for the Court of Appeals to affirm that ruling.

For the reasons stated herein, we reverse the Court of Appeals and remand this case to that court for further remand to the Superior Court, Harnett County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. PAUL DEGEOFREY HOLT

No. 85PA95

(Filed 8 December 1995)

1. Homicide § 256 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where, during a confrontation between defendant and the victim, defendant went to a store located thirty feet away and returned with a gun; by his own testimony, this removed him from the confrontation for about two to three minutes; when he returned, he shot the victim as the victim fled, threatened to kill the victim's wife

also, and stated that he hoped he had killed the victim; the time interval between the defendant's departure from the confrontation and the shooting was clearly sufficient to allow him to think out the act and form a fixed design to kill in a cool state of blood; and his statements in the wake of the shooting indicate that he in fact did so.

Am Jur 2d, Homicide § 68.

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

2. Homicide § 706 (NCI4th)— first-degree murder—no instruction on voluntary manslaughter

There was no prejudicial error in a noncapital prosecution for first-degree murder where the trial court denied defendant's request for an instruction on voluntary manslaughter, the trial court instructed the jury on first- and second-degree murder, and the jury found defendant guilty of first-degree murder.

Am Jur 2d, Homicide §§ 496, 529-534.

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

On writ of certiorari to review a judgment entered on 20 October 1993 by Walker (Russell G., Jr.), J., in Superior Court, Guilford County, sentencing defendant to life imprisonment upon a jury verdict finding him guilty of first-degree murder. Heard in the Supreme Court 16 November 1995.

Michael F. Easley, Attorney General, by R. Kendrick Cleveland, Associate Attorney General, for the State.

Wallace C. Harrelson, Public Defender, and Walter E. Jones, Assistant Public Defender, for defendant-appellant.

WHICHARD, Justice.

In a noncapital trial, defendant was convicted of the first-degree murder of Olin Brown and sentenced to life imprisonment. Trial counsel failed to perfect the appeal in a timely manner. On 4 May 1995 this Court allowed defendant's petition for a writ of certiorari and

appointed Wallace C. Harrelson, Public Defender of Guilford County, as counsel on appeal. We now find no error in the trial.

The State's evidence, in pertinent summary, showed the following:

Several witnesses observed a confrontation between defendant and the victim, Olin Brown, which involved an exchange of angry words, shoving, and throwing punches. In the course of the confrontation, defendant ran to a store located approximately thirty feet away and returned carrying a gun. The group gathered at the scene scattered, with the victim running toward a nearby field. Defendant fired the gun at the fleeing victim. The victim's wife then found the victim lying in the nearby field, with his pants bloody on the right side. Paramedics and police officers transported him to a hospital, where he died shortly thereafter. After the shooting defendant threatened to kill the victim's wife and said of the victim, "I hope I killed the m——- f——-."

A forensic pathologist testified that a lacerated femoral artery secondary to a gunshot wound in the right leg caused the victim's death.

Defendant testified in his own behalf. He described the confrontation, indicating that he thought the victim's girlfriend was leaving to get a gun and that he had believed the victim had a gun. The victim's previous threats to him caused him to believe the victim would hurt him. Defendant testified: "He threatened me and I was scared." He admitted shooting in the victim's direction, but only for the purpose of scaring him. He stated that he was away from the scene of the confrontation for "[a]bout two to three minutes" when he went to get the gun.

Defendant first contends the trial court erred in denying his motion to dismiss the first-degree murder charge. He argues that the evidence was insufficient to show premeditation and deliberation.

[1] Premeditation and deliberation are necessary elements of first-degree murder based on premeditation and deliberation (as opposed to other bases for first-degree murder set forth in N.C.G.S. § 14-17). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a

fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. A defendant's conduct before and after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation. *State v. Vaughn*, 324 N.C. 301, 305, 377 S.E.2d 738, 740 (1989); *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *sentence vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). In determining the sufficiency of the evidence, the court must consider it in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Baity*, 340 N.C. 65, 73, 455 S.E.2d 621, 626 (1995).

The evidence here shows that during a confrontation between defendant and the victim, defendant went to a store located thirty feet away and returned with a gun. By his own testimony, this mission removed him from the confrontation for about two to three minutes. When he returned he shot the victim as the victim fled, threatened to kill the victim's wife also, and stated that he hoped he had killed the victim. The time interval between defendant's departure from the confrontation and the shooting was clearly sufficient to allow him to think out the act and form a fixed design to kill in a cool state of blood. His statements in the wake of the shooting indicate that he in fact did so. The evidence thus sufficed to permit a reasonable inference that defendant premeditated and deliberated the killing, and the trial court did not err in denying the motion to dismiss. This assignment of error is overruled.

[2] Defendant next contends the trial court erred in denying his request that the jury be instructed on a possible verdict of guilty of voluntary manslaughter. Assuming *arguendo* that the evidence supported such an instruction, the failure to give it was harmless. The trial court instructed the jury on both first-degree and second-degree murder, and the jury found defendant guilty of first-degree murder. It is well established in this jurisdiction that when a jury is properly instructed on first-degree murder and second-degree murder and returns a verdict of guilty of first-degree murder, the failure to instruct on voluntary manslaughter is harmless error. *Vaughn*, 324 N.C. at 309, 377 S.E.2d at 742; *State v. Tidwell*, 323 N.C. 668, 674-75, 374 S.E.2d 577, 581 (1989). These assignments of error are overruled.

We find that defendant received a fair trial, free from prejudicial error.

NO ERROR.

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

HAZARD CANNON, ALVIN OLDS AND NORMAN PHILLIPS v. N.C. STATE BOARD OF EDUCATION, DURHAM COUNTY BOARD OF COMMISSIONERS, DURHAM CITY BOARD OF EDUCATION, DURHAM COUNTY BOARD OF EDUCATION, AND DURHAM COUNTY BOARD OF ELECTIONS

No. 48A95

(Filed 8 December 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, 117 N.C. App. 399, 451 S.E.2d 302 (1994), reversing the trial court's order granting defendants' motion to dismiss for mootness entered by Herring, J., on 18 September 1992 in Superior Court, Wake County. Heard in the Supreme Court 13 November 1995.

Randall, Jervis, & Hill, by John C. Randall, for plaintiff-appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, for defendant-appellant State Board of Education; and Durham County Attorney's Office, by Thomas Russell Odom, and Tharrington Smith, by Michael Crowell, for defendant-appellant Durham County.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Judge Wynn. As to plaintiffs' contention that the method of electing the merged school board is racially discriminatory, we conclude that the issue is not properly before this Court. Plaintiffs never filed pleadings in this matter alleging racial discrimination and thus did not properly present the issue for determination by the trial court.

REVERSED.

LAUREL WOOD OF HENDERSON, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, RESPONDENT AND PARK RIDGE HOSPITAL AND PIA-ASHEVILLE, INC., D/B/A APPALACHIAN HALL, INTERVENOR-RESPONDENTS

No. 102A95

(Filed 8 December 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, 117 N.C. App. 601, 452 S.E.2d 334 (1995), affirming an order entered by Bowen (Wiley, F.), J., on 1 August 1993, in Superior Court, Wake County. On 4 May 1995, we allowed petitioner's petition for discretionary review as to additional issues. Heard in the Supreme Court 14 November 1995.

Bode, Call & Green, by Robert V. Bode and Diana E. Ricketts, for petitioner-appellant.

Michael F. Easley, Attorney General, by James A. Wellons, Special Deputy Attorney General, for respondent-appellee N.C. Department of Human Resources.

Petree Stockton, L.L.P., by Noah H. Huffstetler, III, Barbara B. Garlock, and Gary S. Qualls, for intervenor-respondent-appellee Park Ridge Hospital.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray, William K. Edwards, and Terrill Johnson Harris, for intervenor-respondent-appellee PIA-Asheville, Inc., d/b/a Appalachian Hall.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Judge Lewis. The petition for discretionary review as to additional issues was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE THOMPSON

[342 N.C. 401 (1995)]

IN THE MATTER OF: SUSAN ELIZABETH THOMPSON D.O.B. 01/04/84

No. 104A95

(Filed 8 December 1995)

Appeal by petitioner-appellants Wake County Department of Social Services (DSS) and Elisabeth P. Clary, guardian ad litem, pursuant to N.C.G.S. § 7A-30(2), from an unpublished decision of a divided panel of the Court of Appeals, 117 N.C. App. 731, 453 S.E.2d 877 (1995), which affirmed an order entered on 15 March 1994 by Sherrill, J., in District Court, Wake County, dismissing DSS's petition for termination of the parental rights of the respondent, Craig Gordon Thompson, in the minor child, Susan Elizabeth Thompson. Heard in the Supreme Court 15 November 1995.

Corinne G. Russell, Assistant Wake County Attorney, for Wake County Department of Social Services, petitioner-appellant.

Elisabeth P. Clary for the guardian ad litem, petitioner-appellant.

Jeffrey M. Seigle for respondent-appellee.

PER CURIAM.

REVERSED.

FAIN v. STATE RESIDENCE COMMITTEE OF UNC

[342 N.C. 402 (1995)]

HEATHER M. FAIN, PETITIONER v. STATE RESIDENCE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENT

No. 71PA95

(Filed 8 December 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 541, 451 S.E.2d 663 (1995), vacating an order entered 8 July 1993 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 13 November 1995.

Bailey & Dixon, L.L.P., by J. Ruffin Bailey, David M. Britt, and Alan J. Miles, for petitioner-appellee.

Michael F. Easley, Attorney General, by Thomas O. Lawton III, Assistant Attorney General, for respondent-appellant.

PER CURIAM.

AFFIRMED.

MUSE v. CHARTER HOSPITAL OF WINSTON-SALEM

[342 N.C. 403 (1995)]

DELBERT JOSEPH MUSE, JR., ADMINISTRATOR OF THE ESTATE OF DELBERT JOSEPH MUSE, III, AND JANE K. MUSE v. CHARTER HOSPITAL OF WINSTON-SALEM, INC. AND CHARTER MEDICAL CORPORATION

No. 73A95

(Filed 8 December 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 468, 452 S.E.2d 589 (1995), finding no error in a trial that resulted in a judgment for plaintiff entered on 9 January 1992 and an order filed on 11 June 1992 *nunc pro tunc* 5 March 1992 by Ross, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 November 1995.

Wade E. Byrd for plaintiff-appellees.

Smith Helms Mulliss & Moore, L.L.P., by Bynum M. Hunter and Alan W. Duncan; and Ricci, Hubbard, Leopold & Frankel, P.A., by James R. Hubbard, for defendant-appellants.

Poyner & Spruill, L.L.P., by Benjamin P. Dean, on behalf of North Carolina Association of Defense Attorneys, amicus curiae.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein; and Elizabeth F. Kuniholm on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

Chief Justice MITCHELL and JUSTICE ORR did not participate in the consideration or decision of this case.

EUGENE K. FRANKLIN, DAVID L. FRANKLIN, CO-EXECUTORS OF THE ESTATE OF HENRY B. FRANKLIN, AND WAVA K. FRANKLIN v. WINN DIXIE RALEIGH, INC.

No. 610A94

(Filed 8 December 1995)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 28, 450 S.E.2d 24 (1994), affirming the trial court's dismissal of plaintiff's action entered by Weeks, J., on 2 July 1993 in Superior Court, Wake County. On 9 February 1995, this Court allowed discretionary review of additional issues. Heard in the Supreme Court 16 November 1995.

Marvin Schiller and William E. Moore, Jr., for plaintiff-appellants.

Patterson, Dilthey, Clay & Bryson, L.L.P., by G. Lawrence Reeves, Jr., for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is affirmed based on the authority of *Crossman v. Moore*, 341 N.C. 185, 450 S.E.2d 715 (1995).

AFFIRMED.

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

IN RE APPEAL OF FAYETTEVILLE HOTEL ASSOC.

[342 N.C. 405 (1995)]

IN THE MATTER OF THE APPEAL OF FAYETTEVILLE HOTEL ASSOCIATES, A NORTH CAROLINA LIMITED PARTNERSHIP, FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CUMBERLAND COUNTY BOARD OF EQUALIZATION

No. 619A94

(Filed 8 December 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, 117 N.C. App. 285, 450 S.E.2d 568 (1994), affirming an order of the North Carolina Property Tax Commission entered on 29 October 1993. Heard in the Supreme Court 13 November 1995.

Sandman & Strickland, P.A., by Nelson G. Harris, for petitioner-appellant.

Danny G. Higgins, Deputy County Attorney, for respondent-appellee.

PER CURIAM.

AFFIRMED.

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

MARCIA ENNS AND ROD ENNS v. THE ZAYRE CORPORATION, INC., D/B/A ZAYRE, THE TJX COMPANIES, INC., FORMERLY THE ZAYRE CORPORATION D/B/A ZAYRE

No. 591A94

(Filed 8 December 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 687, 449 S.E.2d 478 (1994), finding error in a trial before Morgan (Melzer A., Jr.), J., at the 25 January 1993 Civil Session of Superior Court, Forsyth County, and awarding plaintiffs a new trial on the issue of damages. Heard in the Supreme Court 16 November 1995.

Petree Stockton, L.L.P., by Steve M. Pharr and Donald M. Nielsen, for plaintiff-appellees.

Hutchins, Doughton & Moore, by H. Lee Davis, Jr., and Laurie L. Hutchins, for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

STATE v. SMITH

[342 N.C. 407 (1995)]

STATE OF NORTH CAROLINA v. ALFREDO F. SMITH, JR.

No. 125A95

(Filed 8 December 1995)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 118 N.C. App. 106, 454 S.E.2d 680 (1995), granting the defendant a new trial. Heard in the Supreme Court 17 November 1995.

Michael F. Easley, Attorney General, by Robin P. Pendergraft, Special Deputy Attorney General, for the State.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Richard B. Glazier, for defendant-appellee.

American Civil Liberties Union Legal Foundation, by Deborah K. Ross, amicus curiae.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion by Judge Walker.

REVERSED.

GOLDIE V. LEACH v. MONUMENTAL LIFE INSURANCE COMPANY

No. 185A95

(Filed 8 December 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, 118 N.C. App. 434, 455 S.E.2d 450 (1995), reversing the judgment on the pleadings for defendant entered by Johnston, J., on 5 April 1994, in Superior Court, Cleveland County. Heard in the Supreme Court 15 November 1995.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by F. Lane Williamson, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, the decision of the Court of Appeals is

REVERSED.

STATE v. LILLY

[342 N.C. 409 (1995)]

STATE OF NORTH CAROLINA v. CARLTON NICHLOS LILLY

No. 20A95

(Filed 8 December 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 192, 450 S.E.2d 546 (1994), which affirmed judgments of imprisonment entered on 20 May 1993 by Guice, J., in Superior Court, Rutherford County, upon defendant's convictions for first-degree rape, first-degree sexual offense, and breaking or entering. On 2 March 1995 this Court allowed the State's petition for discretionary review of an issue not raised by the dissenting opinion in the Court of Appeals. Heard in the Supreme Court 14 November 1995.

Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for the State.

David William Rogers for the defendant.

PER CURIAM.

For the reasons stated in the concurring opinion in the Court of Appeals by Lewis, J., rather than those stated in the opinion for the court, the decision of the Court of Appeals is affirmed. *See State v. Lilly*, 117 N.C. App. 192, 196-97, 450 S.E.2d 546, 549 (1994) (Lewis, J., concurring in the result).

AFFIRMED.

FROST v. FROST

[342 N.C. 410 (1995)]

LINDA FROST v. JERRY LEWIS FROST

No. 33A95

(Filed 8 December 1995)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals in an unpublished opinion, 117 N.C. App. 463, 451 S.E.2d 671 (1994), affirming in part an order entered by Setzer, J., on 15 September 1993, in District Court, Wayne County. On 6 April 1995, the Supreme Court allowed discretionary review of an additional issue. Heard in the Supreme Court 13 November 1995.

Hollowell & Albertson, P.A., by Shelby Duffy Albertson, for plaintiff-appellee.

Craig I. Bryant for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion of Greene, J., we affirm the decision of the Court of Appeals. We conclude that the petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

WELLING v. WALKER

[342 N.C. 411 (1995)]

KAREN D. WELLING v. SHELLY RENEE WALKER

No. 42PA95

(Filed 8 December 1995)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 445, 451 S.E.2d 329 (1994), granting relief from judgment entered by Burroughs, J., on 28 July 1993, in Superior Court, Mecklenburg County, and ordering a new trial. Heard in the Supreme Court 17 November 1995.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III; and Charles M. Welling, for plaintiff-appellee.

Caudle & Spears, P.A., by Harold C. Spears and John A. Folmar, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ALCO STANDARD CORP. v. RYDER TRUCK RENTAL

No. 396P95

Case below: 119 N.C.App. 799

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

APO v. MACDONALD

No. 459A95

Case below: 120 N.C.App. 409

Notice of appeal by plaintiff (substantial constitutional question) dismissed 7 December 1995.

BURNETT v. MACDONALD

No. 460A95

Case below: 120 N.C.App. 410

Notice of appeal by plaintiff (substantial constitutional question) dismissed 7 December 1995.

CAPITOL FUNDS, INC. v. ROYAL INDEMNITY CO.

No. 363P95

Case below: 119 N.C.App. 351

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

CITY OF DURHAM v. LODAL, INC.

No. 456P95

Case below: 120 N.C.App. 407

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

CRAWFORD v. LLOYD TABLE CO.

No. 464P95

Case below: 120 N.C.App. 410

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

DOCKERY v. WOODY

No. 389P95

Case below: 120 N.C.App. 200

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

FRANK v. STAR TRAX, INC.

No. 410PA95

Case below: 120 N.C.App. 200

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1995. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 7 December 1995.

GARDON v. COLONY KNITS, INC.

No. 401P95

Case below: 120 N.C.App. 200

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

GUILFORD COUNTY EX REL. EASTER v. EASTER

No. 455PA95

Case below: 120 N.C.App. 260

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1995.

HANCOCK v. McGEE

No. 437P95

Case below: 120 N.C.App. 200

Notice of appeal by plaintiff (substantial constitutional question) dismissed 7 December 1995. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1995.

HARDIN v. DON LOVE, INC.

No. 453P95

Case below: 120 N.C.App. 407

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

JONES v. KEARNS

No. 466P95

Case below: 120 N.C.App. 301

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

LAWING v. McDOWELL COUNTY SCHOOL BD.

No. 346P95

Case below: 119 N.C.App. 604

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

LYLES v. CITY OF CHARLOTTE

No. 439PA95

Case below: 120 N.C.App. 96

Petition by defendant (City of Charlotte) for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1995.

MEDICARE RENTALS, INC. v. ADVANCED SERVICES

No. 405P95

Case below: 119 N.C.App. 767

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

PORTER v. LENEAVE

No. 329P95

Case below: 119 N.C.App. 343

Notice of appeal by plaintiff (substantial constitutional question) dismissed 7 December 1995. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 December 1995.

REED v. TOWN OF LONGVIEW

No. 454P95

Case below: 120 N.C.App. 408

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

ROSE v. ISENHOUR BRICK & TILE CO.

No. 448A95

Case below: 120 N.C.App. 235

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

STATE v. BOYD

No. 177A83-2

Case below: Surry County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Surry County Superior Court denied 7 December 1995.

STATE v. GRIMES

No. 270P95

Case below: 96 N.C.App. 489

Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 December 1995.

STATE v. HOLLOWAY

No. 404P95

Case below: 120 N.C.App. 201

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

STATE v. HOLMES

No. 434P95

Case below: 120 N.C.App. 54

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

STATE v. JORDAN

No. 467P95

Case below: 120 N.C.App. 364

Notice of appeal by defendant (substantial constitutional question) dismissed 7 December 1995. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1995.

STATE v. KIRKPATRICK

No. 447PA95

Case below: 120 N.C.App. 405

Petition by Attorney General for writ of supersedeas allowed 7 December 1995. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1995.

STATE v. ROBINSON

No. 261A92-3

Case below: Bladen County Superior Court

Motion by defendant for stay of execution allowed 16 November 1995. "This cause is remanded to the Superior Court, Bladen County, with instructions that Petitioner's counsel shall file any motion(s) for appropriate relief they deem appropriate within 60 days of the date of this order. The State shall have 30 days from receipt of a copy of any such motion(s) within which to respond thereto. By order of the Court in conference this the 16 day of November 1995."

Petition by defendant writ of supersedeas dismissed 17 November 1995. Petition by defendant for writ of certiorari to review the order of the Bladen County Superior Court dismissed 17 November 1995.

STATE v. SKIPPER

No. 122A92-2

Case below: Bladen County Superior Court

Petition by defendant for writ of certiorari to review the order of the Bladen County Superior Court dismissed 15 November 1995. Petition by defendant for writ of supersedeas dismissed 15 November 1995. Petition by defendant for reconsideration of dismissal of petition for writ of certiorari dismissed 7 December 1995.

STATE v. WATKINS

No. 509P95

Case below: 120 N.C.App. 804

Motion by Attorney General for temporary stay allowed 7 December 1995 pending timely receipt and determination of the State's petition for discretionary review.

STATE v. WELCH

No. 463P95

Case below: 120 N.C.App. 411

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

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

PETITION TO REHEAR

BROMHAL v. STOTT

No. 520A94

Case below: 341 N.C. 702

Petition by defendant to rehear pursuant to Rule 31 denied 7 December 1995.

STATE OF NORTH CAROLINA v. JEFFREY CLAYTON KANDIES

No. 197A94

(Filed 9 February 1996)

1. Jury § 248 (NCI4th)— jury selection—peremptory challenges—racial discrimination

Both the federal and state constitutions prohibit peremptorily challenging prospective jurors solely on the basis of their race. In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986) the United State Supreme Court set out a three-pronged test; first, a criminal defendant must make out a prima facie case of discrimination by demonstrating that the prosecutor exercised peremptory challenges on the basis of race and that this fact and other relevant circumstances raise an inference of discrimination, but here that question need not be addressed because the prosecutor voluntarily gave reasons for the dismissal of each juror in question; the State must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group, but these reasons need not rise to the level justifying exercise of a challenge for cause; and finally, the trial court must "determine whether the defendant has carried his burden of proving purposeful discrimination." The findings of the trial court, which largely turn on credibility, are to be given great deference and are not to be overturned unless the appellate court is convinced that the determination was clearly erroneous. Factors include the susceptibility of the case to racial discrimination; whether the State used all of its peremptory challenges; the race of the witnesses; questions and statements by the prosecutor during jury selection; whether the State accepted any black jurors; and whether similarly situated whites were accepted. An examination of the actual explanations given by the district attorney is a crucial part of the test.

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-*Baston* state cases. 20 ALR5th 398.

2. Jury § 260 (NCI4th)— capital murder and rape—jury selection—peremptory challenges—racial discrimination

In a first-degree murder prosecution where the defendant is white, the victim was white, several witnesses are white and the prosecutor accepted three black jurors when he had peremptory challenges remaining, the trial court did not err in overruling defendant's objection to the State's excusal of black potential jurors Randleman, Jinwright, and Massey where the prosecutor stated that Randleman was hesitant on the death penalty and her juror questionnaire indicated no convictions but her record indicates a conviction for worthless checks and two speeding violations; Jinwright worked with three- and four-year-old children and was hesitant on the death penalty question; Massey was hard of hearing and had difficulty understanding questions; and defendant made no further showing at trial regarding these jurors. Defendant's approach of finding a single factor among the several articulated by the prosecutor and matching it to a passed juror is rejected.

Am Jur 2d, Jury §§ 234, 244, 264, 279.

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

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

3. Jury § 260 (NCI4th)— capital murder and rape—jury selection—peremptory challenges—racial discrimination

In a first-degree murder prosecution where the defendant is white, the victim was white, and several witnesses are white and the prosecutor accepted three black jurors when he had peremptory challenges remaining, the trial court did not err in overruling defendant's objection to the State's excusal of black potential jurors Rawlinson and McClure where the prosecutor stated that a source within the High Point Police Department indicated that they would not be good jurors for this case because they were weak on the death penalty, a court officer noticed McClure nodding off at least twice during *voir dire*, and the trial court noted that the prosecutor passed a minority juror called as a replacement.

Am Jur 2d, Jury §§ 234, 244, 264, 279.

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

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

4. Jury § 260 (NCI4th)— capital murder and rape—jury selection—peremptory challenges—racial discrimination

In a first-degree murder prosecution where the defendant is white, the victim was white, several witnesses are white and the prosecutor accepted three black jurors when he had peremptory challenges remaining, the trial court did not err in overruling defendant's objection to the State's excusal of black potential jurors Campbell, Hines, and Wilson where the prosecutor stated that he excused Campbell because Campbell stated that he did not believe in the death penalty and a record check indicated that a person named Fred Campbell had a prior common law robbery conviction; Hines was dismissed because he was worried about his employment and loss of income, he had never thought about the death penalty, and the State's records indicated that he had prior convictions for driving while impaired and driving while license revoked even though he denied it; and the prosecutor excused Wilson because it appeared that he had a record of reckless driving, driving while impaired, four worthless checks, two injury to personal property convictions, a simple assault, and assault by pointing a gun. A juror's criminal history is a sufficiently neutral reason to challenge that juror.

Am Jur 2d, Jury §§ 234, 244, 264, 279.

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

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

5. Jury § 260 (NCI4th)— capital murder and rape—jury selection—peremptory challenges—no racial discrimination

In a first-degree murder prosecution where the defendant is white, the victim was white, several witnesses are white and the prosecutor accepted three black jurors when he had peremptory challenges remaining, the trial court did not err in overruling

defendant's objection to the State's excusal of black potential juror Oliver where the prosecutor explained that Oliver appeared to have trouble hearing, as evidenced by her failure to heed the court's instruction about not watching television and not listening to any radio broadcasts concerning this case; the prosecutor was concerned that she would have difficulty hearing and understanding as the trial proceeded; and the trial court noted Oliver's inability to hear the prosecutor's questions without requesting clarification on numerous occasions during *voir dire.*

Am Jur 2d Jury §§ 234, 244, 264, 289.

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

6. Criminal Law § 107 (NCI4th)— jury selection—potential jurors—criminal records—not subject to disclosure by state

The trial court did not abuse its discretion in a first-degree murder prosecution in which the State asserted that it challenged prospective black jurors because they failed to disclose a criminal record by denying defendant's motion to require the State to produce copies of criminal records of prospective jurors. There is no statutory requirement that a prosecutor reveal juror information in his possession; absent evidence to the contrary, it is not unreasonable for the trial court to assume that the prosecutor is telling the truth with regard to the criminal records of prospective jurors; and defendant could have obtained a record check himself or secured a court order requiring production of these documents. There were resources available to defendant to rebut the State's explanations, and he chose not to utilize them.

Am Jur 2d, Jury §§ 234, 238, 264.

7. Jury § 215 (NCI4th)— capital murder—jury selection—consideration of life imprisonment

The trial court did not err during jury selection in a first-degree murder prosecution by failing to excuse a juror for cause where the juror initially responded that life imprisonment for first-degree murder was not fair to the public, but after subsequent questioning said that he could put aside his prejudice and follow the law as instructed.

Am Jur 2d, Jury § 279.

8. Jury § 148 (NCI4th)— capital murder—jury selection—defense questions regarding capital punishment—improper staking out

The trial court did not err during jury selection for a first-degree murder prosecution by sustaining objections to certain defense questions pertaining to jurors' views on capital punishment because the questions were an improper attempt to "stake out" the jurors and determine what kind of verdict the jurors would render under a given set of circumstances.

Am Jur 2d, Jury §§ 205, 279.

9. Jury § 115 (NCI4th)— capital murder—jury selection—objections to defense questions sustained—no abuse of discretion

There was no abuse of discretion in a first-degree murder prosecution involving the death of a four-year-old girl where the trial court repeatedly sustained the prosecutor's objections to defense questions regarding prospective jurors' exposure or relationship to children where the prospective juror in each instance either answered the question before the objection was made or had answered a similar question previously, or an objection was to form and defense counsel was allowed to restate the question.

Am Jur 2d, Jury §§ 205, 206.

10. Evidence and Witnesses § 125 (NCI4th)— rape and murder of child—prior third-party sexual behavior with child—not admissible

The trial court did not err in a prosecution for the first-degree rape and first-degree murder of a four-year-old child by her mother's fiancee by not admitting evidence of prior sexual activity with her father where all of the evidence indicated that the injuries to the child's vagina were recent in relation to the time of her death.

Am Jur 2d, Homicide §§ 245, 270; Rape § 55.

11. Evidence and Witnesses § 1694 (NCI4th)— capital murder—victim's body—photographs

The trial court did not err in a prosecution for the first-degree murder and first-degree rape of a four-year-old girl by admitting a number of crime scene and autopsy photographs of the black plastic bag in which the body was found, the position of the body

and clothes after the bag was opened, pictures of various bloodstains around the house, and autopsy photographs illustrating the injuries. The photographs were neither repetitious nor prejudicial, all were used to illustrate testimony, and the number was not excessive.

Am Jur 2d, Homicide § 416.

12. Evidence and Witnesses § 1731 (NCI4th)— capital murder and rape—videotape of body

The trial court did not abuse its discretion in a prosecution for the first-degree rape and murder of a four-year-old girl by admitting a twenty-minute videotape which portrayed the discovery of the body, including ninety seconds that focused on the bloodied head and body. The videotape was a fair and accurate representation of the gruesome scene officers encountered at defendant's home, the tape was tendered with a limiting instruction, and the fact that it took so long to uncover the body is strong circumstantial evidence of premeditation and deliberation, malice, and intent to kill.

Am Jur 2d, Evidence § 979; Trial § 508.

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

13. Evidence and Witnesses § 2054 (NCI4th)— capital murder—testimony of officer—red dots paint rather than blood

The trial court in a prosecution for first-degree murder and first-degree rape properly allowed an officer to testify that red spots in defendant's truck were red oxide primer rather than blood, which contradicted defendant's statement. Based on the officer's experience with a part-time job doing car repair and body shop work, it is likely that he could perceive the difference between blood and red oxide primer.

Am Jur 2d, Expert and Opinion Evidence § 300.

14. Evidence and Witnesses § 2209 (NCI4th)— capital murder—bloodstains—expert testimony

There was no error in a first-degree murder prosecution where the trial court admitted the testimony of a forensic serology expert that blood found in defendant's laundry room was consistent with the victim's where the witness identified the blood

type as Hemoglobin Type 1 and the blood in the laundry room as Hemoglobin Type A. Although defendant argues that this difference in blood types means that the opinion with respect to consistency between blood types was contrary to the facts, the reference to Hemoglobin Type 1 was no more than a *lapsus linguae.* There is no such thing as Hemoglobin Type 1 blood, the witness testified that the blood from the laundry room was consistent with hemoglobin from defendant and the victim, and then correctly testified that defendant's hemoglobin was Type A.

Am Jur 2d, Expert and Opinion Evidence § 300.

15. Evidence and Witnesses § 1339 (NCI4th)— capital murder—interrogation of defendant—scenario suggested by officer

The trial court did not abuse its discretion in a prosecution for first-degree murder and first-degree rape where the State wished to call an FBI agent to testify regarding a scenario he had presented to defendant as an interviewing technique in order to elicit a response from defendant and which the State wished to use to show that defendant's explanation about accidentally hitting the victim with his truck originated with the agent; defense counsel argued that the scenario was derived from oral statements made by defendant to the agent which had been disclosed pursuant to the court's discovery order; the agent first testified at a hearing that he thought he may have acquired the information from defendant; the court held that the evidence must be excluded; the State was allowed to recall the agent, who testified that the information was obtained from police officers, not from defendant; and the trial court ruled that the discovery order had not been violated and that the testimony was admissible. Because there is competent evidence in the record to support the trial court's finding that the agent knew defendant drove a truck prior to talking with defendant, it cannot be concluded that the trial court abused its discretion.

Am Jur 2d, Evidence § 714.

16. Criminal Law § 445 (NCI4th)— capital murder and first-degree rape—prosecutor's argument—factually based—not an expression of personal opinion

There was no error in a prosecution for the first-degree murder and first-degree rape of a four-year-old girl in the prosecutor's

argument regarding what the mother of the victim said where there was no explicit testimony that the mother asked that question, but the argument in context was factually based, emphasized the fallacy of defendant's explanation, and was not an expression of personal opinion.

Am Jur 2d, Trial §§ 554, 632.

17. Criminal Law § 461 (NCI4th)— capital murder and rape—prosecutor's argument—matters inferred from evidence

There was no error in the prosecution of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that defendant held the victim down and forcibly raped her while she cried and moaned. Although defendant contended that the prosecutor's argument amounted to impermissible speculation as to facts not in evidence, it would be reasonable, if not likely, for the jury to infer from the evidence that defendant physically restrained the victim while he forced himself upon her and that the victim cried out in fear and pain during the ordeal.

Am Jur 2d, Trial §§ 609, 632.

18. Criminal Law § 461 (NCI4th)— capital murder and rape—prosecutor's argument—matters inferred from evidence

There was no error in the prosecution of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that he spoke for the victim, who died to fulfill the sick desires of the defendant. The evidence is sufficiently clear that defendant sexually assaulted the victim and that the killing followed as a part of the same violent transaction; it was not too speculative for the jury to infer that defendant committed these acts against a four-year-old girl with an intent to satisfy his perverse desires.

Am Jur 2d, Trial §§ 632, 664.

19. Criminal Law § 461 (NCI4th)— capital murder and rape—prosecutor's argument—matters inferred from evidence

There was no error in the prosecution of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that a doctor had testified that the victim was raped. The statutory definition of rape includes vaginal intercourse with a victim who is a child under the age of thirteen and where the defendant is at least twelve years old and is at

least four years older than the victim; or with another person by force and against the will of the other person, inflicting serious personal injury. The doctor testified that the victim's injuries were "most indicative of forced intercourse"; under either definition, the prosecutor's characterization of the testimony and the actual testimony are entirely consistent. Further, the trial court repeatedly cautioned the jurors that final arguments are not evidence and instructed that they were to be guided by their own recollection of the evidence.

Am Jur 2d, Trial §§ 632, 640.

20. Constitutional Law § 370 (NCI4th); Criminal Law § 1343 (NCI4th)— capital murder—aggravating circumstance—especially heinous, atrocious, or cruel—not unconstitutionally vague

The especially heinous, atrocious, or cruel aggravating circumstance in capital cases is not unconstitutionally vague.

Am Jur 2d, Trial § 841.

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

21. Criminal Law § 1345 (NCI4th)— capital murder—aggravating circumstances—especially heinous, atrocious, or cruel—evidence independent of rape sufficient

The jury was properly permitted to find in a first-degree murder sentencing hearing both that the murder of the four-year-old victim was committed while defendant engaged in the commission of first-degree rape and that the murder was especially heinous, atrocious, or cruel where, taken as a whole, the evidence of the victim's physical and psychological suffering and of the brutal, dehumanizing nature of the killing was sufficient to support the submission of this aggravating circumstance; while the evidence of rape contributed to this unique combination of factors, ample independent evidence existed to justify submission.

Am Jur 2d, Trial §§ 841, 1760.

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

22. Criminal Law § 1320 (NCI4th)— capital murder—sentencing—instructions—consideration of same evidence for more than one circumstance

There was no plain error in a first-degree murder prosecution where defendant contended that the court erred by not instructing the jury that it could not consider the same evidence to find more than one aggravating circumstance, but, in light of the holding elsewhere that there was independent evidence supporting each aggravating circumstance, defendant did not show that any error in the instructions likely affected the outcome.

Am Jur 2d, Trial § 1760.

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.

23. Criminal Law §§ 448, 451 (NCI4th)— capital murder—sentencing hearing—prosecutor's argument—victim's age—victim's thoughts

There was no prejudicial error in the prosecutor's argument in the sentencing hearing for the first-degree murder of a four-year-old girl where defendant contended that the prosecutor argued matters not supported by the evidence and improperly expressed his personal beliefs. The objectives of the arguments in the guilt and sentencing phases are different and rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase. Given the overwhelming evidence against defendant, the prosecutor's argument regarding what the victim was thinking and feeling while defendant beat and raped her was not prejudicial error, if error at all, and the prosecutor's references to the victim's age merely emphasized the brutality of the crime as well as the depravity of defendant's acts. Nothing in the record suggests that the jury made its recommendations based upon passion or prejudice or that it acted arbitrarily.

Am Jur 2d, Trial §§ 648, 664, 666, 1759.

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

24. Criminal Law § 1329 (NCI4th)—capital murder—sentencing—Issues Three and Four

The trial court did not err in a first-degree murder sentencing hearing by making found mitigating circumstances discretionary when the jury considered issues Three and Four.

Am Jur 2d, Trial § 1760.

25. Criminal Law § 856 (NCI4th)— capital murder and first-degree rape—instruction that sentence of life would be give for rape—denied

The trial court did not err in a prosecution for first-degree murder and first-degree rape by denying defendant's request to instruct the jury that defendant would be sentenced to life in prison for his conviction of first-degree rape.

Am Jur 2d, Trial §§ 1441, 1443.

26. Jury § 141 (NCI4th)— capital murder and rape—questioning of jurors—parole eligibility

The trial court did not err in a prosecution for first-degree rape and first-degree murder by denying defendant's request to question jurors regarding their beliefs about parole eligibility.

Am Jur 2d, Jury §§ 264, 269.

27. Criminal Law § 1373 (NCI4th)— capital murder—death sentence—not disproportionate

A sentence of death for first-degree murder was not disproportionate in a case which has several distinguishing characteristics: defendant was found guilty of first-degree murder based on both the felony murder rule and on premeditation and deliberation; the jury found the murder to be especially heinous, atrocious, or cruel; the victim was a four-year-old girl who knew and trusted defendant; the murder occurred during the commission of a sexual assault; the victim suffered great physical pain in that she was brutally beaten, strangled, and raped; and defendant concealed the body and then purposefully misled police for several days regarding its location.

Am Jur 2d, Criminal Law § 628.

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

STATE v. KANDIES

[342 N.C. 419 (1996)]

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by McHugh, J., at the 4 April 1994 Criminal Session of Superior Court, Randolph County, on a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for first-degree rape was allowed 12 May 1995. Heard in the Supreme Court 13 November 1995.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

J. Kirk Osborn for defendant-appellant.

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder and first-degree rape of Natalie Lynn Osborne, the four-year-old daughter of defendant's fiancée. The jury found defendant guilty on both charges and recommended a sentence of death for the first-degree murder. The trial court sentenced accordingly on the murder charge and sentenced defendant to life imprisonment for the rape, to begin at the expiration of the murder sentence. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error, and that the sentence of death is not disproportionate.

Patricia Craven lived in Asheboro with her four-year-old daughter, Natalie, and her sons, Zachary and Jeremy, ages six and one, respectively. Defendant was Craven's fiancé and Jeremy's father. Although defendant had a separate residence approximately ten miles away in Randleman, he often stayed with Craven at her apartment in Asheboro.

On Easter Monday, 20 April 1992, defendant and Craven disciplined Natalie for eating Zachary's Easter candy by requiring her to stay in her room for the remainder of the day. Craven saw Natalie periodically throughout the day, but last saw her alive between 4:00 and 4:30 p.m. Around 4:45 p.m., defendant left the apartment to go to the grocery store. He did not return until 7:30 that evening. He attributed his tardiness to helping an elderly couple who had mechanical problems with their Winnebago. Once home, defendant began fixing a pizza for the children. When it was ready, he told Zachary to call for Natalie. When Zachary did not find Natalie in her bedroom, defendant and Craven began looking for her. One neighbor told Craven that he had noticed Natalie outside playing sometime that afternoon, but no

one recalled seeing her since that time. After a while, defendant called the Asheboro Police Department to report Natalie missing. An extensive search for her was conducted that night, but without success.

Earlier that evening, around 7:00 p.m., defendant entered the Tank and Tummy, a small convenience store located about one-half mile from the Craven residence. Carolyn Wood, the clerk, testified that at that time, defendant was complaining about his hand hurting. He told Wood that he had gotten into a fight with his brother. Wood noticed that the hand was beginning to swell and suggested that defendant let a medical technician who happened to be in the store look at his hand to see if it was broken. Defendant declined and immediately left the store.

Later that evening, close to midnight, defendant returned to the store to ask if Wood had seen Natalie. He showed Wood a picture of Natalie and told her to call the police if she saw the little girl. At the time, Wood observed black garbage bags in the back of defendant's truck.

On Tuesday, 21 April 1992, defendant agreed to accompany officers to his residence in Randleman to look for Natalie. The police surmised that perhaps Craven and defendant had hidden Natalie at the Randleman residence because Craven had been in a custody dispute over Natalie with her former husband, Ed Osborne. The police looked through the house but did not find Natalie.

On Wednesday, 22 April, Craven and defendant went to the Asheboro Police Department for questioning. Craven was questioned and released around 7:30 p.m., while defendant remained at the station for further interrogation. Defendant was finally taken home by Sergeant Rickey Wilson about 1:00 a.m. Upon defendant's return to the apartment, Craven asked him if he knew anything about what happened to Natalie. Defendant responded by telling Craven that he had hit Natalie with his truck when he was leaving to go to the grocery store on Easter Monday. Natalie was outside rather than in her room, and defendant did not see her in time to stop. Defendant said he panicked because he had been drinking. He picked Natalie up and took her to the house in Randleman to clean her and see how badly she was hurt. During the drive to Randleman, defendant said that Natalie was making gurgling noises and that her head did not look right. After trying to clean her, defendant concealed Natalie and her clothes in

a garbage bag and put the bag in a bedroom closet. Defendant then got in his truck and took his time returning to Asheboro.

Craven called the police immediately upon hearing defendant's story. Defendant was taken to the Asheboro Police Department, where Sergeant Wilson read him his *Miranda* rights and then interviewed him. Defendant told Sergeant Wilson what he had told Craven. Shortly after giving a statement to Sergeant Wilson, defendant gave a statement to Lieutenant Lanny McIver. This statement was more detailed but in substance was the same as that given to Sergeant Wilson. Defendant gave details as to the location of Natalie's body and signed consent to search forms for the Randleman house.

The police searched the Randleman residence and found Natalie's body in a plastic bag, buried under a pile of clothes and carpet pieces in a bedroom closet. A bloody playsuit and a bloody pair of panties, both turned inside out, were also found in the bag. The process of recovering the body was videotaped, and photographs of the crime scene were taken.

Dr. Thomas Clark, a forensic pathologist, performed an autopsy on the body shortly after it was recovered. He found two lacerations to the top of the head which he characterized as blunt-force injuries. He also found lacerations on the right side of the head and abrasions on the left side of the head and on the front of the neck; there was evidence the skull had been fractured. There were multiple bruises on the back and both sides; the bruises were small and rounded and had a distribution and shape suggestive of an adult hand. Clark also found injuries to the pelvic region. There were bruises on both sides of the vagina, which was full of blood. The opening of the vagina was patulous, and there was a laceration a half-inch wide and an inch long on the back wall of the vagina. Clark opined that these injuries were indicative of sexual assault and that they had occurred at or about the time of death.

That evening, after the results of the autopsy had been revealed, Lieutenant McIver again interrogated defendant. When McIver mentioned the possibility of sexual assault, defendant stated, "I told Pat you were going to say I did something like that to Natalie." Thereafter, in his statement, defendant denied doing anything sexual to Natalie. He remembered taking Natalie to his house, putting her in the bathtub, and taking off her clothes to see how badly she was hurt. At that time Natalie was bleeding extensively but appeared to be alive

and moving. Defendant stated that he could not handle the situation and may have strangled Natalie.

A rape suspect collection kit test was completed on defendant. The kit included samples of head and pubic hair, saliva, and blood, and was submitted to the SBI crime lab for examination. Agent Lucy Milks, an SBI forensic serologist, performed a luminal and blood test on the Randleman residence and on defendant's truck. At the Randleman residence, she found the presence of blood on the bathroom floor and tub; the bedroom floor; the laundry room floor; the kitchen floor; and the floor between the bedroom, bathroom, and den. She also found a small amount of blood on the interior of the passenger door of defendant's truck.

Defendant presented no evidence during the guilt-innocence phase. During the sentencing phase, defendant presented evidence through Dr. Brian Glover, a clinical psychologist, who testified as an expert in substance abuse treatment. Glover testified that by age seventeen, defendant was using alcohol and marijuana on a daily basis and that for the several years preceding this offense, defendant was drinking between twelve and twenty-four beers per day. It was Glover's opinion that defendant had severe alcohol dependence and that on the day of the offense, defendant was suffering from acute intoxication which affected his judgment and ability to control his emotions. Glover also opined that on 20 April 1992, defendant was under a mental disorder and that his ability to appreciate the criminality of his actions was impaired.

The jury found defendant guilty of first-degree murder based on both the felony murder rule and on premeditation and deliberation. It also found him guilty of first-degree rape. At the capital sentencing proceeding, the jury found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of first-degree rape and that the murder was especially heinous, atrocious, or cruel. The jury found three of the five proposed statutory mitigating circumstances and eighteen of the twenty-eight nonstatutory mitigating circumstances submitted. It unanimously recommended a sentence of death, which the trial court accordingly imposed.

JURY SELECTION ISSUES

[1] Defendant first argues that the prosecutor violated his state and federal constitutional rights by peremptorily challenging prospective

jurors solely on the basis of their race. Article I, Section 26 of the Constitution of North Carolina prohibits such use of peremptory challenges. *State v. Glenn*, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also prohibits such discrimination. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson* the United State Supreme Court set out a three-pronged process to determine whether a prosecutor impermissibly excluded prospective jurors because of their race. First, a criminal defendant must make out a prima facie case of discrimination by demonstrating that the prosecutor exercised peremptory challenges on the basis of race and that this fact and other relevant circumstances raise an inference of discrimination. *Id.* at 96, 90 L. Ed. 2d at 87-88, *as modified by Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991). Here the prosecutor voluntarily gave reasons for the dismissal of each juror in question. Accordingly, we need not address the question of whether defendant met his initial burden of showing discrimination and may proceed as if a prima facie case had been established. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991).

Second, the State must "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). These reasons " 'need not rise to the level justifying exercise of a challenge for cause.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88). "So long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate "hunches" and past experience.' " *Id.* (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988)).

Finally, the trial court must "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). In evaluating the State's explanations, a reviewing court should remember that the trial court's findings "largely will turn on evaluation of credibility, [and so] should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. The findings of a trial court are not to be overturned unless the appellate

court is "convinced that its determination was clearly erroneous." *Hernandez*, 500 U.S. at 365, 114 L. Ed. 2d at 412.

Factors to which this Court has looked to determine the presence or absence of intentional discrimination include (1) " 'the susceptibility of the particular case to racial discrimination,' " *Porter*, 326 N.C. at 498, 391 S.E.2d at 150 (quoting *State v. Antwine*, 743 S.W.2d at 65); (2) whether the State used all of its peremptory challenges, *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840; (3) the race of witnesses in the case, *id.*; (4) questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724-25 (1991); (5) whether the State accepted any black jurors, *id.*; and (6) whether similarly situated whites were accepted as jurors, *Robinson*, 330 N.C. at 19, 409 S.E.2d at 298. Additionally, "[a]n examination of the actual explanations given by the district attorney for challenging black veniremen is a crucial part of testing defendant's *Batson* claim." *Smith*, 328 N.C. at 125, 400 S.E.2d at 726.

[2] In this case the defendant is white, the victim was white, and several witnesses are white. The prosecutor accepted three black jurors when he had peremptory challenges remaining.

With these general facts and guidelines in mind, we turn to the State's reasons for peremptorily challenging each of the nine black prospective jurors. Defendant raised his first *Batson* challenge when the prosecutor struck potential jurors Randleman, Jinwright, and Massey. As the basis for his exercise of the peremptory challenges, the prosecutor stated that (1) Randleman was hesitant on the death penalty, and although her juror questionnaire indicated no convictions, her record indicates that she had been convicted of worthless checks and two speeding violations; (2) Jinwright worked with three- and four-year-old children and was hesitant on the death penalty question; and (3) Massey was hard of hearing and had difficulty understanding questions. Defendant made no further showing at trial regarding these jurors. He now argues that the prosecutor passed several similarly situated white jurors and that this disparate treatment of black and white jurors reveals a pretextual explanation for excluding blacks from the jury.

Defendant's approach "involves finding a single factor among the several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor." *Porter*, 326 N.C. at 501, 391 S.E.2d at 152. We have rejected this approach and do so again

because it "fails to address the factors as a totality which when considered together provide an image of a juror considered . . . undesirable by the State." *Id.* We conclude that the trial court did not err in overruling defendant's objection to the State's use of its peremptory challenges for these jurors.

[3] In his second *Batson* objection, defendant questioned the State's dismissal of prospective jurors Rawlinson and McClure. As his reason for these dismissals, the prosecutor stated that a source within the High Point Police Department indicated that Rawlinson and McClure would not be good jurors for this case because they were weak on the death penalty. Further, a court officer noticed McClure nodding off at least twice during *voir dire.*

After the prosecutor volunteered these explanations, the trial court noted that the prosecutor passed a minority juror called as a replacement. The trial court then held that the reasons enunciated by the prosecutor were valid bases and not solely motivated by impermissible racial discrimination. We hold that the trial court did not err in overruling defendant's objection to the State's excusal of these prospective jurors.

[4] Defendant's subsequent *Batson* challenges arose when the State excused prospective jurors Campbell, Hines, and Wilson. The prosecutor voluntarily responded to each challenge. He stated that he excused Campbell because he stated that he did not believe in the death penalty. Moreover, a record check indicated that a person named Fred Campbell had a prior common law robbery conviction. Hines was dismissed because he was worried about his employment and loss of income; he had never thought about the death penalty; and although Hines denied it, the State's records indicated that he had prior convictions for driving while impaired and driving while license revoked. The prosecutor excused Wilson because it appeared that he had a record of reckless driving, driving while impaired, four worthless checks, two injury to personal property convictions, a simple assault, and assault by pointing a gun. A juror's criminal history is a sufficiently neutral reason to challenge that juror. *See Porter*, 326 N.C. at 499, 391 S.E.2d at 151. We find no error in the trial court's dismissal of prospective jurors Campbell, Hines, and Wilson.

[5] Defendant raised his final *Batson* challenge when the State excused prospective alternate juror Oliver. The prosecutor voluntarily explained that Oliver appeared to have trouble hearing, as evidenced by her failure to heed the court's instruction about not watch-

ing television and not listening to any radio broadcasts concerning this case. The prosecutor was concerned that she would have difficulty hearing and understanding as the trial proceeded. In overruling defendant's objection, the trial court noted Oliver's inability to hear the prosecutor's questions without requesting clarification on numerous occasions during *voir dire*. We hold that the trial court properly overruled defendant's objection to the State's excusal of this prospective juror.

Taken singly or in combination, the State's dismissal of each of these jurors was based on race-neutral reasons which were clearly supported by their individual responses during *voir dire*. The trial court correctly ruled that the State did not exclude any jurors based solely upon their race in violation of *Batson* or the Constitution of North Carolina. Defendant's assignments of error on these grounds are overruled.

[6] In his next assignment of error, defendant contends that the trial court erred in denying his motion to require the State to produce copies of criminal records of prospective jurors. Defendant moved pretrial for copies of all the criminal record checks for prospective jurors obtained by the prosecution. The trial court denied this motion. Defendant subsequently renewed the motion three times during jury selection when the prosecutor asserted that the reason he was challenging a prospective black juror was because the juror failed to disclose a prior criminal record either on his questionnaire or during *voir dire*. Defendant argues that the trial court's acceptance at face value of the prosecutor's reason for discharging a black juror because of an undisclosed criminal record violates defendant's due process rights as well as his right to a fair and impartial jury. We disagree.

It is well settled in North Carolina that "the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). Defendant has failed to show an abuse of discretion here. First, there is no statutory requirement that a prosecutor must reveal juror information in his possession. Section 15A-903 of the North Carolina General Statutes describes types of information obtained by the State that may be subject to disclosure. No mention is made of criminal records of prospective jurors. N.C.G.S. § 15A-904 pertains to information not subject to disclosure;

it provides in pertinent part that except as otherwise required by N.C.G.S. § 15A-903, production of reports, memoranda, or other internal documents made by the State or persons acting in its behalf in connection with the prosecution of the case is not required. Where a statute expressly restricts discovery, as does N.C.G.S. § 15A-904(a), the trial court has no authority to order discovery. *State v. Hardy*, 293 N.C. 105, 125, 235 S.E.2d 828, 840 (1977).

Further, the district attorney is an officer of the court and, as such, is sworn to represent the State honestly and to the best of his ability. Absent evidence to the contrary, it is not unreasonable for the trial court to assume that the prosecutor is telling the truth with regard to the criminal records of prospective jurors.

Finally, once the prosecutor has articulated a nonracial explanation for each challenged peremptory strike, the burden shifts to the defendant to introduce evidence that the State's reasons are a pretext. *Robinson*, 330 N.C. at 16, 409 S.E.2d at 296. Thus, the ultimate burden of rebutting the State's representations and proving purposeful discrimination lies with the defendant. Defendant had sufficient opportunity to produce evidence that the prospective jurors in question did not have criminal records. He could have obtained a record check himself or secured a court order requiring production of these documents. There were resources available to defendant to rebut the State's explanations, and he chose not to utilize them.

Absent authority mandating that the trial court allow defendant to discover these documents and absent any evidence produced by defendant questioning the validity of the prosecutor's representations, it cannot be said that the trial court abused its discretion in denying defendant's motion. This assignment of error is overruled.

[7] Defendant next contends that the trial court erred in failing to excuse juror Mayberry for cause because his views regarding first-degree murder would prevent him from considering life imprisonment as an appropriate punishment. The standard for determining whether a prospective juror may properly be excused for cause for his views on capital punishment is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). Our reading of the transcript reveals that defendant did not establish that Mayberry's views on capital punishment would substantially impair the perform-

ance of his duties as a juror; therefore, the trial court properly denied defendant's challenge.

Defendant initially challenged Mayberry for cause based upon his response that life imprisonment for someone convicted of first-degree murder was "not fair to the general public." Without ruling on the challenge, the trial court allowed the prosecutor to question Mayberry. After several perplexing answers to the prosecutor's questions, the trial court spoke with Mayberry. The trial court's *voir dire* proceeded in pertinent part as follows:

> THE COURT: All right. So a juror must be able to consider both penalties at that sentencing hearing and must be able to weigh whether the State has carried its burden of proof on each of the three issues. So a juror who would automatically vote to impose the death penalty on any first degree murder case would not be carrying out his duty to consider the three additional issues that any juror must consider under our law. So the question becomes whether you can follow the law and require the State to prove those three things beyond a reasonable doubt if we reach a sentencing hearing and whether you can consider the imposition of a sentence of life imprisonment if you, as part of that sentencing jury, finds [sic] that the State has not carried its burden of proof on those three issues.
>
> MR. MAYBERRY: Okay. I follow what you're saying.
>
> THE COURT: Okay. Now, we'll go back. Do you believe, searching your own conscience, that you would be able to consider both possible penalties and require the State to prove the things the law says must be proved before the jury can consider the death penalty, if we reach that stage?
>
> MR. MAYBERRY: Understanding the law now, I guess I would have to.
>
> THE COURT: Would you be able to abide by the Court's instructions and apply that procedure in determining the appropriate punishment?
>
> MR. MAYBERRY: Yeah, I guess I would have to.
>
> THE COURT: And you are—Is it correct for me to say then that you would not automatically vote for the death penalty in the event this Defendant is found guilty by the jury of first degree murder?

MR. MAYBERRY: Provided the second phase has been followed.

THE COURT: If you were part of the jury that returned a verdict of first degree murder would you be willing to require the State to prove those additional three issues before you would consider recommending the death penalty?

MR. MAYBERRY: That's the way the system works, isn't it? I would.

THE COURT: Would you be willing to follow the law as the Court explains it to you?

MR. MAYBERRY: Yes.

Thereafter, defense counsel was permitted to question Mayberry further, whereupon Mayberry restated that he would consider the law as instructed by the trial court.

Because Mayberry said he could put aside his prejudice concerning the death penalty and could follow the law as instructed, he was properly not excused for cause under the *Witt* standard. *See State v. Quesinberry*, 319 N.C. 228, 235, 354 S.E.2d 446, 450-51 (1987). We conclude the trial court did not err in refusing to remove Mayberry upon defendant's challenge for cause.

[8] In a related assignment of error, defendant argues that the trial court improperly limited his *voir dire* of jurors Mayberry and Peterson. On several occasions the trial court sustained objections to questions pertaining to these jurors' views on capital punishment. Examples include:

What feelings or what life experiences do you bring into the courtroom that would make you feel [very strongly for the death penalty]?

Do you think the defendant should prove to you why he should be given life imprisonment rather than the death penalty if he's convicted of first degree murder?

Would the age of the victim in this case, any particular first degree murder, make a difference to you as to whether you would impose a life sentence or a death sentence?

Do you have any difficulty in imposing a life sentence on someone you just convicted of first degree murder?

> Do you feel that it would be difficult for you to consider any other punishment other than death if you were entirely convinced and fully satisfied that someone had committed first degree murder?
>
> Would it be hard or difficult or substantially impair your ability to consider that [the State] had to prove more [aggravating circumstances as well as defendant's guilt] to you?

Defendant argues that he must be permitted the opportunity "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would *always* impose death following conviction." *Morgan v. Illinois*, 504 U.S. 719, 733, 119 L. Ed. 2d 492, 506 (1992). To this end, he contends that these questions were proper under *Morgan* because they inquired into whether a juror could be fair and impartial and whether predetermined views regarding the death penalty would substantially impair that prospective juror's ability to serve. We conclude that *Morgan* does not require that a defendant be allowed to ask the questions at issue.

In *State v. Robinson*, 339 N.C. 263, 273, 451 S.E.2d 196, 202 (1994), *cert. denied*, ---- U.S. ----, 132 L. Ed. 2d 818 (1995), this Court held that it was improper to ask potential jurors if they would impose the death penalty under the particular facts and circumstances of the case. In *Robinson* the defendant attempted to ask prospective jurors if they would be able to follow the trial court's instructions and weigh the aggravating and mitigating circumstances even though the defendant had killed three people, including a child, and had a previous conviction for first-degree murder. *Id.* at 272, 451 S.E.2d at 202. This Court held that the trial court did not err by disallowing the question because the question was "an improper attempt to 'stake out' the jurors as to their answers to legal questions before they are informed of legal principles applicable to their sentencing recommendation." *Id.* at 273, 451 S.E.2d at 202. This Court further noted that " '[c]ounsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided . . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances.' " *Id.* (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)). We conclude that the questions at issue here were an improper attempt to "stake out" the jurors and determine what kind of verdict the jurors would render under a given set of circumstances.

[9] Under this same assignment of error, defendant also contends the trial court erred by repeatedly sustaining the prosecutor's objections

to defense questions regarding the prospective juror's exposure or relationship to children. In each instance defendant complains of, the prospective juror either answered the question before the objection was made; or had answered a similar question previously; or an objection was made as to form, and defense counsel was allowed to restate the question. Thus, defendant has failed to show an abuse of discretion by the trial court.

GUILT-INNOCENCE PHASE

[10] Defendant's next assignment of error concerns the admissibility of evidence regarding prior instances of sexual behavior of Natalie. Defendant filed a written motion pursuant to N.C.G.S. § 8C-1, Rule 412(b)(2) offering proof that Natalie had testified in a juvenile hearing on 30 January 1992 that her father had "kissed her pee-pee." After an *in camera* hearing, the trial court denied defendant's motion. Defendant contends that he should have been allowed to present this evidence because it supported his argument that Natalie had been involved in prior sexual behavior and that defendant, having run over Natalie with his truck, only aggravated preexisting injuries to her vagina. We conclude that defendant's proffered evidence was too temporally remote to be relevant to this offense and that the trial court properly denied defendant's motion.

All of the evidence indicates that the injuries to Natalie's vagina were recent in relation to the time of her death. Dr. Clark testified that he performed an internal examination of Natalie and found serious injuries to the pelvic region. Natalie's vagina was full of blood, and there was a laceration on the back wall of the vagina. The laceration was a blunt-force injury and was indicative of forced intercourse. Clark opined that the injuries occurred at or about the time of death based on the amount of blood that was in the vagina and the lack of healing. Clark also testified that the opening of the vagina was patulous, which means it was gaping open. This is a condition not normally seen in the body of a young child, even in a state of decomposition. Finally, Clark stated that the vaginal injuries were so significant that they would have caused bleeding visible to an average person. Yet, Craven, Natalie's mother, had never noticed any bleeding or vaginal problems prior to the date of this offense.

In view of the uncontroverted evidence indicating that Natalie's vaginal injuries occurred near the time of her death, we find defendant's argument to be without merit. This assignment of error is accordingly overruled.

[11] Defendant next argues that the trial court erred by admitting into evidence a number of crime-scene and autopsy photographs as well as a videotape of the crime scene. Specifically, defendant objects to crime-scene photographs of the black plastic bag and of the position of the body and clothes after the bag was opened; pictures of various bloodstains around the house; autopsy photographs illustrating Natalie's injuries; and a videotape that contained a ninety-second close-up of the body after recovery. The trial court admitted all of these exhibits for illustrative purposes.

Defendant contends that these exhibits should have been excluded because they were repetitious and their probative value was outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (1992). What represents "an excessive number of photographs" and whether the "photographic evidence is more probative than prejudicial" are matters within the trial court's sound discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Photographs "showing the condition of the body when found, its location when found, and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Repetitive photographs may be introduced, even if they are revolting, as long as they are used for illustrative purposes and are not offered solely to arouse prejudice or passion in the jury. *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. Factors a court may consider include what the photographs depict, the level of detail, the manner of presentation, and the scope of accompanying testimony. *Id.* at 285, 372 S.E.2d at 527.

The photographs about which defendant complains were neither repetitious nor prejudicial. All were used to illustrate the testimony of witnesses. The photographs of the crime scene were introduced during the testimony of Sergeant Wilson and illustrated his testimony "with respect to the crime scene in general" and "the location and position of the body when found." *State v. Smith*, 320 N.C. 404, 416, 358 S.E.2d 329, 336 (1987). The autopsy photographs used by Dr. Clark showed various angles of the lacerations to the head as well as the injuries to the vaginal area and properly illustrated the nature of the wounds and the manner of killing. The number of photographs was not excessive, and in fact, the trial court excluded several pictures because they were repetitive. Defendant has failed to show an abuse of discretion in the admission of the crime-scene and autopsy photographs.

[12] Defendant also contests the admission of a twenty-minute videotape which portrayed the discovery of the body and contained ninety seconds of footage that focused on the bloodied head and body of Natalie. The basic principles which govern the admissibility of photographs apply to videotapes, *State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970), and relevant videotapes of crime scenes are admissible when they are not inflammatory or so unduly prejudicial as to outweigh any probative value, *cf. State v. Leazer*, 337 N.C. 454, 456-57, 446 S.E.2d 54, 55-56 (1994) (admission of videotape of crime scene, including removal of victim, upheld).

Here the videotape was introduced during the testimony of Sergeant Wilson and was a fair and accurate representation of the gruesome scene officers encountered at defendant's home. The tape was tendered with a limiting instruction that it was being admitted for the purpose of illustrating the testimony of the witness and was not to be considered for any other purpose. Such a cautionary instruction limits the likelihood of unfair prejudice. *State v. Thompson*, 328 N.C. 477, 492, 402 S.E.2d 386, 394 (1991). Further, photographic evidence, including videotapes, may "be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. This videotape was more than twenty minutes long, not including an eighteen-minute gap, the majority of which portrayed the discovery and removal of Natalie's body from the bedroom closet. The fact that it took so long to uncover the body is strong circumstantial evidence of premeditation and deliberation, malice, and intent to kill. We find no abuse of discretion in admitting the videotape. This assignment of error is overruled.

[13] By his next assignment of error, defendant argues that the trial court erred by allowing the State on two occasions to introduce improper opinion evidence in violation of Rules 701 and 702 of the North Carolina Rules of Evidence. We disagree.

In the first instance, Sergeant Wilson testified that he examined the inside of defendant's truck and found some red dots in the cab to be red oxide primer (as opposed to blood). Defendant contends that Sergeant Wilson was not qualified to give this testimony because he was not a chemical expert. Rule 701 permits a lay witness to testify to opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. N.C.G.S. § 8C-1, Rule

701 (1992). Sergeant Wilson testified that the spots in defendant's truck looked peculiar, so he sanded a spot with a knife and discovered it to be red oxide primer. He also testified that he held a part-time job doing car repair and body shop work. Based on his experience, it is likely that Sergeant Wilson could perceive the difference between blood and red oxide primer. Further, Sergeant Wilson's discovery of paint rather than blood contradicted defendant's statement that he hit Natalie with his truck and that she was bleeding when he put her in the truck. Thus, the testimony was helpful to a determination of a fact in issue. We therefore conclude that the trial court properly allowed this testimony.

[14] Defendant also contests admission of the opinion testimony of Agent Lucy Milks. Milks testified as an expert in forensic serology and opined that blood found in the laundry room of defendant's house was consistent with Natalie's. However, when describing the two blood types, Milks stated that Natalie's blood was Hemoglobin Type 1, while the blood found in the laundry room was Hemoglobin Type A. Defendant argues that this difference in blood type means that Milks' opinion with respect to consistency between blood types was contrary to the facts and should have been stricken.

The portion of Milks' testimony about which defendant complains was not objected to at trial, nor did defendant make a motion to strike. Defendant also failed specifically and distinctly to contend that the error amounts to plain error, thereby waiving appellate review under Rule 10(c)(4). *See State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). Even if this assignment of error had been properly preserved, defendant still is not entitled to relief. First, there is no such thing as Hemoglobin Type 1 blood. Second, Milks testified that the blood from the laundry room was consistent with hemoglobin from both defendant and Natalie. She then correctly testified that defendant's hemoglobin was Type A. We therefore conclude that the inaccurate statement was no more than a *lapsus linguae* on the part of the witness. This assignment of error is overruled.

[15] By another assignment of error, defendant contends that the trial court erred in permitting FBI Agent Robert Durdack to testify regarding a scenario he presented to defendant while interviewing him regarding Natalie's death. The State wished to call Durdack for the purpose of showing that defendant's explanation about accidentally hitting Natalie with his truck originated from an interviewing

technique the agent employed in which he suggested this version of events to defendant in order to elicit a response from him. However, before the State called Durdack as a witness, the trial court conducted a hearing to determine the permissible scope of Durdack's testimony. At the hearing defense counsel argued that the scenario was derived from oral statements defendant made to Durdack and that by failing to disclose the substance of these statements to defendant, the State violated the trial court's discovery order. Defendant contended that evidence regarding the scenario thus should be suppressed as a discovery sanction.

Durdack testified at the hearing. On cross-examination by defense counsel, he stated he was aware that defendant had a truck and that he thought he may have acquired that information from defendant. As a result, the trial court initially held that evidence concerning the proposed scenario must be excluded because it was derived from information defendant provided to Durdack. The State was then allowed to recall Durdack, whereupon he testified that the information he included in the scenario was obtained from Asheboro police officers, not from defendant. Upon further consideration, the trial court ruled that the information upon which Durdack based his scenario was gleaned from other officers, and therefore the State's failure to provide the substance of the scenario to defendant did not constitute a violation of the discovery order. Accordingly, the trial court concluded that Durdack's testimony was admissible.

Defendant now contends that the trial court abused its discretion in reversing its original ruling and allowing Durdack to testify about the proposed scenario. For the trial court to be reversed for an abuse of discretion, there must be a "showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). As we read the transcript, the only colorable discrepancy in Durdack's testimony is that he initially said he *thought* the information that defendant had a truck came from defendant. However, he subsequently testified that he had been fully briefed on the case by the Asheboro police officers prior to interviewing defendant. Further, in response to the trial court's specific question, the agent firmly stated that the elements that he included in the scenario were obtained from the officers, not from defendant. He also testified that his interview with defendant revealed no new facts or information. Because there is competent evidence in the record to support the trial court's finding that Durdack knew defendant drove a truck prior to talking with defendant, we

cannot conclude that the trial court abused its discretion in this matter. This assignment of error is overruled.

[16] Defendant next contends that the trial court erred in permitting the prosecutor to make several prejudicial statements during closing arguments. Defendant asserts that the prosecutor's arguments contained improper statements of his own personal beliefs and opinions as well as statements not based upon any reasonable interpretation of the evidence.

We note that:

> "[C]ounsel [generally] will be allowed wide latitude in the argument of hotly contested cases. 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. Brown, 320 N.C. 179, 194, 358 S.E.2d 1, 12-13 *(quoting State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985)) (citations omitted), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Defendant first complains specifically about the following remarks:

> But [Natalie] lives here, the hospital's here, and he takes her to Randleman. Where is the child in Randleman, but [Ms. Craven] says he says in the house. And she calls the police and goes out in the yard and is upset, as any mother would be, because he says she's dead. I took her there to clean here [sic] up. She's dead in Randleman. I ran over her with my truck. But instead of going to the hospital, she says why didn't you go to the hospital—
>
> . . . .
>
> But instead of going to the hospital he goes to Randleman, the residence down there.

Defendant contends that there was no evidence that Craven asked defendant why he did not take Natalie to the hospital. While there is no explicit testimony to this effect, there was testimony as to the proximity of the Randolph County hospital to Craven's apartment and of defendant's claim that he took Natalie to the Randleman house, not

the hospital, in order to clean her and to see how badly she was hurt. In this context the prosecutor's remarks were not an expression of his personal opinion, but rather a factually based argument emphasizing the fallacy of defendant's explanation.

[17] Defendant also excepts to a portion of the prosecutor's closing argument in which he stated:

> The story just didn't fit the light of day. Look at her injuries. The back injuries of Natalie Osborne. You will recall the doctor saying that the curve, the little bruises fit, the curves, a person's hand, an adult hand as he holds down a little four-year-old—
>
> . . . .
>
> . . . and forcibly has intercourse with her, and forcibly tears her vagina, bruising her labia and causing bleeding in her vagina, and I submit crying and moaning, as he said.

Defendant contends the prosecutor's argument amounted to impermissible speculation as to facts not in evidence because there was no testimony indicating that defendant held Natalie down and forcibly raped her while she cried and moaned. We disagree.

The prosecutor's argument did not misstate or manipulate the evidence. Rather, it was an accurate synthesis of the evidence presented against defendant. Dr. Clark testified that Natalie's injuries were indicative of forced sexual intercourse which occurred at or near the time of death. He also testified that Natalie's body was covered in bruises which were small and rounded and had the distribution and shape of an adult hand. Defendant himself told Lieutenant McIver that Natalie had made gurgling and gagging noises and that she was alive when he took her clothes off in the bathroom at the Randleman residence. It would be reasonable, if not likely, for the jury to infer from this evidence that defendant physically restrained Natalie while he forced himself upon her and that Natalie cried out in fear and pain during the ordeal.

[18] Defendant next contends that the trial court erred when it allowed the prosecutor to argue that he "spoke for Natalie . . . who died needlessly, mercilessly . . . to fulfill the sick desires of the Defendant Jeffrey Kandies." The evidence is sufficiently clear that defendant sexually assaulted Natalie and that the killing followed as a part of the same violent transaction. It was not too speculative for the jury to infer that defendant committed these acts against a four-

year-old girl with an intent to satisfy his perverse desires. *Cf. State v. Zuniga*, 320 N.C. 233, 256, 357 S.E.2d 898, 913 (not too speculative for jury to infer that defendant committed rape and murder of seven-year-old child with intent to satisfy his desire), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

[19] Finally, within this same assignment of error, defendant excepts to the prosecutor's statement that Dr. Clark testified that Natalie was raped. Defendant contends that the State's evidence of rape was weak and inconsistent and that this argument was a misstatement of law which enabled the prosecutor to improperly characterize the expert's testimony as a conclusion of law.

Clark testified that Natalie's injuries were "most indicative of forced intercourse." The statutory definition of rape includes vaginal intercourse (1) with a victim who is a child under the age of thirteen and where the defendant is at least twelve years old and is at least four years older than the victim; or (2) with another person by force and against the will of the other person, inflicting serious personal injury. N.C.G.S. § 14-27.2(a) (1993). Under either definition, the prosecutor's characterization of Clark's testimony and what Clark actually said are entirely consistent. Further, the trial court repeatedly cautioned the jurors that final arguments are not evidence and instructed that they were to be guided by their own recollection of the evidence. It is presumed that the jury followed the trial court's instructions. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993).

For the foregoing reasons, we conclude that the jury arguments of the prosecutor during the guilt phase did not amount to prejudicial error. Accordingly, this assignment of error is overruled.

SENTENCING PHASE

The trial court submitted to the jury two aggravating circumstances: that the murder was committed by defendant while he was engaged in the commission of first-degree rape, N.C.G.S. § 15A-2000(e)(5) (Supp. 1995), 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.

[20] Defendant argues, for a variety of reasons, that the trial court erred in submitting the especially heinous, atrocious, or cruel aggravating circumstance. Defendant first contends that this circumstance is unconstitutionally vague. He concedes, however, that we have con-

sistently rejected this claim. *Syriani*, 333 N.C. at 388-92, 428 S.E.2d at 139-41. We find no compelling reason to revisit the matter here.

[21] Defendant additionally argues that the facts separate from the rape were insufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance. Because the evidence of rape also supported submission of the aggravating circumstance that the murder was committed during the commission of first-degree rape, defendant contends that submission of both circumstances amounted to double counting.

We have stated that the especially heinous, atrocious, or cruel aggravating circumstance is appropriate when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless, or unnecessarily torturous to the victim. *State v. Hamlet*, 312 N.C. 162, 174-75, 321 S.E.2d 837, 845-46 (1984); *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979). It also arises when the killing demonstrates an unusual depravity of mind on the part of the defendant. *State v. Stanley*, 310 N.C. 332, 345, 312 S.E.2d 393, 401 (1984). Among the types of murders that meet the above criteria are those that are physically agonizing or otherwise dehumanizing to the victim and those that are less violent but involve the infliction of psychological torture. *State v. Oliver*, 309 N.C. 326, 346, 307 S.E.2d 304, 318 (1983).

Double counting arises when two aggravating circumstances are supported by the same evidence. *Quesinberry*, 319 N.C. at 240 n.1, 354 S.E.2d at 453 n.1. In *Goodman*, 298 N.C. at 29, 257 S.E.2d at 587, this Court held it improper to submit two aggravating circumstances supported by the same evidence. "Where, however, there is separate evidence supporting each aggravating circumstance, the trial court may submit both 'even though the evidence supporting each may overlap.' " *State v. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994) (quoting *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993), *cert. denied*, — U.S.— , 133 L. Ed. 2d 60 (1995)).

In determining whether there is sufficient evidence to submit a particular aggravating circumstance, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *Syriani*, 333 N.C. at 392, 428 S.E.2d at 141. Here, the State's evidence tended to show that Natalie was savagely beaten, strangled, and sexually assaulted by a man whom she knew and trusted. When discovered,

she was in a trash bag buried in the recesses of a closet, bloodied and naked, with her soiled clothes piled on top of her. An autopsy showed that Natalie had suffered two blunt-force lacerations to the top of her head. The right side of her head was fractured, and there were seven separate bone fragments in the area, one of which had penetrated the brain and caused a hemorrhage. There were multiple bruises on her face, back, neck, sides, and chest. An abrasion on the front of the neck measuring one-inch wide and approximately two and one-half inches long indicated manual strangulation. There was some discoloration around the rectum, bruises on both sides of the vagina, and blood deep within the vaginal canal.

The pathologist opined that Natalie died as a result of blunt-force injury to the head. While she probably lost consciousness soon after the painful blows, none of the injuries would have caused her heart to stop beating immediately. Therefore, it was several excruciating moments before she actually died.

This evidence, viewed in the light most favorable to the State, was sufficient to support a reasonable inference that Natalie suffered great physical pain as a result of being brutally beaten, raped with sufficient violence to cause bleeding in her vagina, and strangled so forcefully that her neck was scratched. It also supports an inference that the murder was dehumanizing and psychologically torturous. The pathologist testified that Natalie's pelvic injuries occurred at or near the time of death. When a murder occurs during the perpetration of a violent sexual assault, it is unusually dehumanizing and debasing. *State v. Artis*, 325 N.C. 278, 318, 384 S.E.2d 470, 492-93 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, defendant abused the trust of a four-year-old girl and violated her in multiple ways. A reasonable jury could infer that Natalie experienced terror, confusion, and anguish from the moment defendant drove off with her in the truck until her last breath.

Taken as a whole, the evidence of Natalie's physical and psychological suffering and of the brutal, dehumanizing nature of the killing was sufficient to support the submission of this aggravating circumstance. While the evidence of rape contributed to this unique combination of factors, ample independent evidence existed to justify submission. We conclude that under the facts of this case, the jury was properly permitted to find both that the murder was committed while defendant was engaged in the commission of first-degree rape and that the murder was especially heinous, atrocious, or cruel.

[22] Under this same assignment of error, defendant alternatively argues that the trial court erred in not instructing the jury that it could not consider the same evidence to find more than one aggravating circumstance. Defendant neither objected to the instructions given nor requested limiting instructions. Therefore, this claim must be reviewed under the plain error standard, which requires defendant to show that the error was so fundamental that the result would probably have been different absent the error. *Rouse*, 339 N.C. at 99, 451 S.E.2d at 565. In light of our holding that there was independent evidence supporting each aggravating circumstance, defendant has not shown that any error in the instructions likely affected the outcome. This assignment of error is overruled.

[23] By another assignment of error, defendant contends that the prosecutor argued matters not supported by the evidence and improperly expressed his personal beliefs and opinions during closing arguments in the sentencing proceeding. First, defendant contests the prosecutor's arguments regarding what Natalie was thinking, feeling, and saying during the commission of the rape and murder. Second, defendant objects to what he characterizes as an improper argument by the prosecutor that the victim's age was an aggravating circumstance.

Counsel is allowed wide latitude in the jury argument in both the guilt and sentencing phases. *Artis*, 325 N.C. at 324, 384 S.E.2d at 496. However, the objectives of the arguments in the two phases are different, and rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase. *Id.* Further, the prosecutor's closing remarks must be taken in the context of his role as a zealous advocate for criminal convictions. *State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993), *cert. denied* —— U.S. ——, 129 L. Ed. 2d 895 (1994).

In *State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980), this Court found that the prosecutor's closing remarks concerning what the victim must have been thinking as he was dying were not so grossly improper as to require the trial court to intervene *ex mero motu*. Likewise, we conclude here that given the overwhelming evidence against defendant, the prosecutor's argument regarding what Natalie was thinking and feeling while defendant beat and raped her, if error, was not prejudicial.

Defendant further contends that the prosecutor used the victim's age to persuade the jury to recommend the death penalty.

> The prosecutor may not argue an aggravating factor not supported by the evidence or not included in the statutory list of aggravating factors found in N.C.G.S. § 15A-2000(e). Likewise, a jury may not base its sentencing recommendation on an improper aggravating factor. Where there is evidence to support the aggravating factors relied upon by the State, however, the jury's balancing of aggravation and mitigation will not be disturbed unless it appears that the jury acted out of passion or prejudice or made its sentence arbitrarily.

Zuniga, 320 N.C. at 273, 357 S.E.2d at 923 (footnote omitted) (citations omitted). There was ample evidence to support the jury's finding of the aggravating circumstances that the killing was accomplished during the first-degree rape and that the murder was especially heinous, atrocious, or cruel. Nothing in the record suggests that the jury made its recommendation based upon passion or prejudice or that it acted arbitrarily. The prosecutor's references to Natalie's age merely emphasized the brutality of the crime as well as the depravity of defendant's acts. We therefore overrule this assignment of error.

PRESERVATION ISSUES

[24-26] Defendant raises three additional issues which he concedes this Court has decided against his position: (1) the trial court erred in making found mitigating circumstances discretionary when the jury considered Issues Three and Four, (2) the trial court erred in denying defendant's request to instruct the jury that defendant would be sentenced to life in prison for his conviction of first-degree rape, and (3) the trial court erred in denying defendant's request to question jurors regarding their beliefs about parole eligibility.

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.

PROPORTIONALITY REVIEW

[27] Having found no error in the guilt-innocence and 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 the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to

the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

The trial court submitted two aggravating circumstances to the jury: that this murder was committed while defendant was engaged in the commission of first-degree rape, N.C.G.S. § 15A-2000(e)(5), and that this 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 evidence supported the jury's finding of each aggravating circumstance. We further conclude that the jury did not sentence defendant to death 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 (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 (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 characteristics: defendant was found guilty of first-degree murder based on both the felony murder rule and on premeditation and deliberation; the jury found the murder to be especially heinous, atrocious, or cruel; the victim was a four-year-old girl who knew and trusted defendant; the murder occurred during the commission of a sexual assault; the victim suffered great physical pain in that she was brutally beaten, strangled, and raped; and defendant concealed the body and then purposefully misled police for several days regarding its location.

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); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We find the instant case distinguishable from each of these. None involved the murder of a child. *State v. Walls*, 342 N.C. 1, 71, 463 S.E.2d 738, 776-77 (1995). Further, we have never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted. *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995).

Defendant attempts to liken this case to six cases involving sexual assault in which the jury recommended life sentences. Our review of these cases reveals that the case before us is distinguishable.

In three—*State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980)—the sole basis for the conviction was felony murder. Here, defendant was convicted of murder by premeditation and deliberation and under the felony murder rule. We have stated that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In another—*State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986)—the jury rejected the submitted aggravating circumstance that the murder was especially heinous, atrocious, or cruel;[1] the jury here found that circumstance upon ample evidence. We have upheld the death penalty as proportionate in many cases in which the especially heinous, atrocious, or cruel aggravating circumstance has been found to exist. *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In the remaining two cases—*State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (1981); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980)—there was no evidence of sexual intercourse, and there was no apparent relationship between the defendants and their victims.

1. We base this on the record in *Prevette*, which remains a part of this Court's records.

Here, by contrast, there is substantial evidence of rape and sexual assault, and the victim was a four-year-old girl who knew and trusted defendant. As we have stated before, the murder of a young child particularly shocks the conscience. *Artis*, 325 N.C. at 344, 384 S.E.2d at 508.[2]

For the foregoing reasons, we conclude that each of these cases in which the jury recommended life imprisonment is distinguishable from the present case. Further, defendant's case is more comparable to those cases in which the death sentence was affirmed. *E.g.*, *McCollum*, 334 N.C. 208, 433 S.E.2d 144 (first-degree felony murder conviction and death sentence upheld where defendant and three other males "gang" raped and asphyxiated eleven-year-old girl); *Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (death sentence upheld where defendant stabbed and killed a seven-year-old girl during the commission of first-degree rape).

The evidence here indicates that defendant snatched four-year-old Natalie Osborne from her front yard and took her to his house in Randleman, where he raped her, strangled her, and brutally beat her to death. After comparing this case to other "similar cases" used for proportionality review, we conclude that it falls within the category of first-degree murders for which we have previously upheld the death penalty as proportionate. Thus, based upon the characteristics of this defendant and the crime he committed, we are convinced the sentence of death was neither excessive nor disproportionate.

Having considered and rejected all of defendant's assigned errors, we hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

2. While *Artis* is presently no longer in the proportionality pool, the principle remains the same.

STATE v. JONES

[342 N.C. 457 (1996)]

STATE OF NORTH CAROLINA v. LEVON JUNIOR JONES

No. 497A93

(Filed 9 February 1996)

1. Evidence and Witnesses § 388 (NCI4th)— murder trial—evidence about subsequent assault—relevancy

The trial court did not abuse its discretion under the balancing test of Rule 403 by admitting testimony by a murder defendant's former girlfriend about defendant's conviction and sentence for an assault committed after the murder and the victim's condition and blood in defendant's car after the assault, since the testimony was relevant to show that the girlfriend waited three years to tell a deputy sheriff that defendant committed the murder because she was afraid of defendant and wanted to keep defendant in prison, and the testimony was admissible to explain the opening statement by defendant's attorney that the evidence would support the idea that defendant's girlfriend wanted to get away from defendant, that she reported defendant to get a $5,000 reward, and that she had changed her story several times. N.C.G.S. § 8C-1, Rules 403, 404(b).

Am Jur 2d, Evidence §§ 404, 418, 427.

2. Criminal Law § 1320 (NCI4th)— capital sentencing—instruction—consideration of guilt-innocence evidence

The trial court's instruction in a first-degree murder sentencing proceeding that all the evidence from the guilt-innocence phase "will be competent for your consideration in recommending punishment" did not improperly allow the jury to consider an assault by defendant after the murder as an aggravating circumstance for the murder since the court correctly charged the jury that it would have to find that defendant had been convicted of an assault that occurred prior to the murder in order to find the aggravating circumstance that he had previously been convicted of a violent felony. N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Trial § 1441.

3. Evidence and Witnesses § 3156 (NCI4th)— credibility of witness—opinion testimony

A deputy sheriff who investigated a murder was properly permitted to testify that he had formed an opinion that a State's wit-

ness was a truthful and honest person and that he had not caught her in a lie that he could prove, since the credibility of a witness whose credibility has been attacked may be supported by opinion testimony pursuant to N.C.G.S. § 8C-1, Rule 608(a).

Am Jur 2d, Witnesses § 106.

4. Criminal Law § 374 (NCI4th); Evidence and Witnesses § 1783 (NCI4th)— polygraph test—instruction not expression of opinion—time of ruling not prejudicial

The trial court did not comment on defendant's credibility when it instructed the jury not to consider polygraph testimony after the State had accused defendant of lying when he testified that a polygraph operator said he was not guilty of the crime. Furthermore, any error in the admission of testimony that the polygraph operator said defendant was not guilty of the crime before the court instructed the jury not to consider any testimony about the polygraph test was favorable to defendant and not prejudicial.

Am Jur 2d, Trial § 284.

Propriety and prejudicial effect of informing jury that witness in criminal prosecution has taken polygraph test. 15 ALR4th 824.

5. Criminal Law § 434 (NCI4th)— murder trial—closing argument—defendant's assault on another—no impropriety

The prosecutor's closing argument in a first-degree murder trial concerning defendant's aggravated assault on another victim did not tell the jury to convict defendant of the murder because he had been convicted of the assault.

Am Jur 2d, Trial §§ 609, 648.

6. Criminal Law § 444 (NCI4th)— murder trial—closing argument—length of investigation—not comment that defendant guilty because in jail

The prosecutor's closing argument in a murder trial that the sheriff's department didn't go out and arrest the first live body they could find and put him in jail and charge him with the murder, that this case sat for over five years before defendant was arrested, and that "we have plenty to do without putting innocent people in jail" did not improperly tell the jury that defendant would not be in jail if he was not guilty but in effect told the jury

that, based on the length of the investigation, the jury should conclude it was painstakingly done and believe the State's evidence.

Am Jur 2d, Trial § 648.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused-modern state cases. 88 ALR3d 449.

7. Criminal Law §§ 501, 878 (NCI4th)— jury divided in favor of conviction—knowledge by court—instructions about further deliberation—not coercive

The trial court's additional instructions to a deadlocked jury were not coercive because the court knew the jury was divided eleven to one in favor of conviction. Nor were the instructions coercive because they included language not endorsed by N.C.G.S. § 15A-1235(b)(1) that "the court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict."

Am Jur 2d, Trial §§ 1581, 1585.

8. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's closing argument—prior felony convictions—no impropriety

The prosecutor's closing argument in a first-degree murder capital sentencing proceeding that defendant had three prior felony convictions did not improperly allow the jury to consider defendant's conviction for an assault that occurred after the murder as an aggravating circumstance where the prosecutor and the court made clear that the assault which occurred prior to the murder was the only crime that would support the prior conviction of a violent felony aggravating circumstance. Furthermore, the prosecution was entitled to argue that the assault subsequent to the murder could be used in determining what weight to give to this aggravating circumstance.

Am Jur 2d, Trial §§ 572, 1441.

9. Criminal Law § 442 (NCI4th)— capital sentencing—prosecutor's argument—crime rate—jury's duty

It was not error for the prosecutor to argue in a capital sentencing proceeding that "you read the newspapers and magazines, and you watch TV, and you say, good gracious, look at this crime rate, it is out of hand, why don't they do something about it? . . . You are they."

Am Jur 2d, Trial §§ 569, 648.

10. Criminal Law § 455 (NCI4th)— capital sentencing—prosecutor's argument—death penalty—deterrence of defendant

It was not error for the prosecutor to argue in a capital sentencing proceeding that the "only way you can guarantee that [defendant] won't get out of prison and kill somebody else is to impose the same punishment on him that he imposed on [the victim]."

Am Jur 2d, Trial § 572.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR3d 449.

11. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's argument—jurors could produce more mitigating circumstances—no impropriety

The prosecutor's argument in a capital sentencing proceeding that members of the jury or the prosecutor could produce more mitigating circumstances than the defendant if called upon to do so did not ask the jurors to place themselves in the place of a litigant and was not improper.

Am Jur 2d, Trial §§ 572, 1441.

12. Jury § 192 (NCI4th)— failure to renew challenge for cause—waiver of appeal

Defendant did not preserve his right to appeal the denial of his challenge for cause of a prospective juror whom he peremptorily challenged where defendant did not renew his challenge for cause after exhausting his peremptory challenges.

Am Jur 2d, Jury §§ 235-237.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment. 8 ALR4th 149.

13. Jury § 203 (NCI4th)— jury selection—disbelief in presumption of innocence—ability to follow law—denial of challenge for cause

The trial court did not err by denying defendant's challenge for cause of a prospective juror where the court could have con-

cluded from the juror's *voir dire* testimony that, although he did not agree with the presumption of innocence, he would follow the law as given to him by the court.

Am Jur 2d, Jury §§ 228-230.

14. Jury § 203 (NCI4th)— jury selection—desire not to see pictures of victim's body—denial of challenge for cause

The trial court in a capital trial did not err by denying defendant's challenge for cause of a prospective juror who stated several times during her *voir dire* testimony that she did not want to see pictures of the victim's body and that seeing them would upset her where the juror also stated unequivocally at least three times that she would require the State to prove the defendant's guilt beyond a reasonable doubt.

Am Jur 2d, Jury §§ 228-230.

15. Criminal Law § 1322 (NCI4th)— capital trial—parole eligibility—jury request—instructions

Where the jury in a capital trial sent a note to the trial court asking whether a life sentence carried with it a possibility of parole, the court did not err by instructing the jury that the possibility of parole should not be considered and that the jury should make its recommendation as if life imprisonment means imprisonment for life.

Am Jur 2d, Trial §§ 286, 1443.

16. Criminal Law § 1361 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—evidence insufficient to require submission

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired where testimony was presented at trial that defendant bought and drank some amount of liquor prior to the crime but the testimony did not speak to the effect the liquor had on the defendant's ability to understand and control his actions. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

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

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

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

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalties imposed in other first-degree murder cases, considering both the crime and the defendant, where defendant intentionally shot the victim in his own home during a robbery and left him to die; defendant gained entry to the victim's home because the victim knew him; the jury found defendant guilty based on premeditation and deliberation as well as felony murder; the jury found as aggravating circumstances that (1) the defendant had previously been convicted of a felony involving the use of violence, and (2) the murder was committed for pecuniary gain; and the only mitigating circumstance found was the nonstatutory circumstance that defendant had exhibited religious beliefs and practices since incarceration.

Am Jur 2d, Criminal Law § 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstnace that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Grant (Cy D.), J., at the 8 November 1993 Criminal Session of Superior Court, Duplin County, upon a verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to his convictions of armed robbery and conspiracy to commit armed robbery was allowed by this Court on 15 August 1994. Heard in the Supreme Court 9 May 1995.

The defendant was tried for the first-degree murder of Leamon Grady, conspiracy to commit armed robbery, and armed robbery. The evidence showed that the body of Mr. Grady was found in his home at 3:00 a.m. on 28 February 1987. In August 1990, Ms. Lovely Lorden talked to Dalton Jones, investigations supervisor in the Duplin County Sheriff's Department. In November 1990, she told Mr. Jones all she knew of the incident.

Ms. Lorden testified that in February 1987 she was living with the defendant. She testified further that sometime after midnight on 28 February 1987, she rode in an automobile with the defendant and two other men to the home of Leamon Grady. The three men left the automobile and went into Mr. Grady's home. The defendant was carrying a pistol. Ms. Lorden heard the sound of two gunshots, and the men returned to the automobile.

Ms. Lorden testified that she did not report the incident to the Sheriff's Department for three years because she was afraid of the defendant. The defendant was convicted in another case of assault with a deadly weapon with intent to kill and was sentenced to prison. Because she was afraid of what the defendant would do to her when he was released from prison, she told the complete story of the killing of Mr. Grady to Dalton Jones.

The defendant was convicted of all charges. After a sentencing hearing, the jury recommended that the defendant be sentenced to death. This sentence was imposed. The convictions for armed robbery and conspiracy to commit armed robbery were consolidated for sentencing, and a sentence of forty years in prison was imposed for these two crimes. The defendant appealed.

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

Thomas K. Maher for defendant-appellant.

WEBB, Justice.

[1] The defendant's first assignment of error involves the testimony of Lovely Lorden. In 1990, the defendant was convicted of assaulting a Mr. Martinez and was sentenced to prison. The assault occurred after the murder of Mr. Grady. Ms. Lorden had seen Mr. Martinez after the assault had occurred, and she was allowed to testify as to Mr. Martinez's condition and the blood that was in the defendant's automobile as a result of the assault. She was also allowed to testify that the defendant was convicted and sentenced to prison for assaulting Mr. Martinez. Dalton Jones was then allowed to testify to the condition of Mr. Martinez after the assault.

The defendant concedes that this testimony had some relevance to prove that Ms. Lorden was so afraid of him that she waited three years to contact Dalton Jones about the Grady murder and that she finally did so because she wanted to keep the defendant in prison.

N.C.G.S. § 8C-1, Rule 404(b) (1992); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991). He says, however, that there was ample other evidence to prove these facts and that this testimony should have been excluded as unfairly prejudicial to him pursuant to N.C.G.S. § 8C-1, Rule 403. It is within the discretion of the trial judge whether to exclude relevant evidence pursuant to Rule 403. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). We cannot hold that the court abused its discretion in admitting this testimony.

We note that in his opening statement to the jury, the defendant's attorney said there would be evidence from defendant's girlfriend that once again would send him to prison, that the evidence would support the idea that she wanted to get away from him, that she had reported the defendant to collect the $5,000 reward for producing Mr. Grady's murderer, and that she had changed her story several times. The State was entitled to introduce this testimony by Ms. Lorden to explain this opening statement by the defendant's attorney.

This assignment of error is overruled.

[2] The defendant next assigns error to the charge of the court at the sentencing proceeding. The court charged the jury that all the evidence from the guilt-innocence phase "will be competent for your consideration in recommending punishment." The defendant says this allowed the jury to consider the assault on Mr. Martinez as an aggravating circumstance, which it should not have been allowed to do because the assault occurred after the crime for which he was being tried. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

N.C.G.S. § 15A-2000(a)(3) provides that all evidence presented during the guilt-innocence determination is competent for the jury's consideration in passing on punishment. The court instructed the jury according to this statute, and it was not error to do so. The court correctly charged the jury that it would have to find that defendant had been convicted of an assault that occurred prior to the time of the crime for which he was being tried in order to find the aggravating circumstance that he had been previously convicted of a felony involving the use or threat of violence to the person. This was one of the aggravating circumstances that supported the death penalty. The jury could consider evidence of the assault committed on Mr. Martinez in determining the weight to be given the aggravating circumstances.

This assignment of error is overruled.

[3] The defendant next assigns error to the allowance of testimony by Dalton Jones. During direct examination of Mr. Jones, the following colloquy occurred:

> Q. In your dealings with Mrs. Lovely Lorden, have you been able to form an opinion as to whether or not she's a truthful and honest person?
>
> MR. PHILLIPS: Objection.
>
> THE COURT: Overruled.
>
> A. Yes, I think so. I've not, so far, per se, caught her in a lie that I can prove.

The defendant concedes that pursuant to N.C.G.S. § 8C-1, Rule 608(a), the credibility of a witness whose credibility has been attacked may be supported by opinion testimony. *State v. Morrison*, 84 N.C. App. 41, 351 S.E.2d 810, *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987). Nevertheless, the defendant says this testimony should have been excluded by N.C.G.S. § 8C-1, Rule 403, as more prejudicial than probative.

The defendant says a jury would likely give more weight than justified to the opinion of a law enforcement officer who investigated the case because it would assume he is an experienced professional who knows the facts. We cannot hold that this is a sufficient reason for us to write an exception into Rule 608(a) and say the rule does not apply to law enforcement officers.

This assignment of error is overruled.

[4] The defendant next assigns error to the way in which the court handled certain testimony in regard to a polygraph test. While the defendant was being cross-examined as to when he had told Ms. Lorden that he would leave her, he said he had talked to Ms. Lorden in regard to a polygraph test he had taken. He said that Dalton Jones was present when the test was given and that Jones told the defendant he had failed the test. He then started to say what the person who administered the test had said, and the State objected, which objection was sustained. After a bench conference, the court directed the defendant to complete his answer to the question, and the defendant said the person who gave him the test said he was not guilty of the crime. The State cross-examined the defendant in regard to what was said by the person who administered the polygraph test and accused

the defendant of lying. The court then instructed the jury not to consider the testimony in regard to the polygraph test.

The defendant says that by instructing the jury not to consider the polygraph testimony after the State had accused the defendant of lying, the court gave the impression it did not believe the defendant, which violated the court's duty not to comment on the evidence. N.C.G.S. § 15A-1222 (1988).

We cannot find error in the way the court handled this matter. The defendant testified without objection that he was given a polygraph test, and that Dalton Jones had told him he had failed it. The State then interposed an objection before the defendant could testify as to what the polygraph operator said. The court allowed the defendant to testify that the polygraph operator said he was not guilty. This could not have prejudiced the defendant.

Evidence of the polygraph test should not have been admitted, and the court properly excluded it when an objection was made. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). It could only be error favorable to the defendant to admit testimony that the polygraph operator said the defendant was not guilty before instructing the jury not to consider the testimony regarding the polygraph test.

This assignment of error is overruled.

The defendant next assigns error to arguments to the jury. No objection was made to these arguments, but the defendant contends they were so egregious the court should have intervened *ex mero motu*. When no objection is made, an argument must affect a defendant's right to a fair trial before a court must intervene. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

[5] The defendant argues that there was evidence introduced of the assault on Mr. Martinez for the purpose of showing why Lovely Lorden was afraid of the defendant. He says the State erroneously argued that the jury should find the defendant guilty of the murder of Leamon Grady because he was involved in the assault on Mr. Martinez. We do not so read the argument. One of the prosecutors recounted the injuries inflicted on Mr. Martinez. He then said:

> And this defendant was accused of what the very—almost same thing that he's accused of here in court today, assault with a deadly weapon inflicting serious injury—well, he's elevated now,

> he's charged with murder now, as you know, and robbery, which is exactly what he did to Mr. Leamon Grady.

[6] We do not believe this argument tells the jury to convict the defendant of murder because he was convicted of the assault on Mr. Martinez. While the court might have sustained an objection to this argument if one had been interposed, it was not so egregious that the court should have intervened *ex mero motu*.

At another place in the jury argument, a prosecuting attorney said:

> The sheriff's department didn't go out and arrest the first live body they could find and put them over there in jail and charge them with murder, did they? This case sat for six—it sat until August of '92 before the defendant and his coconspirators were arrested. It's not fun and games to lock people up and (inaudible), you know that? It's not a lot of fun to do that. I can assure you that we have plenty to do without putting innocent people in jail.

The defendant contends that this argument is improper because it tells the jury that the defendant would not be in jail if he was not guilty. He says the argument rests on facts that are not in evidence but are known to the prosecutor. We believe the prosecutor's argument is that based on the length of the investigation, the jury should conclude it was painstakingly done and should believe the State's evidence. This is not an improper argument.

This assignment of error is overruled.

[7] The defendant's next assignment of error deals with the court's instruction as to the jury's duty to reach a verdict. After approximately one-half day of deliberation, the jury sent the court a note stating it was eleven to one for conviction. The court told the defendant and the attorneys that the split was eleven to one but did not tell them eleven were for conviction. The court instructed the jury that it should continue its deliberations. Several hours later, at approximately 5:00 p.m., the jury sent the court a note that read, "[S]till no decision! Please instruct." The court sent the jurors home for the evening and instructed them the next morning as follows:

> Now, you informed me that you have so far been unable to agree upon a verdict. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women

> and to reconcile your differences if you can without the surrender of conscientious convictions. But, no jury [sic] should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict. I will now let you resume your deliberations and see if you can reach a verdict.

Approximately one-half hour later, the jury found the defendant guilty of all charges.

The defendant concedes that this Court has upheld similar instructions in *State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987), and *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984). He says the distinction between those cases and this case is that the court in this case knew the jury was eleven to one for conviction, while it knew only the numerical divisions in *Forrest* and *Fowler*. He says when the court and the jury know the division is in favor of one result, any instruction on the duty to reach a verdict will be understood by the jury as an endorsement of the majority's position.

We do not believe this instruction by the court is any more coercive because the court knew the majority position. It should be equally coercive whether or not the court knows the division of the vote.

The defendant also says the language used by the court—"[t]he Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict"—is not specifically endorsed by N.C.G.S. § 15A-1235(b)(1), which only authorizes an instruction that "[j]urors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment." The defendant acknowledges that we approved this language in *Forrest* and *State v. Bussey*, 321 N.C. 92, 361 S.E.2d 564 (1987).

This assignment of error is overruled.

[8] The defendant next assigns error to an argument made by the prosecuting attorney at the sentencing proceeding. He argued as follows:

> This is not a case where the defendant had a bad day and never done anything wrong in his life. Members of the jury, you've heard

> about his life. You've heard that he has had three prior felony convictions before today, three prior felony convictions.

The defendant says this improperly allowed the jury to consider the conviction of the assault on Mr. Martinez, which was not an aggravating circumstance or relevant to rebut any mitigating circumstance because the assault occurred after the murder of Mr. Grady.

The prosecuting attorney and the court made clear that the assault on Allen Bizzell, which occurred prior to the murder of Mr. Grady, was the only crime that would support the aggravating circumstance that the defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988) (amended 1994). The prosecution was entitled to argue that the assault on Mr. Martinez could be used in determining what weight to give this aggravating circumstance.

This assignment of error is overruled.

The defendant next assigns error to three separate parts of the State's jury argument during the sentencing proceeding. At one point, the prosecuting attorney argued:

> [Y]ou read the newspapers and magazines, and you watch TV, and you say, good gracious, look at this crime rate, it is out of hand, why don't they do something about it? Well, ladies and gentlemen, there's no mythical "they" floating out in space anymore. You are they.

The defendant, relying on *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985), says that it was error to allow the State to make this argument because it asked the jury to convict him in response to the crime rate. In *Scott*, we held it was error for the State to argue that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." *Id.* at 312, 333 S.E.2d at 298. We said this statement encouraged the jury to ignore the evidence and "hark to a pack already hot on the trail and in full cry." *Id.*

We also said in *Scott* that it was not error for the State to argue that "you read these things and you hear these things and you think to yourself, 'My God they ought to do something about that. . . .' Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the 'they'." *Id.* at 311, 333 S.E.2d at 297. The language used by the prosecuting attorney in this case is similar to the language we approved in *Scott*. We find no error. *See State*

v. Moseley, 338 N.C. 1, 53, 449 S.E.2d 412, 443 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995).

[10] The defendant next argues under this assignment of error that the State should not have been allowed to argue that the "only way you can guarantee that [the defendant] won't get out of prison and kill somebody else is to impose the same punishment on him that he imposed on Leamon Grady." He concedes that we have decided this issue contra to his position in *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). We see no reason to change our position on this question.

[11] The defendant next contends that it was error to allow the State to make the following argument in an effort to denigrate the mitigating circumstances he submitted:

> You've heard, and we're not going to stay up here and argue, I'll argue all day how flimsy these factors are. But you just sit up here and go, if you were up here, how many mitigating factors you'd have your might [sic] present to you, the good things that you've done in your lifetime, just think about it. It would be a sad commendation if all I had was 10 mitigating factors, ten whole things in my whole lifetime that are of value.

The defendant contends that this argument is a form of "Golden Rule" argument in which jurors are asked to put themselves in the place of litigants in deciding what they deserve. He says this is an improper argument. *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). An argument that the members of the jury or the prosecuting attorney could produce more mitigating circumstances than the defendant if called upon to do so does not ask the jurors to put themselves in the place of a litigant. We find no error in this argument.

This assignment of error is overruled.

The defendant next assigns error to the denial of his challenges for cause to two of the jurors. When the last juror was to be selected, Donald Ray Davis was called to the box. The prosecuting attorney questioned Mr. Davis as follows:

> Q. Okay. And then I assume, as you sit here today, that you can give both sides a fair trial?
>
> A. Well, I reckon, I don't know.

Q. Okay. Well, talk to us about that. You say you reckon you can?

A. Well.

. . . .

Q. Okay. Now, at this time he is presumed to be innocent. He's presumed to be innocent. All people charged with crimes are presumed to be innocent until they are proven guilty, okay?

A. (Nods.)

Q. And do you believe in that law, that a person is presumed to be innocent?

A. Well.

Q. Until we prove him otherwise?

A. Well, to tell you the truth, I don't.

Q. You don't believe in that?

A. No. Well, I think they spend a lot of money for nothing a lot of times to be honest with you.

Q. Okay. Well, that's exactly what we want. We want your honesty. Mr. Davis, do you feel like you could be a fair juror in this case or not?

A. Mm, I really don't know to tell you the honest truth, to give you an honest answer, I don't know.

. . . .

Q. Okay. Now, let me ask you this then. If you sat here on this jury and you heard the case and you just were not convinced the man was guilty, you would vote not guilty, wouldn't you?

A. Yeah, if I was convinced of that, yeah.

Q. Now, you understand that he doesn't have to convince you of anything?

A. (Nods.)

Q. . . . As I've indicated, the defendant has been charged with these crimes, and he's pled not guilty and says he's innocent, okay?

A. (Nods.)

Q. The law is that, since we charged him with the crime of murder and we say he is guilty, it's us, we must prove that he's guilty to you, do you understand?

A. Right.

Q. And if we don't do our job and if we don't prove to you that he's guilty, then it's your job to find him not guilty, do you understand?

A. Mm-hmm.

Q. He doesn't have to prove he's innocent. He doesn't have to prove anything, okay?

A. (Nods.)

Q. We have to prove it. That's our system of justice. It's not just for him. . . . Do you understand?

A. Yeah.

Q. And until we prove that he's guilty, it's your job to vote not guilty. Do you understand?

A. Yeah.

Q. Okay. And you agree with that law?

A. Well, I reckon so.

Q. Well, you don't think a person charged should have to prove their innocence, do you?

A. Well, if you've got to have some evidence to charge him, it looks to me like, you know, well, I may be wrong, I don't know.

Q. Well, anyhow, the point is, Mr. Davis, . . . can you put aside your own personal opinions about that and sit and listen, I mean if I just stood up there now and said that we would rest our case and not present anything, . . . you would find him not guilty, wouldn't you?

A. I reckon so.

Q. Well, you wouldn't want to be in his position?

A. No, I wouldn't.

Q. And charged and say you find him guilty just because he's charged with it?

A. Right.

Q. That's what I'm getting at. Just because he's been charged is certainly no evidence of his guilt. That is if that would be true, every time we'd just go ahead and do it, do you understand?

A. Right.

Q. Okay. So if you're selected to be on this jury, you would vote not guilty until we prove to you that he's guilty, wouldn't you?

A. Yeah, I reckon so.

Q. I mean you'd do that, wouldn't you?

A. Yeah.

The defense counsel then questioned the juror as follows:

Q. Now, you also indicated that you felt like that maybe the judicial system in the trial of cases sometimes just took too much of the public's time?

A. I think they do, a lot of taxpayer[s'] dollars, you know.

Q. And well, in a case like this, where [defendant] is charged with murder and robbery and conspiracy to commit robbery, if he elects not to take the stand and testify, would you hold that against him?

A. Well, if he don't stand up for himself, I mean, he should stand up for himself, that's the way I feel about it, you know.

Q. Even though if the Court should instruct you that you could not hold that against him, you still feel that he ought to stand up for himself in this trial?

A. Right, he should.

The defendant challenged Mr. Davis for cause, which was denied. The court then explained to Mr. Davis the law in regard to the presumption of innocence and engaged him in the following colloquy:

Q. All right. That's going to be the law. That's what I'm going to instruct the jury. Now in this case, I'm asking you can you follow that law? I know you may have other opinions as to what the law is or what the law ought to be, but can you follow the law as I just gave it to you as it applies to this case?

A. Yeah, but the way I look at it, I am, you know, you've got certain evidence against him, right?

THE COURT: No, I don't have any evidence against him, sir.

A. Well, why do you hold him? Well, you're holding him for some reason.

THE COURT: Excuse me. I'm not going to get into an argument.

A. Well, yeah, I know what you're talking about.

THE COURT: I'm sort of like a referee. The State is Mr. Hudson. They have a burden to prove him guilty to the jury and they need to carry that burden before you can find him guilty. Do you understand that, sir?

[A]. Mm-hmm.

THE COURT: He may simply sit over there and rely—and his lawyers may determine that the State has not carried its burden, that the State has not proved him guilty, that they have not presented enough evidence to prove him guilty, and he may not take the witness stand. Now, I'm saying, can you follow that law?

A. Yeah, if that's what you want me to do, I will.

THE COURT: If you sit as a juror, that would be your duty to follow the law. Can you do that?

A. I'll try it.

The defendant renewed his challenge for cause, and the challenge was denied. The defendant then exercised his last peremptory challenge to Mr. Davis. The defendant asked the court to give him an extra peremptory challenge when the next juror said he had previously served on a jury that had sentenced someone to death. This request was denied.

[12] N.C.G.S. § 15A-1214 provides:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and

(3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(h), (i) (1988). The defendant did not renew his challenge for cause to Mr. Davis. Thus, he has not preserved his right to appeal the denial of his challenge for cause under this section. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991).

[13] If the defendant had preserved his right to appeal, he would not have been entitled to relief. He argues, relying on *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), and *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), that Mr. Davis repeatedly stated that he did not agree with the presumption of innocence and would expect the defendant to prove he was innocent. The defendant says Mr. Davis agreed only to "try" to follow the law if he were selected as a juror. We disagree. As we read the statement of Mr. Davis, the court could have concluded that Mr. Davis may not have agreed with the presumption of innocence but would follow the law as given to him by the court. This was all that was required to deny the challenge for cause. *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991).

[14] The defendant also contends under this assignment of error that it was error not to allow his challenge for cause to Ms. Bobby Outlaw Tucker. During jury selection, the following colloquy occurred between defense counsel and Ms. Tucker:

A. Could I say something? If they were going to show a lot of pictures of the man and he's murdered and all that, I don't believe that I'd like to see that, that would bother me because I don't believe in violence.

Q. Ms. Tucker, in the event that you were shown a picture of Mr. Grady in this case, as indicating his death, and the fact that he is actually dead in the picture, would that alone influence you into determining in your mind that somebody ought to pay for that and

somebody ought to pay a death for a death and an eye for an eye, do you believe in that?

A. Sort of.

Q. Sort of?

A. I do not like violence at all. I won't even look at violence on TV.

Q. Yes, ma'am. But if you were shown this picture and that picture illustrates that—

A. That probably would upset me because, like I said, I will not look at anything violent, so that is one thing that would bother me.

Q. Well, after you've seen that picture, or it's been showed to you for your viewing, could you then be fair the rest of the trial, even though you'd seen that picture?

A. I don't believe so.

Q. Do you feel that that would be able to keep you from then listening to the instruction of the Court and giving my client a fair trial?

A. It probably would.

Q. If this Court would then instruct you to follow his instructions and to abide by his instructions, could you even then render an impartial verdict in this case after you'd seen those photographs?

A. I don't know. I can't stand to look at pictures like that without it upsetting me.

THE COURT: I guess the question would be, Ms. Tucker, if you looked at the pictures and they somewhat bothered you, would you in some way feel unfair to the defendant, Mr. Jones, or hold something against Mr. Jones simply because he's being tried for that murder?

A. If I felt like he was guilty of it, I mean.

Q. You would still have to go through the process of him [being] proven guilty to you beyond a reasonable doubt?

A. Yeah.

Q. Is that correct?

A. Yeah.

Q. And that standard wouldn't be any less simply because you saw the pictures, would it?

A. Well, I was just saying, I don't want to see the pictures of it.

Q. I understand that. Now, if you were to sit as a juror in this particular case, and pictures are introduced, and all the other jurors see the pictures, you will have to look at the pictures. Now, there's no rule that you have to look at them any longer than another juror, or as long as another juror, but you would be required to look at all the evidence.

A. I wouldn't like that.

Q. I understand. And Mr. Hudson, I think I'm correct in saying these are all black and white pictures, aren't they?

MR. HUDSON: Yes, sir, they are.

THE COURT: These are black and white pictures. They will not be color photographs.

A. Well, like I said, I won't even look at violence on TV, and I don't want to see no pictures.

Q. But if you're chosen as a juror, would you look at the pictures?

A. I reckon I have to, but I wouldn't want to.

Q. All right. You may continue, Mr. Phillips.

MR. PHILLIPS: Is she back with me, Your Honor?

THE COURT: Yes, sir.

MR. PHILLIPS:: Ms. Tucker, are you saying to this Court that if you have an opportunity to look at some pictures, and it indicates what I've just said, that after you look at those pictures, that it will alarm you in such a way, possibly, that you could not then deliberate fairly and render a verdict fairly as far as my client is concerned?

A. Probably, right.

MR. PHILLIPS: I'd challenge for cause.

THE COURT: Why is that, Ms. Tucker? Why couldn't you be fair after looking at the pictures?

A. I don't know. Anything like that just upsets me.

Q. Well, what I'm saying, ma'am, we realize that it may upset you, but would you in some way hold that against Mr. Jones or hold it against the State because you saw the pictures of a deceased person?

A. Well, I ain't never been put in that—well, I don't know.

Q. You would still require that the State prove to you beyond a reasonable doubt, that is fully satisfy you and entirely convince you that this man did it? That this man committed the murder that is reflected in the picture, wouldn't you, ma'am?

A. Well, they must have reason to think he did it, or he wouldn't be here.

Q. What I'm saying, you're going to require that they prove it to you beyond a reasonable doubt, is that correct?

A. Yes.

Q. And if they fail to prove it to you, if you're not fully satisfied or if you're not entirely convinced that this man did it, . . . would you find him not guilty?

A. Well, I guess so.

Q. Even after looking at the pictures would you find him not guilty.

A. I don't know. I ain't never been faced with anything like that before.

Q. Let's say for example you have an opportunity to view the pictures and they may upset you, you would still then require, wouldn't you, that the State prove to you beyond a reasonable doubt, that is if they fully satisfy you and entirely convince you that Mr. Jones did it, he committed the murder as reflected in the pictures, before you would return a verdict of guilty?

A. No.

THE COURT: I'm going to deny your challenge, Mr. Phillips.

After the defendant's challenge for cause was denied, he then challenged Ms. Tucker peremptorily. He contends her answers demonstrate that viewing photographs of Mr. Grady's body would prevent her from rendering a fair verdict. The defendant did not

renew his challenge for cause to Ms. Tucker and did not preserve the right to appeal the denial of the challenge under N.C.G.S. § 15A-1214(h).

If the defendant had preserved his right to appeal the denial of his challenge for cause to Ms. Tucker, it would have been to no avail. While Ms. Tucker said several times that she did not want to see pictures of Mr. Grady's body and that seeing them would upset her, she also stated unequivocally at least three times that she would require the State to prove the defendant's guilt beyond a reasonable doubt. Thus, she indicated she would follow the law. Despite her final answer in the negative, we cannot hold that the court, in light of Ms. Tucker's previous answers and demeanor, was in error in determining she would be a reliable juror. Considering the deference we must pay to the trial court, we can find no error in its ruling. *See State v. House*, 340 N.C. 187, 194, 456 S.E.2d 292, 296 (1995).

This assignment of error is overruled.

[15] The defendant next assigns error to an instruction to the jury in regard to his eligibility for parole. The jury sent a note to the court asking whether a life sentence carried with it the possibility of parole. The court instructed the jury that the possibility of parole should not be considered and that the jury should make its recommendation as if life imprisonment means imprisonment for life. The defendant says this was error.

The defendant candidly concedes we have decided this question against his position. *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). He wishes to preserve this question for further review.

This assignment of error is overruled.

The defendant argues under his next assignment of error that the court did not properly instruct the jury in regard to the mitigating circumstances unrelated to the crime. He concedes that we answered this question against his position in *Skipper* but wishes to preserve this question for further review.

This assignment of error is overruled.

[16] The defendant's final assignment of error is that the court erred in failing to submit to the jury the statutory mitigating circumstance that the defendant's capacity to appreciate the criminality of his conduct was impaired. N.C.G.S. § 15A-2000(f)(6). The defendant argues

that because there was direct testimony that the defendant had been consuming liquor for hours prior to the crime and that it made him intoxicated, the court should have submitted the circumstance. Voluntary intoxication is properly considered under the (f)(6) mitigating circumstance. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981). Before (f)(6) applies, however, a defendant's faculties must have been impaired by intoxication to such a degree that it affects his ability to understand and control his actions. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). The defendant has not made such a showing. The testimony at trial was that the defendant bought some amount of liquor and drank some of it. The testimony does not speak to the effect the liquor had on the defendant's ability to understand and control his actions. Therefore, the court did not err in failing to submit the mitigating circumstance to the jury.

This assignment of error is overruled.

We find no error in the trial or sentencing proceeding.

PROPORTIONALITY REVIEW

[17] In reviewing the sentence, as we are required to do by N.C.G.S. § 15A-2000(d), *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), we have conducted a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, and we conclude that the jury's finding of each aggravating circumstance was supported by the evidence. We further conclude that nothing in the record suggests that the jury recommended the death penalty while under the influence of passion, prejudice, or any other arbitrary factor.

Our final task is to determine whether the sentence was excessive or disproportionate to the penalties imposed in other first-degree murder cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2). The defendant in this case murdered the victim in his own home during the course of a robbery. The jury found the defendant guilty of first-degree murder based on premeditation and deliberation as well as felony murder. The jury found as aggravating circumstances that (1) the defendant had previously been convicted of a felony involving the use of violence, N.C.G.S. § 15A-2000(e)(3); and (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The only mitigating circumstance found was the

nonstatutory mitigating circumstance that defendant had exhibited religious beliefs and practices since incarceration.

The defendant cites two cases with facts similar to the facts in this case where the jury recommended life in prison. *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984); *State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982). He also cites *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), in which this Court held the death sentence disproportionate in a case in which the defendant killed a man during a robbery. The opinions in *Wilson* and *Hunt* do not say what aggravating circumstances, if any, were found. In *Jackson*, the pecuniary gain aggravating circumstance was found.

We are impressed in this case that the jurors found as an aggravating circumstance that the defendant had previously been convicted of a violent felony. A jury could well be more willing to impose the death sentence on one who is prone to violence. In *State v. Harris*, 338 N.C. 129, 449 S.E.2d 371 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 752 (1995); *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994); *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994); and *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983), we affirmed death penalties when the juries found the prior conviction of a violent felony aggravating circumstance. In *Rose* we said, "Of the cases in which this Court has found the death penalty disproportionate, none have involved the aggravating circumstance of a prior conviction of a felony involving the threat or use of violence against the person." *Rose*, 335 N.C. at 351, 439 S.E.2d at 546.

We are also impressed that the jury found that the murder in this case was based on premeditation and deliberation. We believe this is a crime more deserving of the death penalty than felony murder. The defendant gained entry to Mr. Grady's home because Mr. Grady knew him. He intentionally and deliberately shot Mr. Grady and left him to die. Juries have consistently returned death sentences in this state for murders comparable to this one. The sentence imposed in this case is proportionate.

NO ERROR.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. BRENDA KAY MABE, ET AL, DEFENDANTS

JESSE WILLARD SCOTT, JR., INDIVIDUALLY, AS THE PARENT OF LUCINDA SUE SCOTT, AND AS THE ADMINISTRATOR OF THE ESTATE) OF CAROLYN MABE SCOTT, AND LUCINDA SUE SCOTT, BY HER GUARDIAN AD LITEM, ANNE CONNOLLY, THIRD-PARTY PLAINTIFFS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, THIRD-PARTY DEFENDANT

BRENDA KAY MABE, ROGER LEE MABE, KIMBERLY HOPE MABE, A MINOR B/H/G/A/L S. MARK RABIL AND HEATHER DORA MABE, A MINOR B/H/G/A/L GREGORY W. SCHIRO, PLAINTIFFS v. ROBERT LEONARD GREGORY, AND MARY ELIZABETH WILSON, DEFENDANTS

JESSE WILLARD SCOTT, JR., INDIVIDUALLY AS THE PARENT OF LUCINDA SUE SCOTT AND AS THE ADMINISTRATOR OF THE ESTATE OF CAROLYN MABE SCOTT, AND LUCINDA SUE SCOTT, B/H/G/A/L ANNE CONNOLLY, PLAINTIFFS v. ROBERT LEONARD GREGORY, MARY ELIZABETH WILSON, AND JODY RAY BULLINS, DEFENDANTS

No. 312PA94

(Filed 9 February 1996)

1. Insurance § 690 (NCI4th)— automobile accident—prejudgment interest—beyond policy limits of liability—defined by policy as damages rather than costs

In an action arising from an automobile accident, the Court of Appeals correctly limited Nationwide's responsibility to pay prejudgment interest to its $300,000 UIM limit of liability where the parties entered consent judgments exceeding the limit of liability; under *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, prejudgment interest is an element of damages; Nationwide can only be liable for prejudgment interest if it was contractually obligated; and the definition clause in Nationwide's policy expressly including prejudgment interest as an element of damages controls the determination of whether prejudgment interest is payable beyond the policy limits. N.C.G.S. § 24-5.

Am Jur 2d, Automobile Insurance § 428.

Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in tort actions. 40 ALR4th 147.

Liability of insurer for prejudgment interest in excess of policy limits for covered loss. 23 ALR5th 75.

2. Insurance § 532 (NCI4th)— automobile accident—UIM coverage—owned vehicle exclusion—contrary to statute

The owned vehicle exclusion in a UIM clause was in violation of N.C.G.S. § 20-279.21(b)(4) and is invalid where Carolyn Scott was killed in an automobile accident; a business automobile policy had been issued to her husband covering a Mack flatbed truck and a low-boy trailer used in farming operations; and it is clear that the policy by its language does not extend coverage to Ms. Scott or her daughter, who was riding with her, because Ms. Scott was driving a car owned by Mr. Scott which was not a covered automobile under the policy. It is undisputed that Mr. Scott is the named insured and that his wife and daughter are members of the first class under the UIM clause of the policy. The Motor Vehicle Safety and Financial Responsibility Act is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished; the purpose of the Act is to allow an insured injured party to recover damages when the tortfeasor has insurance, but his coverage is in an insufficient amount; and it is clear that UIM is person-oriented.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Uninsured motorist coverage: validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy. 30 ALR4th 172.

Validity, under insurance statutes, of coverage exclusion for injury to or death of insured's family or household members. 52 ALR4th 18.

3. Insurance § 528 (NCI4th)— automobile accident—UIM coverage—stacking

Neither interpolicy stacking nor intrapolicy stacking were available where Carolyn Scott was killed in an automobile accident while driving a car owned by her husband which was not covered by a business automobile policy issued to her husband which covered the Mack flatbed truck and low-boy trailer he used in his farming operations. Both inter- and intrapolicy stacking are available only when the coverage is nonfleet and the vehicle cov-

ered is of the private passenger type. Intrapolicy stacking is not available because the trailer does not have a pick-up body and is not a delivery sedan or panel truck, as required under N.C.G.S. § 58-40-10, and interpolicy stacking is not available for the Mack flatbed for the same reasons. Although the Scotts contended that the truck is a private passenger vehicle because passengers can ride in the cab and because it is used exclusively in farming, thereby falling within the statutory farming exception, those factors are considered only after the vehicle meets the threshold test of having a pickup body or being a delivery sedan or panel truck. Moreover, common sense indicates that the legislature was referring to vehicles used every day by the citizens of the state, and the provision of an exception for farming recognized the reality that a pickup serves as both a private passenger vehicle and a work vehicle.

Am Jur 2d, Automobile Insurance §§ 322, 326, 329.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 193, 444 S.E.2d 664 (1994), reversing in part and affirming in part as modified the order and judgment entered 28 September 1992, by Davis (James C.), J., in Superior Court, Stokes County. Heard in the Supreme Court 13 April 1995.

Petree Stockton, by James H. Kelly, Jr., and Edwin W. Bowden, for plaintiff-appellee Nationwide Mutual Insurance Company.

Metcalf, Vrsecky & Beal, by Anthony J. Vrsecky, for defendant-appellants Brenda Kay Mabe, Roger Lee Mabe, Kimberly Hope Mabe, and Heather Dora Mabe.

Theodore M. Molitoris for defendant and third-party plaintiff-appellant/appellee Lucinda Sue Scott by her Guardian ad Litem, Anne Connolly; and John E. Gehring for defendant and third-party plaintiff-appellant/appellee Jesse Willard Scott, Jr., as the Administrator of the Estate of Carolyn Mabe Scott.

Pinto, Coates & Kyre, L.L.P., by Paul D. Coates and David L. Brown, for defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

ORR, Justice.

On 16 February 1990, Lucinda Sue Scott, Brenda Kay Mabe, Kimberly Hope Mabe, and Heather Dora Mabe were passengers in a vehicle driven by Carolyn Mabe Scott travelling down North Carolina Highway 89 when their vehicle was struck head-on by a 1989 Toyota truck. As a result of the accident, Carolyn Mabe Scott was killed, and the remaining passengers all suffered extensive injuries. The occupants of the Toyota truck were Robert Leonard Gregory and Jody Ray Bullins. While it is unclear from the record who was driving the truck, the parties consented that judgment would be entered against Gregory.

On 4 May 1990, a complaint was filed on behalf of Brenda Kay Mabe, Roger Lee Mabe, Kimberly Hope Mabe, and Heather Dora Mabe ("the Mabes") against Gregory and Gregory's mother, Mary Elizabeth Wilson, in whose name the Toyota truck was titled. The complaint alleged that Gregory was driving the truck with his mother's permission, that he was driving in a negligent manner while intoxicated, and that his use of the truck fell within the family-purpose doctrine. On 24 September 1990, Jesse Willard Scott, Jr., and his daughter, Lucinda Sue Scott, ("the Scotts") filed a complaint against Gregory and Wilson alleging the same causes of action as in the Mabes' complaint.

Mary Elizabeth Wilson had a liability policy on the Toyota truck issued by Nationwide Mutual Insurance Company ("Nationwide"), providing coverage in the amount of $100,000 per person and $300,000 per accident. Jesse Willard Scott had in effect a Nationwide liability insurance policy which contained underinsured motorist (UIM) coverage of $100,000. Mr. Scott also had in effect a business automobile policy issued by North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") which provided UIM coverage of $100,000. This policy provided $100,000 liability coverage each on a 1964 Mack flatbed truck and a 1978 low-boy trailer, both titled in Scott's individual name. These vehicles were used by Scott exclusively in his farming operations. Their primary purpose was to transport his tractor from farm to farm.

On 14 March 1991, Nationwide, in an attempt to settle the claims arising out of the accident, offered to pay its policy limits of $300,000 to the claimants. Assuming that the potential claims exceeded the extent of its policy limit, Nationwide proposed a pro rata distribution in the following amounts and conditioned settlement upon concurrent agreement by all of the claimants:

Estate of Carolyn Scott	$ 35,000
Lucinda Sue Scott (Minor)	$ 42,600
Heather Dora Mabe (Minor)	$ 18,380
Kimberly Hope Mabe (Minor)	$100,000
Brenda Kay Mabe	$100,000
Julie Harger	$ 2,040
Jody R. Bullins	$ 1,930

The Scotts were unwilling to give their unconditional acceptance because if they were unable to obtain UIM coverage from other sources, they felt they were entitled to a larger portion of Nationwide's liability coverage. Accordingly, on 5 July 1991, Nationwide filed an interpleader declaratory judgment action and named all of the claimants as defendants. Nationwide then tendered its $300,000 policy limits to the court and asked for an order declaring that it had satisfied its policy obligations. Nationwide contended in its interpleader action that it did not owe any prejudgment interest to the claimants because Nationwide had already paid out its entire $300,000 limit of liability.

On 18 September 1991, the Scotts filed a third-party complaint in the interpleader action, naming Farm Bureau as a third-party defendant. The Scotts alleged in their third-party complaint that Farm Bureau refused to negotiate the "division of the initial liability policies in consideration for the underinsured motorist coverage [of $100,000] and on occasion has denied that this coverage even affords the stated underinsured insurance coverage." Farm Bureau filed an answer to the third-party complaint on 27 November 1991 denying that it had any coverage on the Scotts arising out of the accident in question. Specifically, Farm Bureau alleged as follows:

> The policy issued by North Carolina Farm Bureau Mutual Insurance Company covered a 1964 Mack flatbed vehicle which was not a private passenger automobile, and the policy issued by North Carolina Farm Bureau Mutual Insurance Company was a business auto policy which covered . . . only those vehicles listed on the policy, and excluded coverage for all other vehicles, and since the defendants and third-party plaintiffs were not occupying the covered vehicle under the North Carolina Farm Bureau Mutual Insurance Company policy, then such coverage for the operation of any other vehicles is excluded under the Farm Bureau policy, and therefore, Farm Bureau provides no coverage

to the defendants and third-party plaintiffs as a result of this accident.

All claimants subsequently moved for summary judgment, and a hearing was held at the 8 September 1992 Civil Session of Superior Court, Stokes County. Mediation followed, resulting in all parties entering into a consent judgment on 28 September 1992 for damages in the following amounts:

Estate of Carolyn Mabe Scott	$400,000
Lucinda Sue Scott	$125,000
Brenda Kay Mabe	$500,000
Kimberly Hope Mab by her Guardian ad Litem S. Mark Rabil	$600,000
Heather Dora Mabe, by her Guardian ad Litem Gregory W. Schiro	$ 40,000
Roger Lee Mabe	$ 15,000

Based on these amounts, the parties agreed to apportion the $300,000 liability coverage provided by Nationwide on the 1989 Toyota pickup truck belonging to Mary Elizabeth Wilson as follows:

Jesse Willard Scott, Jr., as the Administrator of the Estate of Carolyn Mabe Scott	$ 55,040
Lucinda Sue Scott, by her Guardian ad Litem Anne Connolly	$ 29,280
Brenda Kay Mabe	$100,000
Kimberly Hope Mabe, by her Guardian ad Litem S. Mark Rabil	$ 66,667
Blue Cross and Blue Shield for expenses of Kimberly Hope Mabe	$ 33,333
Heather Dora Mabe, by her Guardian ad Litem Gregory W. Schiro	$ 7,333
Blue Cross and Blue Shield for expenses of Heather Dora Mabe	$ 3,667
Julie Harger	$ 780
Roger Lee Mabe	$ 3,900
TOTAL	$300,000

Nationwide paid the claimants their pro rata share of liability coverage as agreed upon in the consent judgment.

The entry of the consent judgment and the subsequent pro rata distribution of Nationwide's liability coverage left only two issues to

be determined by the trial court: (1) whether Nationwide owed prejudgment interest, and (2) the extent of Farm Bureau's UIM coverage. After making findings of fact and conclusions of law, the trial court ordered that Nationwide pay prejudgment interest to each of the claimants based on their respective pro rata shares of the $300,000 liability coverage from the date each complaint was filed up to the date of judgment. The trial court further granted the Scotts' motion for summary judgment concerning the UIM coverage in Mr. Scott's Nationwide policy; ordered that Nationwide's separate limit of liability available to Lucinda Scott and the Carolyn Scott estate was $100,000 less the primary liability coverage already paid; and ordered that based on the UIM provision, Farm Bureau's separate limit of liability available to Lucinda Scott and the Carolyn Scott estate was $200,000 less the primary coverage and Nationwide's UIM coverage already paid. Nationwide objected and excepted to entry of the order with respect to the payment of prejudgment interest. The claimants objected and excepted to the entry of the order concerning the amount of Nationwide's liability for prejudgment interest. Farm Bureau objected and excepted to entry of the order as to coverage of its policy. All parties gave timely notice of appeal to the Court of Appeals.

The Court of Appeals reversed the trial court on the issue of prejudgment interest, holding that Nationwide does not owe the claimants any prejudgment interest over and above its liability limit of $300,000 because Nationwide's limit of liability for "damages" expressly includes "prejudgment interest." The Court of Appeals also affirmed in part, as modified, on the issue of UIM coverage, holding that although the owned vehicle exclusion in the UM/UIM section of the Farm Bureau policy was clear and unambiguous, the exclusion violated the North Carolina Motor Vehicle Safety and Financial Responsibility Act ("the Financial Responsibility Act"), N.C.G.S. ch. 20, art. 9A (1989), and was, therefore, unenforceable. Consequently, in determining whether the Scotts were entitled to stack their UIM coverage as provided in the Farm Bureau policy, the court had to first determine whether the vehicles listed in the policy, a low-boy trailer and 1964 Mack truck, were "private passenger motor vehicles." The Court of Appeals held that the low-boy trailer was not a private passenger motor vehicle; therefore, intrapolicy stacking would not be allowed. The court concluded that the extent of Farm Bureau's liability was $100,000. While the court raised the question as to whether the Mack truck listed in Mr. Scott's Farm Bureau policy was a "private

passenger motor vehicle," the court did not discuss the status of the Mack truck and whether interpolicy stacking was allowed, although the decision could be read to impliedly allow coverage of the Mack truck. From the Court of Appeals' decision, we granted discretionary review.

I.

Prejudgment Interest

[1] The first issue presented in this appeal by the Mabes and the Scotts is whether the Court of Appeals erred in holding that Nationwide did not owe prejudgment interest, having paid in full its stated liability policy limits of $300,000. Claimants contend that Nationwide owes prejudgment interest from the date of the filing of their complaint, 24 September 1990, to the date the judgment was satisfied, 23 September 1992, based on the stipulated judgment values of $125,000 to Lucinda Scott and $400,000 to the Carolyn Scott estate. They argue (1) that in its policy, Nationwide contractually agreed to pay "all costs taxed against the insured" in addition to its limits of liability; (2) that Nationwide's policy is ambiguous in that it contains conflicting provisions regarding prejudgment interest that should be construed against Nationwide; and (3) that public policy considerations should mandate reversal of the Court of Appeals' decision regarding prejudgment interest. Nationwide contends that this Court should affirm the decision of the Court of Appeals, arguing that the $300,000 paid is the extent of its liability limits based on the language of the insurance policy. We affirm the Court of Appeals.

Prejudgment interest is governed by N.C.G.S. § 24-5, which provides in pertinent part:

> In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C.G.S. § 24-5(b) (1991).

> It has been established by this Court that when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the

> statute, the provisions of the statute prevail to interpret the applicable . . . policy with regard to prejudgment interest.

Baxley v. Nationwide Mut. Ins. Co., 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993); *see Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991). However, we have previously held that "the prejudgment interest statute, N.C.G.S. § 24-5, is *not* a part of the Financial Responsibility Act so as to be written into every liability policy." *Baxley*, 334 N.C. at 6, 430 S.E.2d at 898 (citing *Sproles v. Greene*, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991)) (emphasis added). Thus, "in the absence of a statutory provision, a liability insurer's obligation to pay interest in addition to its policy limits is governed by the language of the policy." *Id.* (citing *Sproles*, 329 N.C. at 612-13, 407 S.E.2d at 502-03). Accordingly, the language of a liability carrier's policy controls the liability carrier's obligation to pay prejudgment interest in addition to its stated limits.

The Nationwide liability insurance policy, as amended by Endorsement 2096, which embodies all of the changes which are relevant to this appeal, reads in pertinent part as follows:

II. LIABILITY COVERAGE

Part B is amended as follows:

A. The first paragraph of the Insuring Agreement is replaced by the following:

> We will pay damages for **bodily injury** or **property damages** for which any **insured** becomes legally responsible because of an auto accident. *Damages include prejudgment interest awarded against the* ***insured***. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will *pay all defense costs we incur.* Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for **bodily injury** or **property damage** not covered under this policy.

B. Section 3 of the Supplementary Payments provision is replaced by the following:

> *In addition to our limit of liability, we will pay on behalf of an* ***insured****:*

3. *all costs taxed against the* ***insured*** *and interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.*

C. The first sentence of the Limit of Liability provision is replaced by the following:

The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages for **bodily injury**, including damages for care, loss of services or death sustained by any one person in any one auto accident.

(Emphasis added).

In *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), this Court construed an insurance policy in which the insurer expressly agreed to pay, in addition to its contractual limit of liability, "all costs taxed against the insured." *Id.* at 463, 329 S.E.2d at 651. The insurance policy at issue did not have a provision specifically dealing with prejudgment interest as a part of damages. We held that "prejudgment interest provided for by N.C.G.S. 24-5 is a 'cost' within the meaning of the contract which, *under the contract in the present case*, the insurer is obligated to pay." *Id.* at 464, 329 S.E.2d at 651 (emphasis added). The "under the contract in the present case" language evinces this Court's intent to decide prejudgment interest issues based upon its interpretation of the specific policy under review.

In the more recent case of *Sproles*, 329 N.C. 603, 407 S.E.2d 497, the same issue was decided differently based upon the specific facts in that case. In *Sproles*, this Court determined that an insurer was *not* required to pay prejudgment interest beyond its limits of liability where the terms of the contract provided that the insurer would pay "all defense costs" in excess of the limit of liability. We determined that "all defense costs" was not as broad a phrase as "all costs" because the phrase "defense costs" includes only those expenses associated with litigation. Thus, *Lowe* and *Sproles* clearly establish that this Court will look to the specific terms of a policy in deciding whether a liability carrier is required to pay prejudgment interest in addition to its limit of liability. As Nationwide has done in the instant case, nothing in *Lowe* or *Sproles* prevents a liability insurer from

defining "damages" to include prejudgment interest and then capping the amount of damages that can be paid.

Further, this Court has stated that if a policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision. *See Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). The claimants argue that Nationwide's contractual agreement to pay "in addition to its limit of liability, . . . all costs taxed against the insured" obligated it to pay prejudgment interest on the stipulated judgment entered in the underlying tort actions based upon the decision in *Sproles*. They further argue that Nationwide's policy is ambiguous with respect to prejudgment interest and, therefore, should be construed in their favor. We disagree. That portion of the policy agreeing to pay "all costs taxed against the insured" is combined with "any interest accruing after judgment." This provision must be read in conjunction with the language specifically including prejudgment interest as an element of damages. In the policy in question, prejudgment interest, postjudgment interest, costs taxed, and defense costs are all clearly addressed. Thus, the reasoning in *Sproles* does not apply.

If a policy defines a term, then that meaning is to be applied "regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit." *York Indus. Cent., Inc. v. Michigan Mut. Liab. Co.*, 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967). Moreover, all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy's provisions. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978).

The Nationwide policy in the present case contains a provision in part B, subsection A of the liability coverage clause which defines prejudgment interest as part of damages—"Damages include prejudgment interest awarded against the insured." We conclude that the definition clause expressly including prejudgment interest as an element of damages controls the determination of whether prejudgment interest is payable beyond the policy limits. Even if the clause defining prejudgment interest as a part of damages had not existed, as was the case in *Baxley*, we would still hold that, based on the reasoning in *Baxley*, prejudgment interest is an element of damages. *See Baxley*, 334 N.C. at 8, 430 S.E.2d at 900. Therefore, in the instant case, the

Court of Appeals correctly limited Nationwide's responsibility to pay prejudgment interest up to its $300,000 UIM limit of liability. However, because the parties have entered consent judgments for actual damages exceeding a total of $300,000, Nationwide can only be liable for prejudgment interest if it was contractually obligated to pay it above and beyond its limits of liability. Having concluded to the contrary, we affirm the Court of Appeals.

II.

Owned Vehicle Exclusion

[2] The second issue raised in this appeal is the extent of Farm Bureau's UIM coverage. The specific issue we address is whether Farm Bureau's policy, which, under the UIM clause, excludes all other owned vehicles not listed in the policy, is in violation of N.C.G.S. § 20-279.21(b)(4) of the Financial Responsibility Act. This is a question that we specifically left undecided in *Smith*, 328 N.C. at 142, 400 S.E.2d at 47, as well as in *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992), because the policies in those cases did not contain an owned vehicle exclusion in the UM/UIM section of the policy. In *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995), we held that such an exclusion for UM coverage is against the public policy of the Financial Responsibility Act and is, therefore, unenforceable. We are now faced with addressing this issue as it relates to UIM coverage. Concluding as this Court did in *Smith*, 328 N.C. at 149, 400 S.E.2d at 50, that "the definition of 'persons insured' for UM/UIM coverage strongly suggests that the UM/UIM coverage follows the person rather than the vehicle," and following the reasoning in *Bray*, we affirm the holding of the Court of Appeals.

The North Carolina Motor Vehicle Safety and Financial Responsibility Act was promulgated for the purpose of providing compensation for

> innocent victims of financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or

> circumstances of the injury are covered by the contractual terms of the policy. The provisions of the Financial Responsibility Act are "written" into every automobile policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.

Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977).

"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*, 328 N.C. at 142, 400 S.E.2d at 47.

In the present case, the type of coverage at issue is UIM coverage. The business automobile policy in question, which Farm Bureau issued to Mr. Scott, covering the Mack flatbed truck and the low-boy trailer, included UIM coverage. Section 20-279.21(b)(4), supplemented by other provisions of section 20-279.21 of the Financial Responsibility Act, governs UIM coverage. *Id.* "UIM insurance in North Carolina is an outgrowth from and development of uninsured motorist insurance." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989) (citing J. Snyder, Jr., *N.C. Automobile Insurance Law* § 30-1 (1988)). "UIM coverage allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." *Id.*

As we stated in *Sutton*:

> "The cardinal principle of statutory construction is that the intent of the legislature is controlling." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978). Legislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other. "The Court will not adopt an interpretation which resulted in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences." *Insurance Co. v. Chantos*, 293 N.C. at 449, 238 S.E.2d at 603 (citations omitted).

Sutton, 325 N.C. at 265, 382 S.E.2d at 763 (citations omitted).

An "owned vehicle" or "household-owned" or "family-owned" vehicle exclusion (collectively, "owned vehicle exclusion") in the UIM section of an insurance policy is one which purports to deny UIM coverage to a family member injured while in a family-owned vehicle not listed in the policy at issue. Farm Bureau's argument for an owned vehicle exclusion stems from the "Schedule of Coverages and Covered Autos" provision of the policy. As the Court of Appeals correctly summarized, under this clause, numerical symbols are used to describe the type of vehicles that may be covered under the policy. The symbol beside the UIM coverage in Mr. Scott's policy is "07," relating to specifically described autos. Symbol 07 applies only to those autos listed on the declarations page of Scott's policy and lists only a 1964 Mack truck and a 1978 low-boy trailer; the vehicle Carolyn Mabe Scott was driving at the time of her death was not listed. This policy provided UIM coverage of $100,000 per accident. Thus, it is clear that the business automobile policy in this case, by its language, does not extend coverage to Carolyn or Lucinda Scott because Carolyn Scott was driving a car owned by Mr. Scott, which was not a covered automobile under the Farm Bureau policy. The question then becomes whether such an exclusion in the business vehicle policy violates the Financial Responsibility Act.

We begin our analysis by determining whether the Scotts are "persons insured" or persons who are covered by the Financial Responsibility Act's UIM provisions. 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) (1989).

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 (quoting *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986)). Members of the first class are "persons insured" for the purposes of UIM coverage where the insured vehicle is not involved in the insured's injuries. *Id.* Members of the second class are "persons insured" for the purposes of UIM coverage only when the insured vehicle is involved in the insured's injuries. *Id.* We are concerned in this case with the first class of "persons insured" under N.C.G.S. § 20-279.21(b)(4) for purposes of UIM.

It is undisputed that Mr. Scott is the named insured under the policy at issue. His wife, Carolyn Mabe Scott, and daughter, Lucinda Sue Scott, are clearly members of the first class under the UIM clause of the policy "without regard to whether the insured vehicle was involved in the insured's injuries." *Id.*

Having decided that the Scotts are "persons insured" of the first class, we must now determine whether the owned vehicle exclusion as provided in the business vehicle policy at issue is inconsistent with the legislative intent of the Act. We agree with the Court of Appeals and conclude that it is. As the Court of Appeals aptly stated, "to hold otherwise would defeat the intention of individuals who purchase UIM coverage to protect all of their family members and would abrogate the distinctions between liability coverage[, which is vehicle-oriented,] and UM/UIM coverage[, which is person-oriented]." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 206, 444 S.E.2d 664, 672 (1994).

The Act is a "remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. We have already stated that the purpose of the Act is "to allow an insured injured party to recover damages when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the party." J. Snyder, Jr., *N.C. Automobile Insurance Law* § 30-1. Our interpretation, as required, is in accord with what our legislature intended. Further, contrary to Farm Bureau's argument, we have made it clear that in applying the Financial Responsibility Act to insurance policies, liability insurance is "vehicle-oriented" and UIM coverage is "person-oriented." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992);

Bass, 332 N.C. 109, 418 S.E.2d 221; *Smith*, 328 N.C. 139, 400 S.E.2d 44. In *Harris*, we stated

> [w]hen one member of a household purchases first-party UIM coverage, it may fairly be said that he or she intends to protect all members of the family unit within the household. The legislature recognized this family unit for purposes of UIM coverage when it defined "persons insured" of the first class as "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . ." These persons insured of the first class are protected, based on their relationship, whether they are injured while riding in one of the covered vehicles or otherwise.

Harris, 332 N.C. at 193, 420 S.E.2d at 130 (citations omitted) (alteration in original).

Accordingly, we hold that the owned vehicle exclusion provision in the UIM clause at issue is in violation of the North Carolina Motor Vehicle Safety and Financial Responsibility Act and is, therefore, invalid.

III.

Private Passenger Motor Vehicle

[3] Based on our holding that the owned vehicle exclusion is unenforceable, we must now determine whether the Scotts are entitled to the inter- or intrapolicy stacking of their UIM coverage. This analysis turns on whether the vehicles listed in the policy are "private passenger motor vehicles." Unlike our analysis of the validity of the owned vehicle exclusion, "[o]ur disposition of whether stacking is allowed in the case *sub judice*, however, does not rest upon the classification of the insureds, but rather upon the type of vehicle the insureds were occupying at the time of the accident." *Aetna Cas. & Sur. Co. v. Fields*, 105 N.C. App. 563, 566, 414 S.E.2d 69, 71, *disc. rev. denied*, 331 N.C. 383, 417 S.E.2d 788 (1992).

N.C.G.S. § 20-279.21(b)(4) instructs this Court as to whether intrapolicy stacking for UIM coverage is applicable to any claim. At the time of the accident, N.C.G.S. § 20-279.21(b)(4), provided in pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability

policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies; *Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10).*

N.C.G.S. § 20-279.21(b)(4) (1989) (emphasis added). We have previously held that the "language quoted above in subdivision (b)(4) explicitly mandates intrapolicy and interpolicy stacking of UIM coverages for the benefit of an injured policy owner." *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 314, 420 S.E.2d 180, 183 (1992) (citing *Sutton*, 325 N.C. 259, 382 S.E.2d 759). "The language of this statute makes it clear that intra-policy stacking is only available when the coverage is nonfleet and the vehicle covered is of the private passenger type." *Aetna Cas. & Sur. Co.*, 105 N. C. App. at 567, 414 S.E.2d at 71.*

Farm Bureau does not contend that the business automobile policy in the case at bar is a fleet policy. Therefore, the issue to be decided is whether the 1964 Mack flat bed truck and the 1978 low-boy trailer are private passenger motor vehicles as defined by statute, so as to allow stacking.

The applicable definition of a "private passenger motor vehicle" is controlled by N.C.G.S. § 58-40-10 (1989), the statute in effect on 16 February 1990, the date of the accident. This statute was amended in 1989 and became effective 1 February 1990, but was applicable only to policies written on or after that date. The Farm Bureau policy at issue in this case was written on 14 January 1990. N.C.G.S. § 58-40-10, as it read prior to being amended, provided in pertinent part:

(1) "Private passenger motor vehicle" means:

a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver;

b. A motor vehicle with a pick-up body, a delivery sedan or a panel truck that is owned by an individual or by hus-

*Language in the original opinion was changed pursuant to an order reported at 342 N.C. 899.

> band and wife or individuals who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm copartnership or corporation shall be considered owned by an individual for purposes of this Article.

N.C.G.S. § 58-40-10(1) (1987) (amended 1989). N.C.G.S. § 20-4.01(23) defined a "motor vehicle" as follows:

> (23) Motor Vehicle—Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.

N.C.G.S. § 20-4.01(23) (1989) (amended 1991). The transcript and record are devoid of any evidence that supports a finding that the low-boy trailer satisfies the first prong of the private passenger motor vehicle test.

In this case, subsection (a) of N.C.G.S. § 58-40-10(1) is not applicable. Thus, under subsection (b), in order to satisfy the definition of a "private passenger motor vehicle," the low-boy trailer must first have a "pick-up body" or be "a delivery sedan or a panel truck." Mr. Scott testified that the trailer is about seventeen feet long and is pulled by the Mack truck. He further testified that it is used exclusively in his tobacco farming business to haul his tractor. Therefore, based on the evidence before this Court, we agree with the Court of Appeals and hold that the low-boy trailer is not a private passenger motor vehicle; it does not have a pickup body and is not a delivery sedan or a panel truck.

The Court of Appeals did not address whether the Mack truck is a private passenger motor vehicle despite acknowledging that question as an issue that was raised by the parties. After concluding that the low-boy trailer is not a private passenger motor vehicle, the Court then held that the Scotts are not entitled to *intrapolicy* stacking and limited the extent of Farm Bureau's coverage to $100,000. While the need to decide the status of the Mack truck was negated with respect to whether the Scotts are entitled to *intrapolicy* stacking, the Court failed to consider the propriety of the *interpolicy* stacking between the Farm Bureau business automobile policy and the Nationwide UIM policy. Since the end result will not change, in our discretion, we have decided not to remand this case to the Court of Appeals for a deter-

mination of the status of the Mack truck; instead, we will proceed to address whether the Mack truck is a "private passenger motor vehicle." Applying the same definition set forth above, and for the same reasons, we hold that it is not.

In the instant case, Mr. Scott testified at trial with respect to the Mack truck as follows:

> Q. For a second, if you would, would you describe the Mack flat bed truck. What did it physically look like?
>
> A. Well, it's a truck with one front axle and one back axle. . . .
>
> Q. State about what size it was.
>
> A. Probably in the range of a one ton, what's considered a one ton truck. Somewhat, a bit larger than a pickup.
>
> Q. How much larger?
>
> A. About twice the size, I'd say. I mean, not physical size, it wouldn't be that big.
>
> Q. We're talking, I'm asking for you to describe for me physically what did it look like. What did it look like compared to a pickup truck?
>
> A. It would be a little bit taller and probably about the same length, maybe a little bit wider.
>
> Q. Okay. And did it have any sides to the back of it?
>
> A. Just little short sides.
>
> Q. How many passengers did it carry?
>
> A. Three people could ride in it okay.

After reviewing a copy of the title he received when he purchased the truck, Mr. Scott testified that the empty weight of the truck as reflected on the title is 10,000 pounds. Later, Mr. Scott testified that he had never owned any large tractor trailers or any eighteen wheelers. Further, in the affidavit of Lee Vaughn, an independent claims adjuster and experienced automobile accident investigator, Mr. Vaughn stated that

> this vehicle is typically sold without any type of bed on the vehicle which can be placed on the vehicle after sale. The typical chasis [sic] road weight of the vehicle is 10,675 pounds. This includes

> the standard chassis weight, plus additional weight of what may be added to the chassis, such as a RAD507 rear axle, air brake equipment, two 50-gallon step tanks, 100 gallons of fuel, heater and defrosters and air horn. This weight does not include a bed to be added to the vehicle. Reference to a title out of Virginia showing a weight of 10,000 pounds would therefore exclude these items and also exclude a bed on the vehicle for its weight.

Finally, the record on appeal includes a copy of a picture and information obtained from Mack, the manufacturer of the truck, which shows that the truck does not have a pickup body and is neither a delivery sedan nor a panel truck.

The Scotts based their contention that the truck is a private passenger motor vehicle on the fact that passengers can sit in the cab of the truck and on the fact that it is used exclusively in Mr. Scott's farming business, thereby falling within the farming exception of N.C.G.S. § 58-40-10(1)(b). However, these factors are considered only after it is determined that the vehicle at issue meets the threshold test of having a pickup body or being a delivery sedan or panel truck. *See* N.C.G.S. § 58-40-10(1)(b). Moreover, in determining what the legislature intended when defining "private passenger motor vehicle," common sense tells us that the legislature was referring to vehicles used every day by the citizens of this State. In addition, the legislature provided in subsection (b) an exception to the exclusion of vehicles used in an occupation, profession, or business by including specific types of trucks used in farming or ranching operations, recognizing the reality of farm life where a pickup truck, for example, serves as both a private passenger vehicle and a work vehicle on the farm. Accordingly, having concluded that neither the low-boy trailer nor the Mack truck are private passenger motor vehicles, the Scotts are not entitled to the interpolicy stacking of the UIM coverage under Mr. Scott's Farm Bureau business vehicle policy with Nationwide.

Summarizing, the Court of Appeals is affirmed with respect to the issue of prejudgment interest and owned vehicle exclusion. On the issue of the status of the low-boy trailer as it impacts intrapolicy stacking, we affirm the Court of Appeals. On the issue of the status of the Mack truck as it impacts interpolicy stacking, we hold that the Mack truck is not a private passenger motor vehicle; therefore, interpolicy stacking is also not allowable.

AFFIRMED.

STATE OF NORTH CAROLINA v. NORFOLK JUNIOR BEST

No. 300A93

(Filed 9 February 1996)

1. Criminal Law § 78 (NCI4th)— pretrial publicity—denial of motion for second change of venue

In a capital trial wherein defendant made a motion for a change of venue from Columbus County to Bladen, New Hanover, or Brunswick County, and the trial court allowed the motion and moved the case to Bladen County because of pretrial publicity, the trial court did not err by denying defendant's motion for a second change of venue to either New Hanover or Brunswick County on the ground that Bladen is a small county contiguous to Columbus County with the same newspapers and television stations serving both counties where defendant introduced newspaper articles which were reports of the facts of the case and an affidavit indicating that news broadcasts on television stations had reported the case; there was no evidence of widespread knowledge about the case in Bladen County; and six of the jurors chosen to serve at defendant's trial had not heard of the case, four of the jurors had seen something about the case on television but stated that they had not formed an opinion about it, and two of the jurors had read about the case in a newspaper but had formed no opinion about it. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law §§ 372-378.

2. Jury § 260 (NCI4th)— peremptory challenges of black potential jurors—racially neutral reasons—absence of racial motivation

The trial court did not err by finding that the reasons for the State's peremptory challenges of six black prospective jurors and one black alternate juror in a capital trial were racially neutral and that the challenges were not racially motivated where the prosecutor stated the following reasons for the challenges: the first potential juror had seen defendant although she did not know him, was hesitant in responding to questions about the death penalty, and had family members who had been prosecuted by the district attorney; the second potential juror opposed the death penalty although not to the extent that she could be challenged for cause; the third potential juror was serving a proba-

tionary sentence for Employment Security Commission fraud; the fourth potential juror was against the death penalty and was hesitant about her ability to vote for the death penalty; the fifth potential juror was a friend of a man charged with murder; the sixth potential juror indicated she was against the death penalty but would go along with the rest of the jurors; and the prospective alternate juror had strong religious beliefs against the death penalty and went "back and forth" on her position on the death penalty.

Am Jur 2d, Criminal Law §§ 681, 682; Jury §§ 234, 235, 244.

3. Jury § 251 (NCI4th)— peremptory challenges—discrimination—failure to object

Where defendant did not object to any of the State's peremptory challenges on the ground of discrimination against women or against African-American women, he cannot raise the question for the first time on appeal.

Am Jur 2d, Jury §§ 234, 235, 244.

4. Evidence and Witnesses § 2211 (NCI4th)— inconclusive DNA tests—exclusion of ninety-four percent of black population—relevancy

Testimony by a DNA expert that DNA tests performed on semen taken from the victim's vagina and blood taken from the defendant were inconclusive in that they did not exclude defendant but they eliminated ninety-four of one hundred persons in the black population was relevant in a prosecution of defendant for murder and rape since the testimony made it more likely that defendant committed the crimes if the tests eliminated ninety-four percent of the black population but not defendant.

Am Jur 2d, Expert and Opinion Evidence §§ 278, 300.

5. Rape and Allied Offenses § 90 (NCI4th)— first-degree rape—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for the first-degree rape of a murder victim where the jury could find that someone other than her husband penetrated the victim from testimony by a DNA expert that semen

taken from the victim's vagina was not from her husband; the jury could find the penetration was not consensual from evidence of the defensive wounds on the victim's hands, the cuts on her neck and chest, and the multiple injuries to her face and head; and defendant's identity as the perpetrator of the crime was established by his fingerprint on a knife found next to the body of the rape victim's husband.

Am Jur 2d, Rape §§ 88 et seq.

6. Evidence and Witnesses § 110 (NCI4th)— evidence inadmissible to show habit—admission not plain error

Assuming that testimony by the daughter of two robbery-murder victims that her father kept an envelope in his wallet containing $1,000 he had received from the settlement of an insurance claim and her mother kept in an envelope $800 she had received from the sale of a car was not admissible to prove habit and was not admissible under some other rule of evidence, the admission of this testimony did not amount to plain error.

Am Jur 2d, Evidence §§ 303, 316-319.

7. Constitutional Law § 370 (NCI4th)— death penalty—defendant's failure to show mental retardation

Defendant failed to show he is mentally retarded, and there is thus no merit to his contention that the death penalty was improperly imposed upon him because he is mentally retarded, where the evidence showed that defendant has an IQ of seventy; defendant presented evidence that he was employed and able to function in society; and this evidence negates a finding that he has a deficit in adaptive behavior. N.C.G.S. § 122C-3(22).

Am Jur 2d, Criminal Law §§ 625-628.

8. Evidence and Witnesses § 3003 (NCI4th)— cross-examination—conviction more than ten years old—error cured by instruction

Any error when the prosecutor asked defendant on cross-examination about an assault conviction more than ten years old was cured by the trial court's instruction to the jury not to consider the question. N.C.G.S. § 8C-1, Rule 609(b).

Am Jur 2d, Witnesses §§ 916, 924.

9. Criminal Law § 471 (NCI4th)— prosecutor's improper question—error cured by instruction

Assuming without deciding that the prosecutor was guilty of misconduct by asking defendant's DNA expert whether she knew that she was the second DNA expert consulted by defendant, any error was cured when the trial court sustained defendant's objection to the question and instructed the jury to disregard the question and not to consider the question in its deliberations.

Am Jur 2d, Trial §§ 705 et seq.

10. Criminal Law § 441 (NCI4th)— prosecutor's argument—improper attack on expert's credibility—error cured by instruction

Assuming without deciding that the prosecutor improperly attacked the credibility of defendant's DNA expert by arguing to the jury that defendant chose an expert from Ohio rather than choosing one from either of two laboratories in North Carolina, any error was cured when the trial court sustained defendant's objection to the argument and instructed the jury not to consider it.

Am Jur 2d, Trial §§ 705 et seq.

11. Criminal Law § 463 (NCI4th)— prosecutor's argument—murder victim aware wife being raped—supporting evidence

The prosecutor did not improperly argue to the jury that after the male victim received his fatal injuries, he was aware or was contemplating that his wife was being raped where the evidence would support a conclusion that the male victim, whose carotid artery was severed, had the ability to comprehend during the struggle and while he was wounded that his wife might be raped.

Am Jur 2d, Trial §§ 321 et seq., 554-556.

12. Criminal Law § 466 (NCI4th)— prosecutor's argument—not attack on defense counsel's veracity

The prosecutor did not improperly argue in a capital trial that defense counsel lied to the jury when he referred to "that cock-and-bull mess that [defense counsel] have thrown up to you" where the record reveals that the prosecutor was merely responding to defense counsel's argument that the investigators should have examined the bag of a vacuum cleaner near the male

victim's body for blood when he argued that it was not logical for investigators to conclude that the perpetrator used the vacuum cleaner to clean up blood from the killings. The prosecutor's argument was directed at the improbability of the story, not at the veracity of defense counsel.

Am Jur 2d, Trial §§ 497, 499.

13. Evidence and Witnesses § 2950 (NCI4th)— cross-examination about N.C. Resource Center—competency to show bias

Where an intern at the N.C. Resource Center testified for defendant, and the intern and the Resource Center had helped defendant prepare his defense, the State was entitled to cross-examine the witness about the nature and function of the Resource Center to show bias, motive, or interest.

Am Jur 2d, Witnesses §§ 815, 853.

14. Criminal Law § 438 (NCI4th)— capital sentencing—prosecutor's argument—not personal opinion defendant lied—comment on mitigating circumstance

The prosecutor did not express a personal opinion that defendant was lying to the police by his comment in his closing argument in a capital sentencing proceeding that "I suppose he would answer questions from the officers as long as he wasn't telling the truth about it and as long as he was saying . . . [he] didn't do anything." Rather, the prosecutor was commenting on the strength of the evidence supporting the nonstatutory mitigating circumstance that defendant "was cooperative in answering questions of the investigating officers."

Am Jur 2d, Trial §§ 572, 1441.

15. Criminal Law § 426 (NCI4th)— capital sentencing—prosecutor's argument—not comment on invocation of right to silence—comment on mitigating circumstance

The prosecutor did not improperly comment on defendant's invocation of his right to remain silent when he argued in a capital sentencing proceeding that when defendant and an officer started talking about something important, defendant told the officer to take him back to his cell; rather, the prosecutor was merely arguing that the jury should not find any mitigating value in the nonstatutory mitigating circumstance that defendant was cooperative in answering questions of the investigating officers.

Am Jur 2d, Trial §§ 572, 1441.

16. Criminal Law § 1322 (NCI4th)— capital sentencing—parole unlikely—failure to instruct

The trial court did not violate defendant's due process rights in a capital sentencing proceeding by failing to inform the jury that he was unlikely ever to be paroled.

Am Jur 2d, Trial §§ 572, 573, 575, 1441, 1443.

17. Criminal Law § 1325 (NCI4th)— capital sentencing—instructions—weighing aggravating and mitigating circumstances—mitigating circumstances considered

The trial court did not err by failing to require the jury in a capital sentencing proceeding to consider any mitigating circumstances found in Issue Two when weighing the aggravating circumstances against the mitigating circumstances in Issues Three and Four.

Am Jur 2d, Trial §§ 572, 573, 1441.

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

It was not error for the trial court to charge the jury in a capital sentencing proceeding that in order to find a nonstatutory mitigating circumstance, it must find the facts supporting the circumstance to exist and that those facts have mitigating value.

Am Jur 2d, Trial §§ 572, 1441.

19. Criminal Law §§ 478, 872 (NCI4th)— juror communication with court—instructions—no impropriety

The trial judge's instructions, after receiving a report from the jury foreman that one juror wanted to talk with the judge, did not impose an improper rule that required the assent of all jurors for a single juror to communicate with the court; rather, the judge's statement meant that if one or more of the jurors wanted to ask a question of the court, the jury should agree on the form of the question, and the foreman could submit the question in writing to the court, but there was no restriction on any question a juror desired to ask.

Am Jur 2d, Trial §§ 1573 et seq.

20. Criminal Law § 1329 (NCI4th)— capital sentencing—individual jury poll

The trial court did not fail to conduct an individual jury poll in a capital sentencing proceeding as required by N.C.G.S. § 15A-2000(b), although the original transcript indicated that the foreperson answered for certain jurors the inquiry as to the jurors' assent, where the amended transcript shows that each juror answered each question in compliance with § 15A-2000(b).

Am Jur 2d, Criminal Law §§ 1012 et seq.

21. Criminal Law § 1373 (NCI4th)— two first-degree murders—death penalties not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate to the penalties imposed in similar cases where the evidence showed that defendant beat and stabbed the elderly victims in their home to facilitate a robbery, and the jury found as aggravating circumstances for each murder that (1) defendant had previously been convicted of a felony involving the use or threat of violence to the person, (2) the murder was committed for pecuniary gain, and (3) the murder was part of a course of conduct which included the commission of crimes of violence against another person.

Am Jur 2d, Criminal Law §§ 609 et seq., 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Hobgood, J., at the 17 May 1993 Special Criminal Session of Superior Court, Bladen County, upon verdicts of guilty on two counts of first-degree murder. The defendant's motion to bypass the Court of Appeals as to his convictions of first-degree burglary, first-degree rape, and robbery with a dangerous weapon was allowed by this Court on 19 July 1994. Heard in the Supreme Court 15 March 1995.

The defendant was tried on two charges of first-degree murder and one charge each of first-degree burglary, robbery with a dangerous weapon, and first-degree rape. The State's evidence showed that Leslie Baldwin and his wife, Gertrude Baldwin, were eighty-two and seventy-nine years of age, respectively. They were killed in their home during the night of 30 November 1993. Earlier that day, the defendant had done yard work for them.

Mr. Baldwin died as a result of the cutting of his carotid artery, and Mrs. Baldwin died of blunt-force trauma to the head. Money was missing from Mr. Baldwin's wallet and from Mrs. Baldwin's purse. The defendant's DNA matched one of the semen samples taken from Mrs. Baldwin, and his fingerprint matched one on a paring knife found beside Mr. Baldwin's body. The defendant bought between $700 and $1,000 worth of crack cocaine within two days after the killings.

The defendant was found guilty of all charges. After a sentencing hearing, the jury recommended that the death penalty be imposed on both convictions of murder, which sentences were imposed. The defendant was also sentenced to fifty years in prison for first-degree burglary, life in prison for first-degree rape, and forty years in prison for robbery with a dangerous weapon. The prison sentences are to be served consecutively.

The defendant appealed.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Assistant Attorney General, for the State.

Henderson Hill, Director, North Carolina Resource Center, Office of the Appellate Defender, by Marshall Dayan, Senior Staff Attorney, for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the denial of his motion for a change of venue to either New Hanover County or Brunswick County. The crimes involved in this case occurred in Columbus County. The defendant made a motion to change the venue to Bladen, New Hanover, or Brunswick County. The motion was allowed, and the trial was moved to Bladen County after the court found "there has been a great deal of word of mouth publicity concerning this case" and "numerous newspaper articles and editorials . . . including a recital of all previous convictions of the defendant as well as charges filed against him whether or not convicted."

The defendant then made a motion for a second change of venue to either New Hanover or Brunswick County which was denied. The defendant says this was error. He contends that Bladen County is a small county contiguous to Columbus County with the same newspapers and television stations serving both counties. He contends that if he could not receive a fair trial in Columbus County, he could not receive a fair trial in Bladen County. He argues that he was entitled to

take advantage of the findings of fact in the order moving the case from Columbus County in the determination of his motion to change the venue from Bladen County. We presume the court in Bladen County considered the order in Columbus County, but it was not bound by it. The court in Bladen County could make a determination as to whether a fair trial could be had in Bladen County.

N.C.G.S. § 15A-957 provides that if there is so great a prejudice against a defendant in the county in which he is charged that he cannot receive a fair trial, the court must transfer the case to another county or order a special venire from another county. The purpose of this statute is to insure that jurors decide cases on evidence introduced at trial and not on something they have learned outside the courtroom. *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994); *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). In most cases a showing of identifiable prejudice to the defendant must be made, and relevant to this inquiry is testimony by potential jurors that they can decide the case based on evidence presented and not on information received outside the courtroom. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987).

In the hearing on the motion to move the case from Bladen County, the defendant introduced articles and editorials from newspapers from Columbus, Bladen, and New Hanover counties, as well as an affidavit indicating that news broadcasts on television stations had reported the case but not what was contained in the broadcasts. The newspaper articles, except for the editorials, were reports of facts involved in the case. There was no evidence, as there had been in the hearing on the motion to move the case from Columbus County, of widespread knowledge concerning the case.

We cannot hold, based on the evidence presented at the hearing, that there was error in denying the motion for a change of venue. This conclusion is reinforced by the answers given by the jurors during the selection of the jury. Six of those selected to serve had not heard of the case. Four of the jurors selected had seen something about the case on television, but each said he or she had not formed an opinion about it. Two of the jurors had read something about the case in a newspaper but had formed no opinion about it. We are confident the defendant was tried by a jury which was not influenced by information received outside the courtroom.

This assignment of error is overruled.

[2] The defendant, who is black, next assigns error to the overruling of his objection to the allowance of peremptory challenges by the State of six potential black jurors. He says his constitutional rights as delineated in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), were violated by this action. When an objection is made to the exercise of a peremptory challenge on the ground that the challenge is racially motivated, the trial judge must first determine whether the objecting party has made a *prima facie* case of discrimination. If the court determines he has done so, the proponent of the strike must come forward with a racially neutral explanation. The explanation may be implausible or even fantastic, but if it is racially neutral the opponent of the challenge has satisfied his requirement in this step in the process. If the court finds that the explanation is racially neutral, it must then determine whether the challenge was racially motivated. The burden of proof is on the party objecting to the challenge, and the determination of the question of racial motivation is a finding of fact entitled to great deference by an appellate court. *Purkett v. Elem*, —— U.S. ——, 131 L. Ed. 2d 834 (1995); *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991).

When the defendant objected to the peremptory challenges, the prosecutor gave his reasons for exercising them without a ruling by the court that the defendant had made a *prima facie* showing of racial discrimination. We shall examine this assignment of error as if such a finding had been made as to each venireman. *See Hernandez v. New York*, 500 U.S. at 363, 114 L. Ed. 2d at 405.

The State exercised six peremptory challenges against blacks while the jury was being selected and one such challenge while two alternate jurors were being selected. The first potential black juror peremptorily challenged was Lori Featherson. The prosecuting attorney stated as his reasons for exercising the challenge that Ms. Featherson had seen the defendant although she did not know him, that he perceived that she had difficulty in expressing her opinion as to the death penalty, and that an assistant district attorney had prosecuted her grandfather. The court found from the record that Ms. Featherson stated that she had seen the defendant; that from the court's personal observation, she was hesitant in responding to questions regarding the death penalty; and that Ms. Featherson stated she had family members who had been prosecuted by the district attorney. The court held that the defendant had not carried his burden of showing that the challenge to Ms. Featherson was racially discriminatory.

The second potential black juror peremptorily challenged by the State was Vontea Horton. The State gave as its reason for the challenge that she was opposed to the death penalty although not to the extent that she could be challenged for cause. The court found Ms. Horton had stated she was opposed to the death penalty but could consider voting for the death penalty. The court found further that this challenge was not racially discriminatory and overruled the defendant's objection to it.

The third black venireman peremptorily challenged by the State was Nathan Swindell. The State gave as its reason for this challenge that Mr. Swindell had been convicted of an Employment Security Commission fraud and was serving a probationary sentence for it. The court found this challenge was not racially motivated and overruled the objection to it.

The fourth potential black juror peremptorily challenged by the State was Shirley Shaw. The State gave as its reason for the challenge that she had "expressed that she was against the death penalty, and she was very hesitant about her ability to be able to vote for the death penalty." The court found that she had said she was against the death penalty. It found further that the challenge was not racially motivated and overruled the defendant's objection to it.

The fifth potential black juror as to whom the State exercised a peremptory challenge was Lula Corbett. The State gave as its reason for exercising this challenge that she was a friend of a man charged with murder who would be prosecuted by the district attorney's office that was prosecuting this case. The court found that this prospective juror had stated that she was a friend of a person who was charged with murder. It further found that the challenge by the State was not racially motivated and overruled the objection to the challenge.

The sixth potential black juror peremptorily challenged by the State was Rosa Lewis. The prosecuting attorney articulated as his reason for exercising the challenge that she had indicated that she was against the death penalty but would "go along with what the rest of the jurors would do." The court found that Ms. Lewis had so stated and found further that the challenge was not racially motivated. The defendant's objection to the challenge was overruled.

The prospective black alternate juror peremptorily challenged by the State was Shelbin Simpson. The State gave as its reason for the

challenge that Ms. Simpson stated she had strong religious beliefs against the death penalty and went "back and forth" on her position on the death penalty. The court found that the proposed juror had so said and found that this challenge was not racially motivated. The defendant's objection to this challenge was overruled.

We cannot find error in the rulings by the court on the peremptory challenges. The State articulated its reasons for the challenges without a finding that the defendant had made a *prima facie* showing of racial discrimination. The court found that all the reasons for the challenges articulated by the State were racially neutral. The court then held as to each challenge that the challenges were not racially motivated. Giving this finding of fact great deference, as we are required to do, we cannot hold it was error for the court to rule as it did.

[3] The defendant argues under this assignment of error that the prosecution's exercise of twelve of fourteen peremptory challenges against women makes a *prima facie* case of gender discrimination. *J.E.B. v. Alabama ex rel. T.B.*, — U.S. —, 128 L. Ed. 2d 89 (1994). He asks that we remand the case to superior court for a hearing as to whether there was gender discrimination in the selection of the jury.

The defendant also argues that the peremptory challenges by the State of seven of nine African-American women establish a *prima facie* case of discrimination against African-American women. He asks for a hearing in superior court on this matter.

The defendant did not object to any of the peremptory challenges on the ground of discrimination against women or African-American women. He cannot raise the question for the first time on appeal. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).

This assignment of error is overruled.

[4] The defendant next assigns error to the admission of expert testimony from an agent of the State Bureau of Investigation. The agent, without objection by the defendant, was found to be an expert in DNA analysis. He testified he had performed tests by comparing the DNA from semen found in Mrs. Baldwin's vagina with DNA from blood taken from the defendant. The SBI agent testified that the DNA sample taken from the semen was degraded and was difficult to separate from the DNA from the victim's blood. He testified that the tests were inconclusive in that they did "not count[] [the defendant] out" and

that the tests would eliminate approximately ninety-four of one hundred people from the black population.

The defendant contends it was error to admit this "skewed and patently unreliable DNA evidence." This testimony was relevant, as it made it more likely that the defendant was guilty if ninety-four of one hundred persons in the black population were excluded by the DNA test, and the defendant was not. The weight of the evidence was for the jury.

This assignment of error is overruled.

[5] The defendant next assigns error to the denial of his motion to dismiss the charge of first-degree rape. We disagree. The DNA expert testified that the semen taken from the vagina of Mrs. Baldwin was not from Mr. Baldwin. This is evidence from which the jury could find that someone other than her husband penetrated Mrs. Baldwin. The injuries she sustained, including the defensive wounds on her hands, the cuts on her neck and chest, and the multiple injuries to her face and head, are evidence from which the jury could find the penetration was not consensual. The defendant's identity as the perpetrator of the crime is established by his fingerprint on the knife found next to the body of Mr. Baldwin. Any discrepancies in the evidence were for the jury to resolve. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980).

This assignment of error is overruled.

[6] The defendant next contends that it was error to allow certain testimony by the decedents' daughter. The defendant did not object to this testimony, and we must examine this assignment of error under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Betsy Baldwin Marlowe, the decedents' daughter, testified that she knew her father's habit of keeping in an envelope in his wallet approximately $1,000 he had received from the settlement of an insurance claim. Ms. Marlowe also testified that her mother kept in an envelope approximately $800 she had received from the sale of an automobile.

The defendant says that this testimony was propounded as evidence of habit but that it did not show habit and was not admissible under N.C.G.S. § 8C-1, Rule 406. The defendant says this testimony was evidence of specific instances in which the parents of Ms. Marlowe received sums of money.

Assuming this testimony was not admissible to prove habit and that it was not admissible under some other rule of evidence, its admission did not amount to plain error. It was not a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted)).

This assignment of error is overruled.

[7] The defendant next assigns error to the imposition of the death penalty because he says he is mentally retarded. The Eighth Amendment to the Constitution of the United States, which forbids the infliction of cruel and unusual punishment, does not forbid the death penalty for mentally retarded persons. *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989). The statute which provides for the death penalty does not have an exception for mental retardation. N.C.G.S. § 15A-2000 (Supp. 1995). If we are to hold that a mentally retarded person may not be executed in this state, we would have to hold that this part of our capital punishment scheme is unconstitutional under Article I, Section 27 of the Constitution of North Carolina.

The first difficulty with the defendant's argument is that it is not at all certain that he is mentally retarded. N.C.G.S. § 122C-3(22) defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22." N.C.G.S. § 122C-3(22) (1993). An IQ of less than seventy is considered a "significantly subaverage general intellectual functioning." *State v. Skipper*, 337 N.C. 1, 65, 446 S.E.2d 252, 288 (1994) (Exum, C.J., concurring), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). The defendant has an IQ of seventy. The defendant presented evidence that he was employed and was able to function in society. This tends to negate a finding that he had a deficit adaptive behavior. The defendant has not shown he is mentally retarded.

The constitutional issue which the defendant presses under this assignment of error is not before us. This assignment of error is overruled.

[8] In his next assignment of error, the defendant argues there were nine different examples of prosecutorial misconduct which entitle

the defendant to a new trial. The first instance argued by the defendant involved a question on cross-examination of the defendant in which the prosecutor asked him whether he had been convicted of assault with a deadly weapon inflicting serious injury in 1973. The court sustained the objection to this question and instructed the jury not to consider it.

The State had not advised the defendant of its intent to use the evidence which the question was designed to elicit. The defendant contends it was error for the State to ask this question pursuant to N.C.G.S. § 8C-1, Rule 609(b) because the assault conviction was more than ten years old. Any error that occurred was cured by the instruction to the jury not to consider the question. The information imparted by this question was not so shocking or disturbing that the jury would have been unable to follow the court's instruction. We assume the jury followed the court's instructions. *State v. Larrimore*, 340 N.C. 119, 168, 456 S.E.2d 789, 815 (1995).

[9] The defendant's second contention is that the prosecutor was guilty of misconduct by asking the defendant's DNA expert whether she knew that she was the second DNA expert consulted by the defendant. The defendant argues that this question was asked in bad faith and was designed to give the jury the impression that the defendant had shopped for an expert until he found one that would testify as the defendant wanted. The defendant contends the prosecutor knew this was not the case. *State v. Dawson*, 302 N.C. 581, 276 S.E.2d 348 (1981).

The defendant objected to the question. The trial court sustained the objection and instructed the jury to disregard the question and not to consider the question in its deliberations. Assuming without deciding that misconduct occurred, the court's instruction cured any error. The instruction was clear, and we must assume the jury followed the instructions of the court in making its determination. *Larrimore*, 340 N.C. at 168, 456 S.E.2d at 815.

[10] The defendant's fourth contention is that the prosecutor improperly attacked the credibility of the defendant's DNA expert by arguing to the jury that the defendant chose an expert from Ohio rather than choosing one from either of two laboratories in North Carolina.

The defendant objected to the argument. The trial court sustained the objection and instructed the jury not to consider the prosecutor's argument. Again, assuming without deciding that misconduct

occurred, the court's instruction cured any error. The instruction was clear, and we must assume the jury followed the instructions of the court in making its determination. *Id.*

[11] The defendant next contends that the prosecutor improperly argued during the argument at the guilt phase that after Mr. Baldwin received his fatal injuries, he was aware or was contemplating that his wife was being raped.

The defendant argues that the prosecutor's argument was improper because the State failed to present any evidence that Mr. Baldwin had the ability to comprehend anything after his carotid artery had been severed. "Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury." *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). In addition, during a closing argument, an attorney may, "on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (1988). The forensic pathologist who performed the autopsy on Mr. Baldwin testified at trial that he was unable to determine the exact time of Mr. Baldwin's death. Blood spatters on the wall, bookcases, and the door to Mrs. Baldwin's bedroom supported the inference that Mr. Baldwin received his lethal wound in that location. It could be concluded from the evidence that Mr. Baldwin had the ability to comprehend during the struggle and while he was wounded that his wife might be raped.

[12] The defendant next contends that the prosecutor, during his jury argument, said that defense counsel lied to the jury, which violates the rule of *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994), that a prosecutor may not engage in improper conduct toward defense counsel. During his jury argument, the prosecutor said, "And [the defendant is] not entitled to have you buy that cock-and-bull mess that [defense counsel] have thrown up to you."

Our review of the record shows that the prosecutor used the term "cock-and-bull mess" to refer to the contention made by defense counsel in closing argument that the investigators should have examined the bag of the vacuum cleaner that was in the hallway near Mr. Baldwin's body for evidence. The record reveals that the prosecutor was merely responding to the contention by saying that it was not logical for the investigators to conclude that the perpetrator used the vacuum cleaner to clean up the blood left from the killings. The prosecutor's argument was directed at the improbability of the story, not

at the veracity of defense counsel. The defendant's contention is without merit.

[13] The defendant next contends there was error in the cross-examination of Susan Brooks, a law-student intern with the North Carolina Resource Center, who testified for the defendant. The defendant contends that rather than directing the cross-examination to the substance of Ms. Brooks' testimony, the State concentrated on the nature and function of the Resource Center, which was irrelevant. Ms. Brooks and the Resource Center had helped the defendant prepare his defense. The State was entitled to cross-examine Ms. Brooks about the Resource Center to show bias, motive, or interest. *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974).

[14] The defendant's final contention in this assignment of error is that the State committed gross misconduct during closing argument of the sentencing phase by calling the defendant a liar and by chastising him for exercising his constitutional right to stop talking to police officers.

The defendant argues that the prosecutor called the defendant a liar when he argued to the jury:

> I suppose he would answer questions from the officers, as long as he wasn't telling the truth about it and as long as he was saying, "I didn't do anything."

The prosecutor made this argument while arguing that the jury should not find the nonstatutory mitigating circumstance "[t]hat although the defendant did not confess, he was cooperative in answering questions of the investigating officers." The defendant testified at trial that when questioned about going back to the Baldwins' house after he finished his work there, he told the officers that he did not return.

A prosecutor may not express a personal opinion concerning the veracity of a witness' testimony. *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967). In this case, the prosecutor was not expressing his belief that the defendant was lying to the police officer. The phrase "I suppose" does not refer to the prosecutor's personal opinion. Rather, it is a comment by the prosecutor on the strength of the evidence supporting the mitigating circumstance.

[15] The defendant also argues that the following argument of the prosecutor was an improper comment on his invocation of the right to remain silent:

So when [the defendant and the officer] start talking about something real important . . . [w]hat does he tell [the officer]? . . . [T]ake me back to my cell.

A defendant's silence after receiving *Miranda* warnings cannot be used against him as evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976). Although the record in this case does not indicate whether the defendant received *Miranda* warnings, if he did, the State has not violated his right to silence because the prosecutor's comment did not address the defendant's guilt. Again, the prosecutor's comment was directed at the strength of the evidence supporting the nonstatutory mitigating circumstance that the defendant was cooperative in answering the questions of the investigating officers. The prosecuting attorney was merely arguing to the jury that it should not find any mitigating value in the mitigating circumstance. *See State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995).

This assignment of error is overruled.

[16] In his next assignment of error, the defendant argues that the trial court violated his due process rights by failing to inform the jury that he was unlikely ever to be paroled. We addressed this issue and found against the defendant's position in *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994), and *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252. The defendant presents no new arguments that persuade us to reconsider these holdings.

[17] In his next assignment of error, the defendant argues that the court erred by failing to require the jury to consider any mitigating circumstance found in Issue Two when weighing the aggravating circumstances against the mitigating circumstances in Issues Three and Four. The court gave an almost identical charge on this point in *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994). We found no error in that case, and the defendant has presented no new argument that persuades us to change our position. This assignment of error is overruled.

[18] The defendant next contends it was error for the court to charge the jury that in order to find a nonstatutory mitigating circumstance, it must find the facts supporting the circumstance to exist and that those facts have mitigating value. We held this was a proper charge in *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). The defendant presents no new

argument which persuades us to change our position. This assignment of error is overruled.

[19] The defendant assigns error to a statement by the court to the jury. After the jury had been excused for the evening meal and seven of the jurors had left the courtroom, the foreman of the jury sent a message to the judge through the bailiff "that one juror wanted to talk to the judge, that the juror could not decide." The judge responded:

> Now, the Court cannot talk to any juror alone. The Court can only make comments in the presence of all twelve jurors. So I ask that all twelve jurors now leave and come back at seven-thirty.

The jurors returned from their recess at 7:30 p.m., and the court instructed them as follows:

> Now, members of the jury, before I ask you to go back into the jury room to continue your deliberations, I would like to inform you of a rule of the Court. The Judge cannot answer a question without all twelve jurors present. If you have any question you wish to have answered, in the jury room agree upon what the question is, have the foreperson write the question down on a piece of paper, and then all—knock on the jury room door and all twelve of you come back into the courtroom. And then at that time the foreperson of the jury can present the written question to the Judge for an answer.

The jury then retired to the jury room. It did not submit a question to the court. The defendant says that the court, by its statement to the jury, imposed a rule that required the assent of all jurors for a single juror to communicate with the court. We disagree.

We read the court's statement to mean that if one or more of the jurors wanted to ask a question of the court, the jury would agree on the form of the question, and the foreman could submit the question in writing to the court. There was no restriction on any question a juror desired to ask.

This assignment of error is overruled.

[20] In his final assignment of error, the defendant contends that the trial court erred by failing to conduct an individual jury poll as required by N.C.G.S. § 15A-2000(b). The defendant argues that the record shows that the foreperson answered the question, "Do you still assent thereto?" for jurors one, two, four, five, six, seven, and eight. The defendant is correct in his assertion that the original transcript

indicated that the foreperson answered the question for those jurors. The transcript has been amended by the court reporter, however, to correct the typographical error of substituting "foreperson" for the juror who was actually answering the question. The amended transcript shows that each juror answered each question in compliance with N.C.G.S. § 15A-2000(b).

This assignment of error is overruled.

We find no error in the trial or sentencing hearing.

PROPORATIONALITY REVIEW

[21] Finding no error in the trial, it is our duty to determine (1) whether the record supports the jury's finding of aggravating and mitigating circumstances; (2) whether any of the sentences were imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether either of the sentences of death is excessive or disproportionate to the penalty imposed in similar cases. N.C.G.S. § 15A-2000(d)(2); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). An examination of the record reveals the evidence supports the findings of the aggravating and mitigating circumstances. The defendant does not contend otherwise. We also hold that the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our next task is to determine whether either of the sentences imposed is excessive or disproportionate to the penalties imposed in similar cases. For both crimes, the jury found three aggravating circumstances: (1) the defendant had previously been convicted of a felony involving the use or threat of violence to the person, (2) the murder was committed for pecuniary gain, and (3) the murder was part of a course of conduct in which the defendant engaged that included the commission by the defendant of a crime of violence against another person. N.C.G.S. §§ 15A-2000(e)(3), (6), (11).

Twenty-eight mitigating circumstances were submitted to the jury. One or more jurors found eleven of them, none of which were statutory mitigating circumstances.

This Court gives great deference to a jury's recommendation of a death sentence. *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 694 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). In only seven cases have we found a death

sentence disproportionate. *See State v. McCollum*, 334 N.C. 208, 240-42, 433 S.E.2d 144, 162-63 (1993), cert. denied, —— U.S. ——, 129 L. Ed. 2d 895 (1994). In several cases which have characteristics similar to this case, we have affirmed the imposition of the death penalty.

We note first that this Court has never found a death sentence disproportionate when a defendant was convicted of more than one murder. *State v. Garner*, 340 N.C. 573, 610, 459 S.E.2d 718, 738 (1995). In fact, the defendant's status as a multiple killer is a "heavy factor to be weighed against the defendant." *State v. Laws*, 325 N.C. 81, 123, 381 S.E.2d 609, 634 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

We found the death sentence not disproportionate in *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591, in which the jury found two of the same aggravating circumstances found in this case, that the murder was committed for pecuniary gain and that the murder was part of a course of conduct which included the commission of crimes of violence against another person. We also found the death sentence not disproportionate in *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994), and *State v. Miller*, 339 N.C. 663, 455 S.E.2d 137, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995). In both of those cases, the jury found the same three aggravating circumstances found in this case.

We are impressed with the brutality and the wanton disregard for human life present in this case. The defendant beat and stabbed the victims to facilitate a robbery. When the killings in this case are compared to those in the cases listed above in which death sentences were imposed, the similarity of the characteristics of the cases convinces us that the penalties imposed in this case are not excessive or disproportionate to the penalties imposed in similar cases, considering the crimes and the defendant.

We hold that the defendant received a trial and sentencing hearing free of prejudicial error; that the aggravating circumstances found were supported by the evidence; that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor; and that the sentences of death are not excessive or disproportionate to the penalties imposed in similar cases.

NO ERROR.

STATE OF NORTH CAROLINA v. DONTRILL LEE JONES

No. 550A94

(Filed 9 February 1996)

1. **Criminal Law § 289 (NCI4th)— noncapital first-degree murder—continuance denied—no supporting affidavit**

There was no abuse of discretion in a noncapital first-degree murder trial where defense counsel discovered the day before trial that defendant's mother and her friends had allegedly abused defendant during his childhood; moved to continue; and in support of the motion presented no affidavits but reported a telephone conversation with a psychologist in which the psychologist stated that defendant's abusive childhood might have affected his mental state at the time of the killing. Defendant's oral motion to continue, made on the date set for trial and not supported by an affidavit, did not set forth any form of detailed proof indicating sufficient grounds for further delay.

Am Jur 2d, Continuance §§ 66, 118.

2. **Criminal Law § 270 (NCI4th)— noncapital first-degree murder—psychiatric evaluation denied—no error**

The trial court did not err or abuse its discretion in a noncapital first-degree murder prosecution by denying defendant's request for a continuance so that another psychiatric evaluation could be performed taking into account recent allegations of childhood abuse. A psychiatric evaluation had found defendant competent to stand trial, defense counsel did not give notice that defendant's mental state at the time of the offense might be a factor in his defense until the first day of trial, and defendant neither requested a court appointed psychiatrist nor indicated the likelihood of an insanity defense. There is no indication in the record that defendant's behavior was bizarre or that the psychiatrist who evaluated defendant recommended either commitment or medication. Defendant has not brought forth any evidence that a psychiatric evaluation would have disclosed a mental condition likely to be a significant factor at trial.

Am Jur 2d, Continuance §§ 61-63, 65, 73, 74.

3. Evidence and Witnesses § 2555 (NCI4th)— noncapital first-degree murder—witness's accent—not disqualified

There was no plain error in a noncapital first-degree murder prosecution where the judge, court reporter, and defense counsel found it difficult to understand a witness due to her accent and the judge allowed the prosecution to ask leading questions to alleviate the problem. This testimony added very little to the State's evidence and did not affect the jury's verdict.

Am Jur 2d, Witnesses §§ 755, 756.

4. Evidence and Witnesses § 2808 (NCI4th)— leading questions—facts previously heard—no plain error

There was no plain error or abuse of discretion in allowing leading questions in a first-degree murder prosecution where defendant contended that an officer was asked leading questions which assumed facts not in evidence and which permitted him to testify about facts of which he had no personal knowledge, but defendant did not object to the questions or answers and a proper foundation was laid for the introduction of the facts incorporated in the questions.

Am Jur 2d, Appellate Review §§ 614, 695, 774; Witnesses § 752.

5. Evidence and Witnesses § 1450 (NCI4th)— noncapital first-degree murder—victim's clothing—chain of custody

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting the victim's shirt into evidence where defendant contended that the chain of custody for the shirt was broken because a former officer was not called to testify. All of the available evidence at trial indicates that the victim was wearing the shirt when defendant shot him and the State must establish a detailed chain of custody only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered.

Am Jur 2d, Evidence §§ 946, 947.

6. Evidence and Witnesses § 2124 (NCI4th)— noncapital first-degree murder—officer's opinion—markings on victim's clothing—gunshot stippling

There was no error in a first-degree murder prosecution where an officer was allowed to identify markings on the victim's

clothing as gunshot stippling based on fifteen years of experience in examining crime scenes. The testimony corroborated testimony about stippling on the victim's shoulder and contradicted defendant's testimony about how far he was standing from the victim when he fired the gun.

Am Jur 2d, Expert and Opinion Evidence §§ 300, 303.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun. 1 ALR4th 1072.

7. Evidence and Witnesses § 1274 (NCI4th)— confession—defendant's mental capabilities—officer's opinion

There was no error in a first-degree murder prosecution where an officer was allowed to give his opinion regarding defendant's mental capabilities at the time he confessed but defendant was not allowed to introduce evidence regarding his mental capabilities. The State has the burden of establishing that a confessing defendant possesses the proper mental capacity to waive his rights and the testimony meets the standards of N.C.G.S. § 8C-1, Rule 701 in that the opinion was rationally based on the officer's perception of defendant at the time of the confession and it was necessary that the officer give his opinion to help determine whether defendant voluntarily gave the statement, a crucial fact in issue. Furthermore, although defendant contends that the jury could have improperly inferred from this testimony that defendant was also mentally capable when he shot the victim, defendant's capacity at the time of the shooting was never in issue.

Am Jur 2d, Criminal Law § 797; Evidence § 744; Expert and Opinion Evidence §§ 164 et seq.

Mental subnormality of accused as affecting voluntariness or admissibility of confession. 8 ALR4th 16.

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

Validity or admissibility, under Federal Constitution, of accused's pretrial confession as affected by accused's mental illness or impairment at time of confession—Supreme Court cases. 93 L. Ed. 2d 1078.

8. Evidence and Witnesses § 2908 (NCI4th)— first-degree murder—defendant's confession to third party—hearsay—admission not prejudicial

There was no prejudicial error in a first-degree murder prosecution where an officer testified on redirect examination that defendant had told a third party that he had murdered the victim. Although the State argued that the defendant had opened the door on cross-examination by eliciting testimony that there were no eyewitnesses who could identify defendant as the killer, there is no particular fact or transaction connecting the statement of the third party, Bridget Merritt, with the testimony on cross-examination. However, the jury would have reached the same verdict without the admission of the hearsay statement.

Am Jur 2d, Appellate Review § 758; Witnesses §§ 740, 741.

9. Evidence and Witnesses § 202 (NCI4th)— first-degree murder—defendant's personal and educational background—properly excluded

There was no error in a first-degree murder prosecution where the trial court did not allow defendant to present evidence that he was incapable of forming the intent required for first-degree murder and discharging a firearm into an occupied vehicle because his mother abused him and he was a slow learner at school. Defendant failed to make any connection at trial between the alleged abuse and below-average intelligence and the crimes committed; on the contrary, the record is replete with evidence tending to rebut defendant's contentions.

Am Jur 2d, Evidence §§ 319, 558.

10. Criminal Law § 610 (NCI4th)— first-degree murder—motion to dismiss—erroneously admitted evidence

The trial court did not err in a first-degree murder prosecution by denying defendant's motions to dismiss for insufficient evidence where defendant argued that the evidence would have been insufficient but for evidentiary errors. The trial court should consider all evidence favorable to the State which is actually admitted when ruling on a motion to dismiss for insufficient evidence; the fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting the motion.

Am Jur 2d, Trial §§ 842 et seq.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection. 79 ALR2d 890.

11. Criminal Law § 691 (NCI4th)— first-degree murder—instructions—objections—no plain error

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court erred in its instructions to the jury and in its failure to give defense counsel the opportunity to object to the instructions out of the hearing of the jury. The trial judge asked the attorneys to approach the bench after completing the substantive charge; after a brief conference announced that both sides were satisfied; gave the final instructions and asked whether the attorneys were satisfied; and both indicated that they were. There is no statute or rule which obligates the trial judge to advise defense counsel to approach the bench for the purpose of making an objection out of the presence of the jury. Furthermore, the State presented overwhelming evidence, including defendant's own signed confession, showing defendant's guilt and the errors cited by defendant did not alter the essential meaning or intent of the pattern jury instructions.

Am Jur 2d, Trial §§ 1079, 1459-1473.

Construction and effect of provision of Rule 51 of the Federal Rules of Civil Procedure, and similar state rules, that counsel be given opportunity to make objections to instructions out of the hearing of jury. 1 ALR Fed. 310.

When does trial court's noncompliance with requirement of Rule 30, Federal Rules of Criminal Procedure, that opportunity shall be given to make objection to instructions upon request, out of presence of jury, constitute prejudicial error. 55 ALR Fed. 726.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Wright, J., at the 25 July 1994 Criminal Session of Superior Court, Wayne 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 for discharging a firearm into an occupied vehicle was allowed 30 May 1995. Heard in the Supreme Court 11 December 1995.

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

Margaret Creasy Ciardella for defendant-appellant.

FRYE, Justice.

Defendant, Dontrill Lee Jones, was indicted on 7 June 1993 for first-degree murder and discharging a firearm into an occupied motor vehicle. In a noncapital trial, the jury found defendant guilty of discharging a firearm into an occupied vehicle and guilty of first-degree murder under the felony murder theory. The trial judge arrested judgment on the underlying felony of discharging a firearm into an occupied vehicle and imposed the mandatory sentence of life imprisonment for the first-degree murder conviction.

On appeal to this Court, defendant makes five arguments. After reviewing the record, transcript, briefs, and oral arguments of counsel, we conclude defendant received a fair trial, free of prejudicial error.

The evidence presented at trial tended to show the following facts and circumstances: At approximately 8:00 p.m. on 12 April 1993, James Broughnden Jr. (the victim) drove his truck to Mary's Drive-In. He was alone. Broughnden went inside the restaurant to use the bathroom, ordered take-out dinner for himself and his family, then returned to his truck. Jackie Powers, an employee of the drive-in, took the victim's order. A short while later, Broughnden knocked on Powers' window and asked her to bring a beer to his truck. After taking the beer to Broughnden, Powers returned to the restaurant and waited for the cook to finish the order. Powers then heard two "pops," turned towards the truck, and saw someone running away. Another witness, Angeline Spencer, saw a young black man running towards her putting a gun into his pants and a white man getting out of his truck and then falling to the ground. Spencer went over to Broughnden and stayed with him until an ambulance arrived. Broughnden died from multiple gunshot wounds.

Defendant, after telling several relatives about the killing, surrendered to police the evening of the shooting. In the written statement he gave to police that night, defendant admitted he had seen Broughnden's truck at the drive-in from across the street. He walked to the restaurant and recognized the victim. Defendant further admitted that he then went behind the building and thought, "That's him.

I've got to get him." He took out a .38-caliber pistol, walked around the back of the truck, and shot Broughnden twice at close range. At trial, contrary to his written statement, defendant testified he was only trying to scare Broughnden, as the victim had scared him in an earlier incident.

Defendant and Broughnden had been involved in an altercation on the evening of 21 March 1993, three weeks prior to the shooting. There is some dispute as to exactly what happened that evening. Broughnden was driving his truck down "the Block" in Goldsboro, an area known to have street-level drug dealers. Defendant was a regular on the Block, where he had been dealing drugs for approximately six months. According to defendant, Broughnden asked him if he had "a twenty of crack cocaine." Defendant handed Broughnden a "rock" of crack, which Broughnden exchanged with a fake that he tried to hand to defendant. When defendant demanded a return of the genuine crack, Broughnden drove off, dragging defendant with him for about two blocks.

Several of defendant's friends had seen the episode from a pool room and jumped into an automobile with defendant. They followed Broughnden onto the property where his mother's house is located. In the incident that ensued, John Smith, Broughnden's brother-in-law, who lives in a separate mobile home and is the owner of the property, unsuccessfully attempted to block defendant's return to the highway. Smith's daughter recorded the license plate number, and the Smiths reported the incident to the Sheriff's Department.

According to his brother-in-law's testimony at trial, Broughnden had described the initial episode which caused the argument and chase differently. In Broughnden's version, he was merely an innocent man being harassed by defendant and his friends. They had parked too close to Broughnden's truck at a gas station, and an argument ensued. There was no mention of drugs. Smith thought Broughnden's story "didn't seem right."

The trial court denied defendant's motions to dismiss made at the close of the State's evidence and again at the close of all the evidence.

[1] In his first argument, defendant contends the trial court committed prejudicial error by denying his motion to continue. On 24 July 1994, the day before the trial, defense counsel discovered that defendant's mother and her friends had allegedly abused defendant during his childhood. After obtaining this information, defense counsel

sought a continuance, which the court denied. Defense counsel asserted that she needed more time to prepare for trial and that another psychiatric evaluation taking into account the allegations of abuse would help to determine whether defendant possessed the necessary intent to commit the alleged offenses.

In support of the motion, defense counsel reported a telephone conversation she had with a psychologist the previous day. The psychologist stated that defendant's abusive childhood might have affected his mental state at the time of the killing and that defendant's response to Broughnden might have been influenced by this history of abuse. There were no affidavits presented, however. The transcript of the hearing shows the trial court had before it only a summary of defendant's psychiatric evaluation conducted at Dorothea Dix Hospital. This summary concluded that there was no evidence of mental confusion or thought disorder and that defendant was competent to stand trial. Defendant did not offer the full report into evidence, either at the hearing or at trial.

Defendant's argument raises two separate issues. First, defendant contends that the trial court's denial of the motion to continue violated defendant's constitutional right to present a defense by denying defense counsel adequate time for trial preparation. Second, defendant contends that the denial of his motion deprived him of the services of a psychiatrist to assist in his defense. We disagree with both contentions.

In deciding pretrial motions in superior court,

> the judge shall consider at least the following factors in determining whether to grant a continuance:
>
> (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; [and]
>
> (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation . . . .

N.C.G.S. § 15A-952(g)(1), (2) (Supp. 1995). This Court has stated that

> "[a] motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion." *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984). However, if "a motion to con-

tinue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *Id.* at 112, 310 S.E.2d at 323.

State v. Covington, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986).

Defendant contends that this alleged error amounts to a violation of his rights under the Constitution of the United States. He has failed, however, to show how the denial of his motion to continue impaired either his right to effective assistance of counsel or his right to confront the witnesses against him at trial.

This Court has recently reviewed the legal standards governing the appeal of a denial of a motion to continue:

> 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 affidavit 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)).
>
> . . . .
>
> . . . " '[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.' " [*State v. Cradle*, 281 N.C. 198, 208, 188 S.E.2d 296, 303,] (quoting *State v. Stepney*, 280 N.C. 306, 312, 185 S.E.2d 844, 848 (1972))[, *cert. denied*, 409 U.S. 1047, 34 L. Ed. 2d 499 (1972)].

State v. McCullers, 341 N.C. 19, 31-32, 460 S.E.2d 163, 170 (1995).

In *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981), in circumstances similar to those of the instant case, this Court upheld the trial court's decision to deny defendant's motion to continue. The defendant in *Searles* wanted more time to locate a potential material witness. The trial court denied the continuance because the "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." *Id.* at 155, 282 S.E.2d at 434.

We conclude, therefore, that the trial court did not err or abuse its discretion in failing to grant the motion for continuance. Defendant's oral motion to continue, made on the date set for trial and not supported by an affidavit, did not set forth any form of "detailed proof indicating sufficient grounds for further delay." *Id.*; *see also Cradle*, 281 N.C. at 208, 188 S.E.2d at 303. Accordingly, we reject defendant's argument on the issue of denying adequate time for trial preparation.

[2] We next address the issue relating to the assistance of a psychiatric expert. This Court has held that an indigent defendant has the right to an *ex parte* hearing for the purpose of having an expert appointed to aid in his defense. *State v. Ballard*, 333 N.C. 515, 522, 428 S.E.2d 178, 182-83, *cert. denied*, — U.S. —, 126 L. Ed. 2d 438 (1993). In the instant case, defense counsel did not specifically request an *ex parte* hearing or the appointment of a psychiatrist to assist in the defense. Rather, she argued that a new psychiatric evaluation would be useful for the defense at trial.

Defendant relies on the United States Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985). In *Ake*, the Court held that when an indigent defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the United States Constitution requires a state to provide the defendant a psychiatrist's assistance in preparing for trial. *Id.* at 83, 84 L. Ed. 2d at 66.

Ake is not controlling in the instant case. The Supreme Court opinion catalogued the many psychological factors involved in Ake's case:

> [I]t is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during

trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier.

Id. at 86, 84 L. Ed. 2d at 68.

In the instant case, a psychiatric evaluation found defendant competent to stand trial. It was not until the first day of trial that defense counsel gave the trial court notice that defendant's mental state at the time of the offense *might* be a factor in his defense. Defendant neither requested a court-appointed psychiatrist nor indicated the likelihood of an insanity defense. Unlike the defendant in *Ake*, there is no indication in the record before us that defendant's behavior was bizarre before, during, or after the murder. The record does not indicate that the psychiatrist who evaluated defendant recommended either commitment or medication.

The *Ake* Court emphasized the narrowness of its holding:

> A defendant's mental condition is not necessarily at issue in every criminal proceeding, . . . and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.

Id. at 82-83, 84 L. Ed. 2d at 65-66.

In this case, defendant has not brought forth any evidence, even now, that a psychiatric evaluation would have disclosed a mental condition likely to be a significant factor at trial. Defendant, as the trial judge noted in specific reference to *Ake*, did not make a "threshold showing" that the report was inadequate, that it would result in an unfair trial, or that it would impede trial preparation. *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). We conclude, therefore, the trial court did not err or abuse its discretion. Accordingly, we reject defendant's first argument.

[3] In his second argument, defendant contends that the trial court erred in not disqualifying a witness. The witness, Jackie Powers, an

employee of Mary's Drive-In, took Broughnden's order just before he was killed. It is clear from the transcript that the judge, court reporter, and defense counsel found it difficult to understand Powers due to her accent. The judge allowed the prosecution to ask leading questions to alleviate the problem.

Defendant claims that the assistant district attorney interpreted Powers' testimony for the court. While interpretation was suggested as an alternative at the bench conference, defense counsel indicated she would object to this procedure. Defendant refers to two instances where the prosecutor used words not spoken by the witness. After reviewing the transcript, we conclude that the prosecutor resorted to leading questions rather than interpretation. If we assume for the sake of argument that the prosecutor was interpreting and that this constitutes error, we must examine this error under the "plain error" rule, since defendant did not object to the questions at trial. We have said that

> [u]nder the plain error rule, a new trial will be granted for an error to which no objection was made at trial only if a defendant meets a heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict.

State v. Bronson, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992).

Powers' testimony added very little to the State's evidence against defendant. She was unable to identify defendant and thought the "pops" she heard were caused by "kids." On cross-examination, she testified that she only knew Broughnden was in the truck when she brought him the beer but did not know if he was in the truck when he was shot. Defendant further complains that Powers' testimony that Broughnden requested his wife's meal be prepared "real nice" was prejudicial because it reflected positively on the victim's character. After a thorough review of the record, however, we conclude that none of the above testimony affected the jury's verdict. The admission of this testimony did not constitute error under the plain error standard. Accordingly, we reject defendant's second argument.

In his third argument, defendant contends the trial court committed prejudicial error in numerous evidentiary rulings. We shall consider the contentions *seriatim*.

[4] Defendant first asserts the trial court committed plain error by allowing the State to ask Officer Melvin leading questions that assumed facts not in evidence and that permitted the witness to tes-

tify to facts about which he had no personal knowledge. Defendant did not object to these questions or to Officer Melvin's answers. A review of the transcript reveals that the questions at issue incorporated facts which had been established with the admission of photographs of the victim's body and the crime scene, as well as the testimony of Dr. Schupner, the physician on duty in the emergency room when Broughnden was taken to the hospital. The jurors, therefore, had previously heard testimony that the victim had been shot in the left shoulder and had bled from that wound. They had examined photographs showing blood in the truck's interior and on the ground next to the truck. The shirt itself was torn, stained, and had bullet holes, one of which had stippling. Thus, a proper foundation was laid for the introduction of the facts incorporated in the questions at issue: that the shirt had blood on it, that it had been torn by paramedics in an attempt to provide medical assistance, and that it had bullet holes in it.

"A ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion." *State v. Marlow*, 334 N.C. 273, 286-87, 432 S.E.2d 275, 285-86 (1993). We conclude that there was no error and that the trial judge did not abuse his discretion in allowing the questions.

[5] Defendant also argues that the chain of custody of the victim's shirt was broken because Officer Barnes, who at the time of trial was no longer with the Goldsboro Police Department, was not called to testify. Officer Barnes accompanied Broughnden to the hospital after the shooting and obtained the victim's shirt, which he turned over to Officer Melvin. After removing a bullet from Broughnden's body, Dr. Schupner gave the bullet to Sergeant King, the investigator on call. The police placed this bullet and the shirt in the same evidence envelope. It is unclear from the record who gave Officer Barnes the shirt.

Defendant made only a general objection to the admission of the shirt and therefore failed to make chain of custody of the shirt a disputed issue at trial. Defendant's objection was overruled. A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence. *State v. Adcock*, 310 N.C. 1, 18, 310 S.E.2d 587, 597 (1984). Counsel claiming error has the duty of showing not only that the ruling was incorrect, but must also provide

the trial court with a specific and timely opportunity to rule correctly. *Id.* Nonetheless, we have examined the issue as if a proper objection was made and conclude that there was no error in the admission of the shirt.

In homicide cases, a victim's clothing is admissible if its appearance throws any light on the circumstances of the crime. *State v. Sparks*, 285 N.C. 631, 636-37, 207 S.E.2d 712, 715 (1974), *death sentence vacated*, 428 U.S. 905, 49 L. Ed. 2d 1212 (1976). In *State v. Sloan*, 316 N.C. 714, 343 S.E.2d 527 (1986), the Court dealt with the issue of a lapse in the chain of custody:

> In determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition, the trial court must exercise sound discretion. . . . In the first place, defendant has provided no reason for believing that this evidence was altered. Based on the detailed and documented chain of custody presented by the State, the possibility that the real evidence involved was confused or tampered with "is simply too remote to require exclusion of this evidence." *State v. Grier*, 307 N.C. 628, 633, 300 S.E.2d 351, 354 (1983). Furthermore, any weaknesses in the chain of custody relate only to the weight of the evidence, and not to its admissibility.

Sloan, 316 N.C. at 723, 343 S.E.2d at 533 (citation omitted). The State must establish a detailed chain of custody "only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984).

In *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992), this Court upheld the admission of clothing with bullet holes in circumstances very similar to the instant case. The trial court allowed testimony regarding the correspondence of the holes in the clothing, the entrance and exit wounds in the body, and the presence on the clothing of gunpowder and blood. *Id.* at 486, 418 S.E.2d at 210.

In this case, all of the available evidence at trial indicates Broughnden was wearing the shirt when defendant shot him. The shirt has a name label with the same first name as Broughnden's. Officer Barnes, who accompanied Broughnden to the hospital, gave the shirt to Officer Melvin, the evidence technician. Melvin then placed the shirt in the same evidence envelope as the bullet removed

from Broughnden's body. Officer Melvin maintained continuous custody of the envelope up to the time of trial.

Additionally, the shirt had bloodstains and bullet holes consistent with Broughnden's wounds. Gun residue stippling found on Broughnden's shoulder indicated the gun muzzle was no more than two feet away when the gun was fired. Stippling found around the shoulder wound was consistent with stippling found on the shirt and with stippling visible in photographs taken at the crime scene and at the hospital. Furthermore, Broughnden's wife saw him putting a check in his shirt pocket when he left his home shortly before the shooting. Police found a check in the shirt pocket. Defendant made no showing that the shirt admitted into evidence was not the shirt worn by Broughnden or that anyone had altered the shirt beyond what was required during medical intervention. We conclude, therefore, that the trial court did not abuse its discretion by admitting the shirt into evidence.

[6] Defendant next contends that Sergeant King was not qualified to identify the markings on Broughnden's shirt as stippling. Sergeant King was able to identify stippling as the result of fifteen years of experience in examining crime scenes. Testimony about the stippling on the shirt was admissible since it corroborated testimony about stippling on Broughnden's shoulder and contradicted defendant's trial testimony about how far he was standing from Broughnden when he fired the gun. We conclude that the trial judge did not commit error in allowing Sergeant King's testimony about the gunshot residue stippling on the shirt to be admitted into evidence.

[7] Defendant next contends the trial court erred in allowing Sergeant King's opinion testimony regarding defendant's mental capabilities at the time defendant confessed to the shooting. Defendant asserts that since he was not allowed to introduce evidence regarding his mental capabilities, Sergeant King's opinion should not have been allowed.

The following exchange occurred at trial, without objection, regarding defendant's written statement:

> Q. Now, um, during the time that he was reading that and you were explaining it to him, did he appear to be confused?
>
> A. No. He appeared to understand every bit of it.
>
> Q. Did he appear to be sleeping?

A. No, ma'am.

Q. Did he seem be, um—have his mental capabilities?

A. Yes, he did.

Defendant's argument ignores the fact that the State has the burden of establishing that a confessing defendant possesses the proper mental capacity to waive his *Miranda* rights. In *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995), this Court discussed the factors to be considered:

> (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. 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.

Sergeant King's testimony meets the standards set forth in North Carolina Rule of Evidence 701. His opinion was rationally based on his perception of defendant at the time of the confession. Furthermore, it was necessary that he give his opinion as to defendant's mental state at the time of the confession to help determine a crucial fact in issue, that is, that defendant voluntarily gave the statement to police.

Defendant further contends that Sergeant King's opinion should have been excluded because the jury could infer from the testimony that if defendant was mentally capable when he confessed, he was mentally capable when he shot the victim only hours before. As we have stated previously in discussing argument one, defendant's mental capacity at the time of the shooting was never an issue at trial. We conclude this argument has no merit.

[8] Defendant next contends that the trial court committed prejudicial error by improperly admitting a hearsay statement into evidence. We agree with defendant that it was error to admit the statement. However, we conclude that the admission does not rise to the level of prejudicial error.

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). Hearsay is not admissible except as provided by statute or by the rules of evidence. N.C.G.S. § 8C-1, Rule 802 (1992). At trial, the fol-

lowing exchange took place on redirect between the prosecutor and Sergeant King:

> Q. Um, Officer King, you listed all of these people for the prosecutor, but none of them could independently identify Mr. Jones as the perpetrator, isn't that true?
>
> A. Collectively, the way most cases come out, collective witnesses in the case could indicate that Dontrill Jones committed the murder of James Broughnden. I have nobody that can independently, solely say they stood out there and watched Dontrill Jones shoot James Broughnden.
>
> Q. Thank you. Actually, Dontrill told someone else that he had—
>
> A. Yes, he did.
>
> Q. —murdered James Broughnden.
>
> MS. HOLLOWELL (defense counsel): Objection.
>
> THE COURT: Overruled.
>
> Q. Before—
>
> A. Yes, he did.
>
> Q. Before he told you, didn't he?
>
> A. Yes. As, um, is another—the Bridget Merritt that I had spoken with. He indicated to her that he had done it.

Defense counsel's questions on cross-examination had elicited testimony that there were no eyewitnesses who could identify defendant as Broughnden's killer. On redirect, the prosecutor countered by eliciting hearsay testimony, over objection, that defendant had admitted to killing Broughnden. The State argues that defense counsel "opened the door" for the admission of the hearsay statement, but there is no "particular fact or transaction" connecting Merritt's statement with the testimony on cross-examination. *State v. Rose*, 335 N.C. 301, 337, 439 S.E.2d 518, 538, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994); *see also State v. Ratliff*, 341 N.C. 610, 615, 461 S.E.2d 325, 328 (1995). The statement did not explain or rebut the earlier testimony. Thus, we conclude that the trial court erred in admitting Merritt's out-of-court statement.

We do not agree with defendant, however, that the error was prejudicial. Prejudicial error is shown " 'when there is a reasonable pos-

sibility that, had the error in question not been committed, a different result would have been reached at the trial.' " *State v. Wiggins*, 334 N.C. 18, 27, 431 S.E.2d 755, 760 (1993) (quoting N.C.G.S. § 15A-1443(a) (1988)). We conclude that the jury would have reached the same verdict without the admission of the hearsay statement.

[9] Defendant next contends the trial court erred in not allowing him to present evidence to the jury about his personal and educational background. Defendant argues that because his mother abused him and he was a slow learner in school, he was incapable of forming the necessary intent required for first-degree murder and discharging a firearm into an occupied vehicle. Defendant failed to make any connection at trial, however, between the alleged abuse and below-average intelligence and the crimes committed. On the contrary, the record is replete with evidence tending to rebut defendant's contentions. Indeed, during *voir dire*, defendant admitted that he was not claiming that the abuse he suffered as a child caused him to shoot Broughnden. We conclude that the trial court properly excluded defendant's personal and educational background. Accordingly, we reject defendant's final contention under his third argument.

[10] Defendant's fourth argument concerns the trial court's failure to grant defendant's motions to dismiss. Defendant contends that had the trial court not made the errors alleged in his first and third arguments, the evidence would have been insufficient to convict him of the crimes of first-degree murder under the felony murder rule and discharging a firearm into an occupied vehicle. Thus, defendant argues that the charges against him should have been dismissed for insufficiency of the evidence. We have held that the trial court did not err as to arguments one and three, with the exception of improperly admitting a hearsay statement under argument three.

When ruling on a defendant's motion to dismiss on the ground of insufficiency of the evidence, it is axiomatic that the trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). Thus, the fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting a motion to dismiss. We conclude that the trial court did not err in denying defendant's motions to dismiss for insufficiency of the evidence. Accordingly, we reject defendant's fourth argument.

[11] In his fifth argument, defendant contends that the trial court erred in its instructions to the jury and in its failure to give defense

counsel an opportunity to object to the instructions out of the hearing of the jury. The record of the trial, however, does not support this contention. Upon completing his substantive charge to the jury, the trial judge asked the attorneys to approach the bench. After a brief bench conference, the judge announced that both sides were satisfied. The trial court then gave final instructions to the jury, and asked, "Is the State satisfied and [is] the defendant . . . satisfied?" The attorneys indicated that they were.

Defense counsel could simply have asked to approach the bench for the purpose of making an objection out of the presence or hearing of the jury. There is no statute or rule which obligates the trial judge to advise defense counsel to make such a request.

Furthermore, since defendant did not object to the instruction at trial and did not request an additional instruction, our review is limited to a review for plain error. *State v. Barton*, 335 N.C. 696, 705, 441 S.E.2d 295, 298 (1994). "Only in a 'rare case' will an improper instruction 'justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Weathers*, 339 N.C. 441, 454, 451 S.E.2d 266, 273 (1994) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983)).

In the instant case, the State presented overwhelming evidence, including defendant's own signed confession, showing defendant's guilt. This Court has repeatedly stated "that a jury charge must be construed contextually and that isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Price*, 326 N.C. 56, 89, 388 S.E.2d 84, 103, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Here, the errors cited by defendant did not alter the essential meaning or intent of the pattern jury instructions. We have held that " 'a mere slip of the tongue by the trial judge in his charge to the jury . . . will not constitute prejudicial error when it is apparent from the record that the jury was not misled thereby.' " *State v. Herring*, 338 N.C. 271, 279, 449 S.E.2d 183, 188 (1994) (quoting *State v. Simpson*, 303 N.C. 439, 450, 279 S.E.2d 542, 549 (1981)). We conclude that the instructions did not confuse the jury and that defendant is not entitled to relief under the plain error standard. Accordingly, we reject defendant's fifth and final argument.

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

NO ERROR.

MARLENE R. GRIMSLEY AND DENNY A. GRIMSLEY v. LEROY JEROME NELSON

No. 35A95

(Filed 9 February 1996)

1. Appearance § 10 (NCI4th)— answer filed by UM carrier— no general appearance by defendant motorist

The attorney for plaintiffs' uninsured motorist (UM) carrier, an unnamed party, did not make a general appearance for defendant uninsured motorist when she filed an answer "in the name of the Defendant" and thereby preclude defendant from raising the defense of lack of personal jurisdiction based on insufficiency of service of process where the record shows that defendant and the UM carrier are separate and distinct parties represented by separate counsel, and there is no evidence in the record indicating that counsel for the UM carrier represented the defendant, professed to represent the defendant, or had the authority to appear on defendant's behalf.

Am Jur 2d, Appearance §§ 1, 2.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service: state cases. 77 ALR3d 841.

2. Insurance § 512 (NCI4th)— lack of personal jurisdiction against uninsured tortfeasor—dismissal of case against UM carrier

Where the trial court properly dismissed plaintiffs' negligence action against defendant tortfeasor, an uninsured motorist, for lack of personal jurisdiction, the court also correctly dismissed the case against plaintiffs' uninsured motorist (UM) carrier, an unnamed party, even though the UM carrier failed to assert the defense of lack of personal jurisdiction in its answer, since the UM carrier's only obligation in the case would be to pay any judgment entered against defendant tortfeasor, N.C.G.S. § 20-279.21(b)(3)a, and the UM carrier has no liability to plaintiffs because the tortfeasor has no liability to them.

Am Jur 2d, Automobile Insurance §§ 322, 330.

Justice FRYE dissenting.

Justice WEBB dissenting.

GRIMSLEY v. NELSON

[342 N.C. 542 (1996)]

Appeal by Travelers Indemnity Company, an unnamed party, 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. 329, 451 S.E.2d 336 (1994), affirming in part and reversing in part orders entered 21 September 1993 and 1 November 1993 by Phillips, J., in Superior Court, Craven County. On 6 April 1995, this Court allowed plaintiffs' petition for writ of certiorari of an additional issue. Heard in the Supreme Court 13 September 1995.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Kenyann G. Brown; and Anderson & Anderson, by Albeon G. Anderson, for plaintiff-appellants and -appellees.

Dunn, Dunn & Stoller, by David A. Stoller and Andrew D. Jones, for defendant-appellee.

Johnson & Lambeth, by Beth M. Bryant, for appellant and appellee Travelers Indemnity Company, an unnamed party.

ORR, Justice.

This case arises out of a 4 June 1989 automobile accident involving plaintiffs, Marlene R. Grimsley and Denny A. Grimsley. Plaintiffs were allegedly hit from behind by a vehicle driven by defendant Leroy Jerome Nelson, an uninsured motorist. As a result, on 18 May 1992, plaintiffs filed this action for personal injuries and loss of consortium resulting from the automobile accident. The summons and complaint were improperly served on the defendant's son, Leroy Jerome Nelson, Jr. Pursuant to N.C.G.S. § 20-279.21(b)(3)a, plaintiffs served their uninsured motorist (UM) carrier, Travelers Indemnity Company (Travelers), with a copy of the summons and complaint.

Section 20-279.21(b)(3)a of the Motor Vehicle Safety and Financial Responsibility Act provides as follows:

> [A plaintiff's uninsured motorist] insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law . . . . *The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist* though not named in the

caption of the pleadings and *may defend the suit in the name of the uninsured motorist or in its own name.*

N.C.G.S. § 20-279.21(b)(3)a (1993) (emphasis added).

Travelers retained the law firm of Johnson & Lambeth to represent it. After various exchanges of correspondence between counsel for Travelers and counsel for plaintiffs, Beth Bryant of Johnson & Lambeth filed an answer in the action in which she stated, "the undersigned Counsel, appearing in the name of the Defendant, answers the Complaint . . . ." Ms. Bryant signed the answer, "Beth M. Bryant Appearing in the name of the Defendant." The answer denied the allegations of the complaint and alleged contributory negligence. The plaintiffs then filed a reply denying contributory negligence and pleading last clear chance.

David A. Stoller of the law firm of Dunn, Dunn & Stoller then filed a motion to dismiss on behalf of defendant Nelson on the grounds of insufficiency of process and insufficiency of service of process. On 21 September 1993, the trial court granted defendant Nelson's motion to dismiss for lack of personal jurisdiction on the ground that he had never been served with process. Travelers made a motion for judgment on the pleadings. On 1 November 1993, the trial court granted Travelers' motion, dismissing plaintiffs' action against it on the ground that all issues raised by the complaint in the case against defendant Nelson had been resolved. Since Nelson had no liability to the plaintiffs, Travelers, as the uninsured carrier, had no liability.

Plaintiffs timely appealed the 21 September 1993 and 1 November 1993 orders to the Court of Appeals, which affirmed the trial court's dismissal of plaintiffs' action against defendant Nelson for lack of personal jurisdiction. The Court of Appeals held that Ms. Bryant had not made a general appearance for the defendant when she filed an answer "in the name of the Defendant." The Court of Appeals, however, reversed the trial court's dismissal of the action against Travelers, stating that Travelers waived the jurisdictional defense by filing a general answer to the complaint without raising the defense. The Court of Appeals said that by waiving this defense, Travelers could not now assert as a defense the fact that plaintiffs could not get a judgment against defendant Nelson.

In the dissent, Judge Wynn agreed with the majority that the action against the defendant should be dismissed, but asserted that

plaintiffs could not proceed against Travelers after the action against defendant Nelson was dismissed.

Pursuant to N.C.G.S. § 7A-30(2), Travelers appealed as of right from the decision of the Court of Appeals. Plaintiffs filed a petition for writ of certiorari seeking this Court's review of that portion of the Court of Appeals' opinion affirming the trial court's dismissal of the case as to defendant Nelson, which this Court allowed by order entered 6 April 1995.

I.

[1] We first address plaintiffs' contention that the trial court, as affirmed by the Court of Appeals, erred in granting defendant Nelson's motion to dismiss for lack of personal jurisdiction. The basis of plaintiffs' contention is that while defendant Nelson was not actually served with summons and complaint, Travelers' 12 October 1992 answer constituted a general appearance by defendant Nelson, thereby precluding defendant Nelson from raising the defense of lack of personal jurisdiction. We disagree.

Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent. *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985). Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him. *Guthrie v. Ray*, 31 N.C. App. 142, 144, 228 S.E.2d 471, 473 (1976), *rev'd on other grounds*, 293 N.C. 67, 235 S.E.2d 146 (1977). Although a return of service showing service on its face constitutes *prima facie* evidence of service, such showing can be rebutted by the affidavits of more than one person showing unequivocally that proper service was not made upon the person of the defendant. *Guthrie*, 293 N.C. at 71, 235 S.E.2d at 149; *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957).

In this case, no evidence was introduced suggesting that personal service was made upon defendant Nelson by any means authorized by the North Carolina Rules of Civil Procedure. The evidence in the record on appeal, including three affidavits, unequivocally establishes that the deputy sheriff's return of service indicating service on defendant Nelson was erroneous. The affidavits of defendant Nelson, his son, and his former wife, which were before the trial court, show

that Nelson's son was the person who was served with summons and complaint at the Sheriff's Department and that defendant Nelson has never been served with summons and complaint as required by the Rules of Civil Procedure.

Because defendant Nelson has never been served with summons and complaint, the court may exercise jurisdiction over defendant Nelson only if he or his attorney has consented to the jurisdiction of the court by voluntarily appearing in the case. N.C.G.S. § 1-75.7 (1983). Essentially, plaintiffs argue, without citation of authority, that by signing the 12 October 1992 answer, filed on behalf of Travelers "[a]ppearing in the name of the Defendant," Ms. Bryant made a general appearance on behalf of not only Travelers, but also defendant Nelson, thereby subjecting Nelson to personal jurisdiction and waiving jurisdictional defenses.

Where counsel signs a pleading on behalf of a party, the law imposes a presumption that the attorney held the authority to act for the client he or she professed to represent. *People's Bank of Burnsville v. Penland*, 206 N.C. 323, 173 S.E. 345 (1934). N.C.G.S. § 20-279.21(b)(3)a establishes, however, that the insurer, in this case Travelers, is a separate party to the action between the insured plaintiffs and defendant Nelson, an uninsured motorist. It also establishes that Travelers may defend the suit "in the name of the uninsured motorist" or in its own name.

There exists ample evidence in the record to show that Johnson & Lambeth did not represent defendant Nelson. First, counsel for Travelers never professed to represent defendant Nelson. By affidavit, Ms. Bryant states "[t]hat my firm is counsel of record for Travelers Indemnity Co." and that "Johnson & Lambeth was retained by Travelers Indemnity Co. to defend its interests in this action." In June 1992, Robert Johnson of Johnson & Lambeth informed plaintiffs by letter that "Travelers had retained me to represent its interest as uninsured motors [sic] carrier in [this] matter." In October 1992, Ms. Bryant informed defendant Nelson by letter, addressed to the home where defendant Nelson resided at the time of the accident and thereafter, that "it is important for you to protect your interest in this lawsuit, while I try to protect the interest of the insurance company which provides uninsured motorist coverage to [plaintiffs]." Defendant Nelson and Travelers are separate and distinct parties, each represented by separate counsel—Travelers by Johnson & Lambeth and defendant Nelson by Dunn, Dunn & Stoller.

Thus, the undisputed evidence in the record demonstrates that the law firm of Johnson & Lambeth represented Travelers Indemnity Company in this action and that the scope of such firm's representation was known to plaintiffs' counsel, was confirmed in writing to plaintiffs' counsel, and was communicated in writing to defendant Nelson by Travelers' counsel. There is no evidence in the record indicating that counsel for Travelers represented defendant Nelson, professed to in fact represent defendant Nelson, or had the authority to appear on his behalf. Therefore, because Ms. Bryant had not made a general appearance for the defendant when she filed an answer "in the name of the Defendant," the Court of Appeals was correct in affirming the trial court's dismissal of plaintiffs' action for lack of personal jurisdiction against defendant Nelson. This assignment of error is overruled.

II.

[2] Travelers contends that the Court of Appeals erred in deciding that "this action may proceed against Travelers to determine whether plaintiffs are entitled to uninsured motorist coverage," *Grimsley*, 117 N.C. App. at 336, 451 S.E.2d at 340, and asserts that the trial court's entry of judgment on the pleadings was correct because the order dismissing defendant Nelson's action resolved all issues raised by the complaint.

In *McLaughlin v. Martin*, the Court of Appeals held that a UM carrier's liability "does not attach until a valid judgment is obtained against an uninsured motorist." *McLaughlin*, 92 N.C. App. 368, 369, 374 S.E.2d 455, 456 (1988). In *Brown v. Lumbermens Mut. Cas. Co.*, this Court stated that a "[p]laintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional." *Brown*, 285 N.C. 313, 319, 204 S.E.2d 829, 834 (1974); *see Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294, 378 S.E.2d 21, 25 (1989) (UM carrier's liability is derivative of the tort-feasor's liability).

In *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 406 (1987), the plaintiff accepted a settlement from the tort-feasor's insurance carrier and signed a general release. The trial court granted summary judgment for the underinsured motorist (UIM) carrier in a subsequent action holding that a release of the tort-feasor released the UIM carrier on the basis of derivative liability. There, the Court of Appeals stated:

> When the release was signed, the Travelers Indemnity Company was also released as a matter of law because of the derivative nature of the insurance company's liability. Once the plaintiff released all claims against Givens and the O'Connors, there is no basis of liability on which the defendant insurance company can be held responsible under the terms of the policy.

Id. at 430, 350 S.E.2d at 177; *see also Spivey v. Lowery*, 116 N.C. App. 124, 126, 446 S.E.2d 835, 837 (holding that because plaintiff released the tort-feasor, plaintiff may not assert a claim against the UIM carrier because of the derivative nature of the UIM carrier's liability), *disc. rev. denied*, 338 N.C. 312, 452 S.E.2d 312 (1994).

These cases are consistent with the language of N.C.G.S. § 20-279.21(b)(3)a, which provides that all insurance policies in the State will be deemed to include a provision that "the insurer shall be bound by *a final judgment* taken by the insured against an uninsured motorist," N.C.G.S. § 20-279.21(b)(3)a (emphasis added), providing the insurer is served with a copy of summons and complaint.

The complaint in this case alleged a negligence claim exclusively against defendant Nelson. That cause of action was dismissed pursuant to Nelson's motion to dismiss. Therefore, on the face of the pleadings, nothing remained to be decided, and no liability can be imposed upon the unnamed defendant, Travelers. Travelers' only obligation in this case would be to pay any judgment entered against defendant Nelson. Travelers was properly served with summons and complaint in the action filed by plaintiffs against defendant Nelson pursuant to statute and, therefore, would be bound by any judgment taken by the plaintiffs against defendant Nelson. N.C.G.S. § 20-279.21(b)(3)a. However, having concluded that the trial court correctly dismissed the action against defendant Nelson, we conclude that the trial court correctly dismissed the action against Travelers and that the Court of Appeals erred in reversing the trial court. Accordingly, we affirm the Court of Appeals' decision insofar as it affirmed the trial court's dismissal of plaintiffs' action against defendant Nelson on the basis of lack of personal jurisdiction. We reverse that part of the Court of Appeals' decision that reversed the trial court's order dismissing the action against Travelers. The case is remanded to the Court of Appeals for further remand to the Superior Court, Craven County, for reinstatement of the trial court's order of 1 November 1993 granting Travelers' motion for judgment on the pleadings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice FRYE dissenting in separate opinion.

Justice WEBB dissenting in separate opinion.

Justice FRYE dissenting.

The majority holds the trial court correctly dismissed the case against Travelers Indemnity Company, plaintiffs' uninsured motorist (UM) carrier, because service was improper against defendant Nelson (the tort-feasor). Therefore, the majority concludes that the Court of Appeals erred in deciding that the case could proceed against Travelers to determine whether plaintiffs were entitled to UM coverage. I do not believe that our case law and the statute call for the result reached by the majority. Therefore, I respectfully dissent.

Under the Motor Vehicle Safety and Financial Responsibility Act,

> every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.
>
> a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist . . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name.

N.C.G.S. § 20-279.21(b)(3)a. When plaintiffs were unable to settle their claims growing out of an accident with an uninsured motorist, suit was instituted against the uninsured motorist and plaintiff's insurance carrier, Travelers Indemnity Company, pursuant to the above statute. Summonses were issued against the uninsured motorist and the insurance carrier. The insurance carrier, appearing in the name of defendant, answered the complaint, denying any negligence on the part of the named defendant and alleging contributory negligence on the part of plaintiff. Subsequently, the named defend-

ant's motion to dismiss as to him was allowed on the grounds of insufficiency of service of process, it appearing that the named defendant's son rather than defendant himself had been served with the summons. The crucial question is whether a case may proceed to judgment against the uninsured motorist carrier since any judgment actually obtained would not be enforceable against the named defendant tort-feasor.

The Court of Appeals reasoned that:

> although plaintiffs cannot obtain a judgment against defendant because he properly asserted the defense of lack of personal jurisdiction, this action may proceed against Travelers to determine whether plaintiffs are entitled to uninsured motorist coverage. Furthermore, Travelers, by failing to properly assert the defense of lack of personal jurisdiction in its answer, may not rely on the defense that plaintiffs cannot "reduce its right to judgment" against defendant because of lack of personal jurisdiction in determining whether plaintiffs are "legally entitled to recover damages" from defendant.

Grimsley v. Nelson, 117 N.C. App. 329, 335-36, 451 S.E.2d 336, 340 (1994). I agree with the Court of Appeals and therefore dissent from that portion of the decision of the majority of this Court which reverses the Court of Appeals on this issue.

The majority says that nothing remained in the complaint to pursue a claim against Travelers Indemnity because the tort-feasor was dismissed for insufficiency of service of process. In defense of this position, the majority cites two cases from this Court and three cases from our Court of Appeals. However, those cases, in my opinion, are not controlling in the peculiar posture of this case.

The majority relies on *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989), for the proposition that a UM carrier's liability is derivative of the tort-feasor's liability. I agree. Nevertheless, as stated in the *Silvers'* majority opinion which I joined:

> The issue is whether an insured plaintiff who has entered into a consent judgment with a tort-feasor and the tort-feasor's liability insurance carrier, without notice to or the consent of the insured's underinsured motorist (UIM) coverage carrier, in violation of the terms of the UIM policy, may nevertheless recover UIM benefits under the policy.

Id. at 290, 378 S.E.2d at 22 (footnote omitted). The Court answered in the affirmative. After construing "legally entitled to recover" to mean that the carrier's UIM liability is derivative in nature, the Court added that "[t]he analysis does not end here, however." *Id.* at 294, 378 S.E.2d at 25. The Court then analyzed the internally conflicting provisions of the policy and statute, noted the remedial nature of the statute, and concluded that it was not the intent of the legislature that Silvers be prohibited from recovering UIM benefits from her UIM carrier. I believe that the same legislative intent that permitted Silvers to recover from her UIM carrier after entering into a consent judgment with the tort-feasor and his insurance carrier in violation of the policy would also permit plaintiffs in the instant case to recover from their UM carrier after the tort-feasor was dismissed from the suit because of insufficiency of service of process.

The majority also cites *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974). However, the instant case is distinguishable from *Brown*. The issue in *Brown* was stated by the Court as follows:

> Is an action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist, subject to the two-year statute of limitations prescribed for the commencement of the tort action for wrongful death, G.S. 1-53(4), or the three-year limitation prescribed for actions on contract, G.S. 1-52(1)?

Id. at 315, 204 S.E.2d at 830. The plaintiff had instituted suit against the insurance carrier only and the insurance carrier had asserted the defense of the statute of limitations. This Court simply concluded that the statute of limitations was two years rather than three years and that defendant had specifically pled a defense that defeated the plaintiff's claim. In the instant case, both the tort-feasor and the insurance carrier were parties to the action. The tort-feasor successfully raised the defense of insufficiency of service of process while the insurance carrier did not.

The majority relies heavily on *Buchanan v. Buchanan*, 83 N.C. App. 428, 350 S.E.2d 175 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 406 (1987), and *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835, *disc. rev. denied*, 338 N.C. 312, 452 S.E.2d 312 (1994). Again, as with *Brown*, *Buchanan* and *Spivey* are distinguishable. In *Buchanan*, the plaintiff settled with the tort-feasor's insurance car-

rier. In a subsequent suit by the plaintiff against her UIM carrier, the trial court granted summary judgment on the ground that the release of the tort-feasor and his insurance carrier also released the UIM carrier. Similarly, in *Spivey*, the plaintiff settled with the tort-feasor's insurance carrier and then subsequently filed suit against the tort-feasor and her UIM carrier. The trial court dismissed the suit against the carrier because of the general release signed by the plaintiff.

However, the instant case is factually different from *Buchanan* and *Spivey*. The release in *Buchanan* purported to discharge "any other person, firm or corporation charged or *chargeable* with responsibility or liability." *Buchannan*, 83 N.C. App. at 429, 350 S.E.2d at 176 (emphasis added). The plaintiff in *Spivey* signed a very similar release. *Spivey*, 116 N.C. App. at 125, 446 S.E.2d at 836. By signing the releases, the plaintiffs in both cases ended any further liability and the matter was closed. In the case *sub judice*, the issue of liability has never been settled or adjudicated. In this context, there is a significant difference between a suit dismissed because the plaintiff signed a general release that absolved everyone from liability and one where the suit against the tort-feasor was dismissed for insufficiency of service of process without a determination on the merits of the underlying claim.

The majority also cites *McLaughlin v. Martin*, 92 N.C. App. 368, 374 S.E.2d 455 (1988). However, *McLaughlin* is also distinguishable. In *McLaughlin*, the plaintiffs, without filing a suit for damages, sought a declaratory judgment to determine the status and limitations of the uninsured motorist coverage available to them from defendants' UM carriers. The Court of Appeals affirmed the trial court's dismissal on the grounds that there was no actual case or controversy. The issue was one of jurisdiction, and the Court of Appeals said that the parties could not create jurisdiction by stipulation.

In the instant case, plaintiffs had filed an action for damages, not a declaratory judgment action. Unlike in *McLaughlin*, there is not an issue as to whether plaintiffs will ever file suit for damages resulting from the automobile accident. This is what this suit is about. Thus, none of the decisions relied on by the majority are direct authority for the issue before this Court.

The majority also finds support for its decision in N.C.G.S. § 20-279.21(b)(3)a. However, the statute simply provides that an insurance carrier shall be bound by a final judgment against an uninsured motorist as long as the carrier has been served with a summons

and complaint. Nothing in this statute excludes the possibility that plaintiffs' insurance carrier could be held liable in a suit against the uninsured motorist and the UM carrier, notwithstanding dismissal of the uninsured motorist for insufficiency of service of process.

I would hold that when, as here, plaintiffs' UM carrier makes a general appearance in an action by filing an answer in the name of defendant without raising the defense of insufficiency of service of process on the tort-feasor, the case may proceed to judgment against the UM carrier based on an adjudication by the jury of the tort-feasor's liability, notwithstanding the dismissal of the tort-feasor for insufficiency of service of process. This interpretation is consistent with the Motor Vehicle Safety and Financial Responsibility Act to provide recourse for innocent victims for damages from the negligent operation of automobiles by irresponsible persons. *See Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

Justice WEBB dissenting.

I dissent. I agree with the majority that the dismissal of the action against Leroy Jerome Nelson should be affirmed. I do not agree that the case against Travelers Indemnity Company (Travelers) should be dismissed.

The majority holds that because the plaintiffs cannot get a judgment against the defendant Nelson, there can be no liability for Travelers. I can find nothing in the statute or our decisions that supports this holding.

In *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974), the statute of limitations had run on the plaintiff at the time the action was filed. This Court held the uninsured motorist carrier could plead the statute of limitations as an affirmative defense. In this case, Travelers did not plead the statute of limitations, and its motion to amend its answer to do so was denied. The question of waiver or estoppel was not involved in *Brown. Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989), relied on by the majority, does not involve a waiver or estoppel.

In this case, the summons and complaint were served on 22 May 1992. Travelers was granted "an unlimited extension of time for filing a response" in order to negotiate a settlement. On 3 September 1992, plaintiffs' counsel notified Travelers' counsel that satisfactory

progress was not being made and requested that Travelers file an answer. On 12 October 1992, Travelers filed an answer which did not assert a jurisdictional defense. This defense was first raised on 9 November 1992. If the plaintiffs had been notified within ninety days of the issuance of the summons that it had not been properly served, they could have continued the action in existence by either obtaining an endorsement of the original summons or having an alias and pluries summons issued. N.C.G.S. § 1A-1, Rule 4(d) (1990).

The plaintiffs, with good reason, thought the summons and complaint were validly served. I believe that by waiting until after the time had expired when the defect in service could be corrected to raise the question of the validity of the service, Travelers waived this defense and is estopped to deny the validity of the service. *Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987).

I vote to affirm the decision of the Court of Appeals.

STEWART B. NEWTON v. NEW HANOVER COUNTY BOARD OF EDUCATION

No. 280A94

(Filed 9 February 1996)

1. Negligence § 51 (NCI4th)— police officer—response to silent alarm—invitee—duty owed by landowner

A police officer entering the premises of a landowner in the performance of his public duty enters by authority of law, and the officer's invitation to enter the premises is implied in law. Thus, a landowner's duty of care toward a police officer who enters the premises in response to a silent burglar alarm is the same as the duty owed to an invitee.

Am Jur 2d, Premises Liability §§ 87 et seq.

2. Negligence § 42 (NCI4th)— police officer—invitee—fall on stairway on school premises—negligence of board of education

Plaintiff police officer's evidence was sufficient for the jury on the issue of defendant board of education's negligence in failing to warn of or repair the condition of a stairway on school premises if plaintiff is treated as an invitee where it tended to show that plaintiff went to a high school field house in response

to a silent burglar alarm; plaintiff climbed an exterior metal stairway that led to the second floor of the field house to determine if the building was secure; plaintiff fell and was injured while attempting to descend the stairway; the stairs were too narrow to permit an entire adult foot to be placed on a step, and the slope of the stairway exceeded a safe slope; defendant had constructive, if not actual, knowledge of the dangerous condition of the stairs but failed to correct the situation; and no signs or notices were posted at or near the stairway reserving its use for emergencies or forbidding its use.

Am Jur 2d, Premises Liability §§ 583 et seq., 815 et seq.

3. Negligence § 109 (NCI4th)— stairway at high school—fall by police officer—former student at school—no contributory negligence

Plaintiff police officer who went to a high school field house in response to a silent alarm was not contributorily negligent as a matter of law when he fell while descending a dangerous stairway outside the field house because he had attended the school and had frequently been in the field house while he was a student and since he had completed high school some seven years earlier.

Am Jur 2d, Premises Liability §§ 786, 790.

4. Appeal and Error § 451 (NCI4th)— issue in Court of Appeals brief—review by Supreme Court

The Supreme Court will consider an issue that was properly presented in defendant's brief in the Court of Appeals but was not addressed by the Court of Appeals. N.C. R. App. P. 16.

Am Jur 2d, Appellate Review §§ 690, 696.

5. Evidence and Witnesses § 2369 (NCI4th)— expert testimony—stairway structure—relevancy

The trial court did not err in ruling that videotaped deposition testimony by an expert who inspected an outside stairway at a high school field house that the slope of the stairway exceeded a safe slope and that the risk of falling on the stairs was much greater than the risk of falling on stairs constructed in accordance with good engineering practices and prevailing building codes was relevant in a police officer's negligence action against a board of education to recover for injuries received when he fell while descending the stairway.

Am Jur 2d, Expert and Opinion Evidence §§ 354, 355.

6. Appeal and Error § 147 (NCI4th)— absence of objection— failure to preserve question for appellate review

No question concerning a portion of a deposition containing references to the N.C. Building Code was preserved for appellate review where defendant failed to object to the introduction into evidence of that portion of the deposition. N.C. R. App. P. 10(b)(1).

Am Jur 2d, Appellate Review §§ 614, 615.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 114 N.C. App. 719, 443 S.E.2d 347 (1994), reversing an order granting defendant's motion for judgment notwithstanding the verdict entered 5 March 1993 by DeRamus, J., at the 1 March 1993 Civil Session of Superior Court, New Hanover County. On 5 October 1994, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 12 September 1995.

John K. Burns for plaintiff-appellee.

Crossley McIntosh Prior & Collier, by Francis B. Prior and Sharon A. Johnston, for defendant-appellant.

FRYE, Justice.

In this case of first impression, we must determine whether the Court of Appeals properly reversed the trial court's entry of judgment for defendant notwithstanding a jury verdict for plaintiff, a police officer who was injured after entering defendant's property in response to a burglar alarm. The case turns on whether the police officer was entitled to the same protection as an invitee on the premises. We answer in the affirmative and thus uphold the result reached by the Court of Appeals.

In 1989, plaintiff, Stewart B. Newton, was working as a uniformed patrol officer for the City of Wilmington Police Department. On the evening of 6 June 1989, plaintiff and his partner, Officer Brendan Sheehy, were dispatched to the New Hanover High School field house in response to a silent alarm which was installed to alert the police department to break-ins on school property after school hours. It was raining.

Upon their arrival at the field house, Officer Sheehy investigated the west end of the building, while plaintiff investigated the east end. After checking the doors at ground level, plaintiff climbed an exterior metal stairway that led to the second floor of the field house. Plaintiff described the stairway as being thirteen to fourteen inches from the wall of the building. There was no handrail on the building side of the stairway, but there was a handrail on the side of the stairs away from the building. A bottom rail was positioned parallel to the handrail along the treads of the stairs. These two rails were connected by vertical supports, one each at the top and bottom of the stairs and the other at the midway point. The rails and the supports were made of angle iron.

As plaintiff began to climb the stairs, he held a flashlight in his left hand and held the handrail with his right hand. When he reached the door at the top of the stairs, he found that it was locked. He called Officer Sheehy and reported that his side of the building was secure.

Plaintiff then began to descend the wet stairs. Because the stairs were too narrow to permit an entire adult foot to be placed on a step, plaintiff turned his body to the side in order to get more of his foot on each step. As he went down the stairs, he shifted the flashlight to his right hand and placed his left hand on the handrail. He shined the flashlight at the steps. At some point while descending the stairs, plaintiff fell onto his buttocks and began sliding down the steps on his back and buttocks. Plaintiff was wearing ribbed-sole shoes.

As plaintiff fell, his left hand came off the handrail and landed on the lower rail. His body continued to slide down the stairs until his left hand became caught in the angle formed by the lower horizontal rail and the vertical support midway down the stairway. His fall was stopped when the little finger of his left hand wedged in the angle of the horizontal rail and vertical support. At this point, his left arm was fully extended.

As a result of the fall, plaintiff's left arm, wrist, hand, and little finger were injured. He received medical treatment for injury to his finger and arm and continues to suffer a fifty-five percent permanent physical impairment of his left little finger. Plaintiff was twenty-six years old at the time of the injury.

Plaintiff brought this action against defendant, New Hanover County Board of Education, to recover for injuries sustained at New Hanover High School. It is undisputed that defendant owns and maintains the premises on which plaintiff was injured. It is also undis-

puted that at all times relevant to this action no signs or notices were posted at or near the stairway reserving its use for emergencies or forbidding its use. The parties stipulated that plaintiff suffered injury on the night of 6 June 1989 and incurred medical expenses through 18 October 1989 in the amount of $1,233.41. Because of his injuries, plaintiff lost wages in the amount of $1,856.57. Plaintiff received $5,086.67 in workers' compensation benefits from his employer, the City of Wilmington Police Department.

In this civil action, plaintiff seeks damages in excess of $10,000 from the New Hanover County Board of Education on the basis of injuries sustained due to the Board's negligence, through its agents and employees, in "procuring, maintaining and failing over a number of years to make safe the stairway, which was of negligent design, construction and maintenance."

At trial, plaintiff introduced the videotaped deposition testimony of engineer Daniel M. Aquilino. Aquilino stated that, in his opinion, the slope of the stairway exceeded a safe slope. Aquilino also stated that the risk of falling on the stairs in question was much greater than the risk of falling on stairs constructed in accordance with good engineering practices and prevailing building codes.

The trial court instructed the jury that plaintiff was an invitee on defendant's premises at the time of the injury, and therefore, defendant owed plaintiff a duty to exercise reasonable care to keep its premises in a reasonably safe condition. The court further instructed the jury on contributory negligence. On 5 March 1990, the jury returned a verdict for plaintiff in the amount of $20,000 and found that he was not contributorily negligent. Defendant then moved for judgment notwithstanding the verdict. The trial court granted this motion, holding that the evidence showed as a matter of law that at the time of the injury plaintiff was a licensee rather than an invitee and that no evidence was presented to show that defendant violated the duty owed to a licensee. The court further held that the evidence demonstrated as a matter of law that plaintiff was contributorily negligent. From this judgment, plaintiff appealed to the Court of Appeals.

A divided panel of the Court of Appeals concluded that plaintiff entered defendant's premises as an invitee. The majority of the panel reversed the trial court's order granting judgment notwithstanding the verdict and remanded the case to the trial court for entry of judgment for plaintiff in accordance with the jury's verdict. Judge Johnson dissented, stating:

> The police officer herein does not neatly fit the status of a licensee, "one who enters on the premises with the possessor's permission, express or implied, solely for his own purposes rather than the possessor's benefit," because the police officer is not entering the premises solely for his own purposes, rather than the school's benefit. The police officer clearly is not an invitee, "a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself," because the police officer does not intend to benefit himself by going onto the school's premises; rather, the police officer intends to benefit the landowner and the public. I believe that the predominant "nature of the business bringing [the police officer] to the premises" herein is the officer's duty, as a law enforcement officer, to carry out the responsibilities of his job. A police officer is one who enters the premises of a property owner under the authority of law. On the facts herein, the police officer is entering the school property for the benefit of the public, to maintain civil order and to promote the public welfare.

Newton v. New Hanover Co. Bd. of Educ., 114 N.C. App. 719, 726, 443 S.E.2d 347, 351 (1994) (Johnson, J., dissenting). Judge Johnson concluded that the police officer's status more closely resembled that of a licensee and therefore voted to affirm the trial court. Based on Judge Johnson's dissent, defendant appeals to this Court.

[1] The first question on this appeal is what duty of care is owed to a police officer who enters the premises of another in discharge of his duties as a public officer. This question presents a matter of first impression for this Court.[1]

In cases of premises liability generally, this jurisdiction has applied the common law doctrine that the nature and extent of the duty owed by the owner or occupier of land to persons injured on the land depends upon whether the injured person could be classified as an "invitee," a "licensee," or a "trespasser." In *Hood v. Queen City Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959), this Court said:

> As affecting liability for injury resulting from the condition of premises in private ownership or occupancy, one who enters without permission or other right is a trespasser. One who enters

1. Realizing the uncertainty of the law in this area, the trial court handled this case in a commendable manner, thus obviating the necessity of a new trial in the event this Court held that plaintiff should be treated as an invitee.

with permission but solely for his own purposes is a licensee. One who enters by invitation, express or implied, is an invitee. "The duty owed trespassers is that they must not be wilfully or wantonly injured." *Jessup v. R.R.*, 244 N.C. 242, [245], 93 S.E.2d 84[, 87 (1956)]. "As to a licensee the duties of a property owner are substantially the same as with respect to a trespasser. But a vital difference arises out of conditions which impose upon the owner of property the duty of anticipating the presence of a licensee. If the owner, while the licensee is upon the premises exercising due care for his own safety, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active and affirmative negligence." *Wagoner v. R.R.*, 238 N.C. 162, [172,] 77 S.E.2d 701[, 709 (1953)].

Id. at 540, 107 S.E.2d at 158 (citations omitted). Additionally, in *Williams v. McSwain*, 248 N.C. 13, 102 S.E.2d 464 (1958), this Court said:

> "The law imposes liability on the owner of property for injuries sustained by an invitee which are caused by dangerous conditions known, or which should have been known, by the property owner but which are unknown and not to be anticipated by the invitee." *Harris v. Department Stores Co.*, 247 N.C. 195[, 198-99, 100 S.E.2d 323, 326 (1957)].
>
> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> "(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> "(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> "(c) invites or permits them to enter or remain on the land without exercising reasonable care
>
> "(i) to make the condition reasonably safe, or
>
> "(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are

> entitled to receive, if the possessor is a public utility." Restatement Torts, sec. 343.
>
> "An invitee is one who goes upon the property of another by the express or implied invitation of the owner or the person in control. A license implies permission and is more than mere sufferance; an invitation implies solicitation, desire, or request." *Jones v. R.R.*, 199 N.C. 1, [3,] 153 S.E. 637[, 638 (1930)].

McSwain, 248 N.C. at 17-18, 102 S.E.2d at 467 (citations omitted). Thus, there is an ascending degree of duty owed by the possessor of land to persons on the land based on their entrant status, i.e., trespasser, licensee, or invitee. The obligation owed to a licensee is higher than that owed to a trespasser because the possessor may be required to look out for licensees before their presence is discovered. By the same token, the obligation owed to an invitee is higher than that owed to a licensee because of the express or implied invitation for the invitee to enter the premises.

A police officer who enters the premises of another under authority of law does not fit neatly into either the invitee status or the licensee status. Accordingly, some jurisdictions apply to police officers who enter another's land in discharge of their public duties a "no-duty" rule, often referred to as the "firefighter's rule," which bars these plaintiffs from any recovery. *See, e.g., Flowers v. Rock Creek Terrace Ltd. Partnership*, 308 Md. 432, 520 A.2d 361 (1987). Where this rule is applied, "a police officer, like a firefighter, who is injured in the line of duty, 'generally cannot recover damages for negligence in the very situations that create the occasion for their services.' " *Starkley v. Trancamp Contracting Corp.*, 152 A.D.2d 358, 366, 548 N.Y.S.2d 722, 733 (1989) (quoting *Santangelo v. New York*, 71 N.Y.2d 393, 397, 526 N.Y.S.2d 812, 814, 521 N.E.2d 770, 772 (1988)).

Recognizing that some entrants do not fit well into the traditional classifications, a few jurisdictions classify such entrants injured on the land of another as *sui generis*. *See, e.g., Shypulski v. Waldorf Paper Prod. Co.*, 232 Minn. 394, 45 N.W.2d 549 (1951); *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960); *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920). Some other jurisdictions have purported to abandon any distinction based upon an entrant's status. *See, e.g., Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971). Still others have purported to abandon the distinction between licensees and invitees but have retained the common law

rules as to trespassers. *See, e.g., Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977).

Defendant urges this Court to adopt the firefighter's rule and hold that plaintiff is not entitled to any recovery in this case. However, it does not appear that the firefighter's rule, as adopted in other jurisdictions, would apply to the facts of the instant case because plaintiff was not injured by the emergency situation that caused him to be summoned to the premises. As the majority of the Court of Appeals' panel noted, "plaintiff was injured not as a result of a risk incident to the performance of his duties as a police officer, but from a condition of the premises which plaintiff's evidence tended to show was inherently dangerous." *Newton*, 114 N.C. App. at 724, 443 S.E.2d at 350. Accordingly, we hold that the firefighter's rule is inapplicable to the facts of this case.

In the instant case, plaintiff entered defendant's premises in response to a silent burglar alarm. Plaintiff was obliged to enter the premises to discharge his duties as a public officer. While plaintiff does not fit the traditional definitions of either licensee or invitee, we believe that he should be accorded the same protection as one who is invited to the landowner's premises. The police officer entering the premises of a landowner in the performance of his public duty enters by authority of law, and the officer's invitation to enter the premises should be implied in law. Thus, the landowner's duty toward the police officer who enters the premises in response to an emergency call to the premises should be no less than the duty owed to a person entering the premises at the specific invitation of the landowner. Accordingly, we hold that the duty owed to the police officer in the instant case is the same as the duty owed to an invitee. That duty, as it applies to the instant case, is as stated by the court below:

> A defendant property owner owes an invitee the duty to use ordinary care to keep his property reasonably safe and to warn of hidden perils or unsafe conditions that could be ascertained by reasonable inspection. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In order to recover, an invitee must show that the property owner either negligently created the condition that caused the injury or that the owner failed to correct the condition after receiving actual or constructive notice of its existence. *Id.*

Newton, 114 N.C. App. at 724, 443 S.E.2d at 350.

[2] The next question then is whether the Court of Appeals erred in holding that there was sufficient evidence of negligence on the part of defendant to go to the jury if plaintiff is treated as an invitee. Plaintiff contends, and the majority of the Court of Appeals' panel held, that the trial court erred by granting defendant's motion for judgment in defendant's favor notwithstanding the jury verdict for plaintiff. We agree.

A motion for judgment notwithstanding the verdict, pursuant to N.C.G.S. § 1A-1, Rule 50(b), is essentially a renewal of the motion for directed verdict; if the motion for directed verdict could have been properly granted, the motion for judgment notwithstanding the verdict should be granted. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). In ruling on a motion for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50(a), the trial court must consider the evidence in the light most favorable to the plaintiff. The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference. *Id.* at 369, 329 S.E.2d at 337-38. A directed verdict is seldom appropriate in a negligence action. Under these principles, defendant in the instant case was not entitled to a directed verdict or to judgment notwithstanding the verdict unless plaintiff's evidence, viewed in its most favorable light, failed to establish the elements of negligence or showed contributory negligence as a matter of law.

Negligence is the failure to exercise a duty of care for the safety of another. *Dunning v. Forsyth Warehouse Co.*, 272 N.C. 723, 158 S.E.2d 893 (1968). We hold that plaintiff's evidence was sufficient to raise a jury question as to whether defendant was negligent. We agree with the majority of the panel of the Court of Appeals that, when viewed in the light most favorable to plaintiff, the evidence was sufficient to show that defendant had constructive, if not actual, knowledge of the dangerous condition of the stairs and negligently failed to correct the situation and that this negligence was the proximate cause of plaintiff's injuries. Therefore, we conclude that the jury could reasonably find that defendant's failure to warn or to repair the condition of the stairway constitutes negligence. Accordingly, we affirm the Court of Appeals as to this issue.

[3] The next question on this appeal is whether the Court of Appeals erred in reversing the trial court's holding that plaintiff was contribu-

torily negligent as a matter of law. A plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980). Thus, a plaintiff may be contributorily negligent if he fails to discover and avoid a defect that is visible and obvious. *Id.* However, this rule is not applicable where there is "some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition." *Walker v. Randolph Co.*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960).

In the instant case, defendant argues that the trial court correctly held that plaintiff was contributorily negligent as a matter of law since the evidence at trial established that plaintiff had attended New Hanover High School and that he had frequently been in the field house while he was a student and since he had completed high school in 1982. However, the Court of Appeals noted:

> Plaintiff entered defendant's premises in response to a silent alarm. He went to the top of the stairs in order to make sure that the building was secure. Once plaintiff was at the top of the stairs, he had no choice but to come down. Plaintiff testified that he made a conscious effort to use care as he descended the stairs. The determination of whether plaintiff exercised the care of an ordinary prudent person under all the attendant circumstances was a determination properly before the jury, and the jury's finding that plaintiff was not contributorily negligent was supported by the evidence at trial. Thus, the trial court erred in holding that plaintiff was contributorily negligent as a matter of law.

Newton, 114 N.C. App. at 725, 443 S.E.2d at 350. We agree with the conclusion of the majority of the panel of the Court of Appeals. Accordingly, we hold that the Court of Appeals did not err in reversing the trial court's determination that plaintiff was contributorily negligent as a matter of law.

[4] The final question on this appeal is whether the trial court erred in admitting into evidence the videotaped deposition testimony of plaintiff's expert witness, Daniel M. Aquilino, a professional engineer who inspected the stairway on which plaintiff was injured. Although this issue was not addressed by the Court of Appeals, it was presented in defendant's brief to the Court of Appeals. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986).

"Petitioners whose cases come before this Court on discretionary review are limited by Rule 16 of the North Carolina Rules of Appellate Procedure to those questions they have presented in their briefs to the Court of Appeals." *Id.* at 467, 343 S.E.2d at 178. Because this issue was properly presented in defendant's brief to that court, we will consider it.

[5] Plaintiff contends that the trial court properly admitted into evidence the videotaped deposition testimony of Mr. Aquilino. Defendant objected at trial to the admission of this expert testimony on the grounds that the danger of unfair prejudice or confusion to the jury substantially outweighed any probative value that the expert testimony may have had in this case. In the videotaped deposition, Aquilino stated that, in his opinion, the slope of the stairway exceeded a safe slope. Aquilino also stated that the risk of falling on the stairs in question was much greater than the risk of falling on stairs constructed in accordance with good engineering practices and prevailing building codes.

Testimony of an expert in the form of an opinion is properly admitted into evidence if the expert's specialized knowledge will assist the jury in understanding the evidence or in determining a fact at issue in the case. N.C.G.S. § 8C-1, Rule 702 (1988). The expert's testimony, even if relevant, must also have probative value that is not substantially outweighed by the danger of unfair prejudice, confusion, or undue delay. N.C.G.S. § 8C-1, Rule 403 (1988). The trial court is afforded a wide latitude of discretion in making a determination regarding the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

We note that Mr. Aquilino's testimony as to the structure and appearance of the stairway was based on direct personal knowledge. This testimony, therefore, was admissible so long as it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rules 402, 403 (1988).

Defendant contends that Mr. Aquilino's testimony was not relevant in that it did not assist the trier of fact. Defendant further contends that Mr. Aquilino's testimony was contrary to plaintiff's testimony and would serve to confuse the jury. Defendant notes that at trial, plaintiff testified that as he descended the stairs, he turned his body so as to permit his entire foot to be on the step. Plaintiff further testified that he did not know how many steps he took before he fell and that he did not know on which step he fell or what caused him to

fall. Therefore, defendant contends, Mr. Aquilino's testimony as to the steepness of the stairway was not relevant to the cause of the fall. Furthermore, defendant argues that plaintiff's testimony that he fell backwards is contrary to Mr. Aquilino's testimony that the steps were such that "would just normally cause that person to intend to fall forward." Because defendant's contentions go to the credibility and weight of the evidence and not to its admissibility, we conclude that the trial court did not err in determining that this testimony was relevant.

[6] Defendant also contends that Mr. Aquilino's testimony concerning the North Carolina Building Code was unfairly prejudicial. On direct examination, Mr. Aquilino testified that the building code that regulates the construction of the stairs is the one that was in effect at the time the stairs were constructed, and that the risk of falling on stairs such as those at the field house was greater than the risk of falling on stairs constructed in accordance with good engineering practices and prevailing building codes. On cross-examination, however, Mr. Aquilino admitted that he did not know when the stairs were constructed and therefore could not testify with certainty as to whether the stairway, when constructed, complied with the prevailing building codes. Defendant did not object to this testimony at trial, and therefore, the trial judge did not have an opportunity to consider defendant's objections.

To preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. N.C. R. App. P. 10(b)(1). Otherwise, no question is preserved for appellate review. Defendant has failed to comply with the requirements of Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. Accordingly, since defendant here failed to object to the introduction into evidence of that portion of the deposition containing references to the North Carolina Building Code, we conclude that this issue is not properly before this Court.

For the foregoing reasons, we affirm the decision of the Court of Appeals and remand the case to that court for further remand to the trial court for entry of judgment on the jury's verdict.

AFFIRMED.

STATE OF NORTH CAROLINA v. TERENCE COREY AIKENS

No. 150A95

(Filed 9 February 1996)

1. Homicide § 260 (NCI4th)— first-degree murder—lying in wait—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of first-degree murder on the theory of lying in wait where it tended to show that defendant went to the victim's home while he was sleeping, armed himself with a loaded gun, and hid in his girlfriend's bedroom; defendant remained out of sight while his girlfriend awakened the victim and told him there was something wrong with the washing machine; defendant watched for the victim to come out of his bedroom and followed him as he walked to the laundry room; defendant shot the victim one time in the laundry room and then ran into another room; defendant watched through a crack in the door while the victim walked into the kitchen; defendant remained hidden until he walked into the kitchen and said, "You know it's over now, motherf——," and the victim said something to defendant; defendant saw the victim reach for something behind him and ordered the victim to get on the floor; defendant then shot the victim two more times; prior to the fatal shots, the victim did not have time to arm himself or to complete a 911 emergency call; and defendant testified that prior to entering the kitchen to confront the victim, he "waited around there for like a minute" and wondered whether he should go into the kitchen or leave. The victim's awareness that he had been assaulted after the first shot and the interval of time between the first shot and the fatal shots, during which time defendant confronted the victim and they had a verbal exchange, did not negate the element of surprise and render the evidence insufficient to support conviction on the theory of lying in wait.

Am Jur 2d, Homicide §§ 47, 49.

Homicide: what constitutes "lying in wait". 89 ALR2d 1140.

2. Homicide § 663 (NCI4th)— murder by lying in wait—specific intent not required—voluntary intoxication irrelevant

Voluntary intoxication is irrelevant to a charge of first-degree murder by lying in wait, a crime that does not require a finding of

specific intent, because voluntary intoxication may only be considered as a defense to specific intent crimes. Therefore, the trial court did not err by failing to instruct the jury on voluntary intoxication in a prosecution for murder by lying in wait.

Am Jur 2d, Homicide §§ 47, 49, 127-129.

Homicide: what constitutes "lying in wait". 89 ALR2d 1140.

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

3. Evidence and Witnesses § 1246 (NCI4th)— confession by juvenile—warnings of rights—trial as adult—rewarning of juvenile rights—issues first raised on appeal—constitutional rights not violated

Where a juvenile tried as an adult for first-degree murder failed to attack the admissibility of his confession at trial on the grounds that he was not informed prior to waiving his rights that he could be tried as an adult and that he was not rewarned of his juvenile rights, he may not do so for the first time on appeal. Furthermore, the trial court's findings are supported by competent evidence, and those findings support the trial court's conclusions that defendant voluntarily, knowingly, and understandingly waived his rights before giving the statement and that none of his constitutional rights were violated.

Am Jur 2d, Appellate Review § 614; Criminal Law §§ 788, 792; Evidence §§ 719, 723.

4. Criminal Law § 878 (NCI4th)— deadlocked jury—supplemental instructions—substantial compliance with statute—no coercion of verdict

The trial court's supplemental instructions to a deadlocked jury in a first-degree murder trial sufficiently addressed all of the concerns set out in N.C.G.S. § 15A-1235(b)(2) and (b)(4) and thus did not coerce a verdict in violation of defendant's constitutional rights, although they did not track the specific language of those subsections, where the trial court advised the jury to "keep an open mind and consider the opinions of all the other jurors and, if you can, to reach a unanimous decision if you can do that without the surrender of any conscientious or individual convictions"; the trial court further instructed that "no juror should give up his

own personal convictions solely for the purpose of reaching a verdict" and that the jury should try to reach a verdict "without surrendering any individual conscientious convictions"; and the court twice assured the jurors that it was not trying to force them to reach a verdict.

Am Jur 2d, Trial §§ 1104, 1108, 1448, 1451.

Appeal 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 5 December 1994 Criminal Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 December 1995.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

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

PARKER, Justice.

A juvenile petition alleging that defendant committed one count of first-degree murder was filed in the Juvenile Court in Forsyth County on 1 October 1993. By order of the Juvenile Court, defendant was bound over to Superior Court for trial as an adult pursuant to N.C.G.S. § 7A-608. On 14 February 1994 defendant was indicted for the first-degree murder of Robert Lee McCravy. Defendant was tried noncapitally. The jury found defendant guilty of first-degree murder on the basis of lying in wait, and Judge Freeman sentenced defendant to life imprisonment.

The State's evidence tended to show that Robert and Sharon McCravy were married in 1991 and lived in Winston-Salem, North Carolina. In 1993 Sharon's teenage daughter, Sherika Caines, came to live with them. Defendant thereafter became Sherika's boyfriend.

On 14 September 1993 Mark Winfrey of the Pardue Insurance Agency met with Robert and Sharon McCravy at their home to discuss life insurance. While there Winfrey saw a young female talking on the telephone and later saw her "kind of standing around the corner kind of in an eavesdropping type of situation on the other side of the kitchen." On 14 September 1993 Winfrey wrote a $100,000 life insurance policy on both Robert and Sharon McCravy.

On 28 September 1993 Damian Shaw, Frederick Carlson, and Albert Walker gave Sherika a ride home. During the drive Sherika stated they were going to be "running into some money, a lot of money real soon." Later Shaw, Carlson, and Walker went to defendant's house to eat pizza. Defendant told the group that he was going to kill Sherika's parents. Defendant showed the group the gun he was planning to use for the murders. Sometime on 29 September 1993, defendant gave the gun to Sherika. In the early morning of 30 September 1993, defendant again told Shaw that he was serious about killing Sherika's parents.

Between 6:00 and 6:30 a.m. on 30 September 1993, defendant called Sherika and talked with her for ten to fifteen minutes. Defendant then told Shaw that they were going to pick up Sherika. Defendant and Shaw told Carlson where they were going, and he joined them. At approximately 7:00 a.m. defendant, Shaw, and Carlson arrived at Sherika's house in Shaw's blue 1987 Celebrity. Defendant told Shaw and Carlson to stay in the car while he went into the house to get Sherika. Shaw saw Sherika open the front door when defendant knocked.

Defendant entered the house, got the gun from Sherika, and went to Sherika's bedroom. Defendant waited in the bedroom while Sherika awakened Robert McCravy (victim) and told him there was something wrong with the washing machine. When the victim went into the laundry room, defendant went in behind him and fired one shot without looking. Defendant then ran into another room and observed the victim through a crack in the door. Defendant observed the victim coming down the hall toward the kitchen, holding his head and yelling for someone to call the police. Defendant came out of the room and confronted the victim in the kitchen. Defendant said, "You know it's over now, motherf——-." Defendant saw the victim reach for something behind him. Defendant told the victim to get on the floor, and then he shot the victim two more times.

Bobby L. Johnson, a school bus driver with the Winston-Salem/Forsyth County Schools, pulled up to the McCravy house shortly after 7:00 a.m. on 30 September 1993. Johnson waited thirty to forty-five seconds for Sherika. While Johnson was waiting he noticed a dark, older, dirty car sitting in the driveway. Johnson could not see in the front seat of the car, but he saw two males sitting in the backseat. When Sherika did not appear, Johnson proceeded on his route.

At 7:18 a.m. Kelly Howell of the Forsyth County Sheriff's Department got a call from Emergency Medical Services (EMS). EMS reported a 911 hang-up call from the McCravy residence. Howell called the residence, and a young female answered the phone. Howell testified that the female was polite but somewhat nervous and said that she accidentally hit the speed dial and everything was fine.

While parked in the driveway at the McCravy residence, Shaw saw the screen come out of one of the front windows of the house and then saw Sherika climb out the window and run to the car. Sherika got in the backseat with Carlson and said, "He just shot him. He just shot him. Fred, go in the house." Carlson went toward the front door, with Shaw and Sherika following. As they entered the house, they saw defendant standing in the hallway with a gun in his hand and blood on the floor toward the kitchen and on the door frame. Defendant was yelling, "F— him, f— him. F— that motherf——-." Shaw and Carlson walked to the kitchen and saw the victim lying on the kitchen floor. Defendant yelled, "Make sure this motherf——- is dead!" Defendant then walked over and kicked the victim.

Sherika removed several telephones from the house, and the group left. Shaw got into his own car; and defendant, Carlson, and Sherika got into the victim's Mercedes-Benz. The group went to Albert Walker's house, where defendant told Walker what had occurred. The group, including Walker, disposed of the telephones in a trash bin, returned the victim's automobile to his residence, threw the gun in a local lake, and threw the victim's wallet down the sewer.

During the investigation of the murder, investigators discovered the 911 call; as a result of this information, Sherika gave a statement. Officers then arrested Shaw, who also gave a statement. Detective Gary Thomas arrested defendant and transported him to the Hall of Justice. Detective Thomas advised defendant of his *Miranda* rights and advised him not to make a statement. Upon arrival at the Hall of Justice, Detective Alex Niforos advised defendant of his juvenile rights. Defendant initialed each of his rights; affirmed that he understood them; stated that he did not want a parent, guardian, custodian, or lawyer present; and stated that he wanted to answer questions. At 5:15 p.m. on 30 September 1993, defendant agreed to make a statement. Defendant wrote, "I am not guilty of murder." Niforos told defendant that he knew he was lying because Sherika had told the truth. Upon his request, defendant was permitted to speak with

Sherika. At 6:25 p.m. defendant made another statement, in which he confessed.

Frederick Carlson was arrested later and also made a statement. Carlson and Shaw were charged with first-degree murder and pled guilty to accessory after the fact of murder and felony larceny of an automobile.

Dr. Donald Jason, an expert in forensic pathology, performed an autopsy on the victim on 1 October 1993 and testified that the victim had three bullet wounds. The first bullet wound, which went from the left upper part of the victim's head to the right upper part of the head, was inflicted while the victim was leaning over the washer in the laundry room. The second bullet wound, above the victim's left eyebrow, was inflicted while the victim was in the kitchen, either while the victim was standing or kneeling. The last bullet wound, in the back right part of the head, was inflicted while the victim lay on the floor. Dr. Jason testified that the victim died as a result of the bullet wound over the left eyebrow.

Defendant testified on his own behalf and also presented the testimony of two expert witnesses. David Abernethy, an expert in substance abuse, testified that defendant was alcohol- and cannabis-dependent. Claudia Coleman, an expert in psychology and substance abuse, testified that results from defendant's psychological tests looked "very much like the profile of a young substance abuser or a young addict."

Defendant's account of the murder was substantially similar to that presented by the State. Defendant admitted that he killed the victim but claimed that he did not know what he was doing at the time of the murder because he was under the influence of alcohol. Defendant also testified that after he fired the first shot into the laundry room, he ran into another room and debated whether to pursue the victim into the kitchen or whether to leave. He testified that when he went into the kitchen, he "started talking to [the victim] about why [the victim] didn't like [him]." Defendant also testified that the victim said something to him before the fatal shots, although he cannot remember what he said. Defendant denied kicking or yelling at the victim. Defendant testified that he felt sorry for the victim and himself and that he "wouldn't want to be hunt [sic] down like that," "[l]ike the way I did him."

[1] In defendant's first assignments of error, he contends there was insufficient evidence to convict him of first-degree murder on the theory of lying in wait and, therefore, that this theory should not have been submitted to the jury. Specifically, defendant argues that the element of surprise is lacking in this case. Defendant contends that the initial shot in the laundry room that alerted the victim, the time lapse between the first shot and the fatal attack, and defendant's confrontation and conversation with the victim prior to the killing negated the element of surprise. Thus, defendant contends there was insufficient evidence to support a conviction based on the theory of lying in wait. We do not agree.

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

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

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

Viewed in the light most favorable to the State, the evidence in the instant case was sufficient to support the submission of murder by lying in wait to the jury. In *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994), we stated that a defendant commits homicide by lying in wait when he "lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, [and] intentionally assaults the victim, proximately causing the victim's death." *Id.* at 231, 446 S.E.2d at 12 (citations omitted). In *State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979), we described "lying in wait" as follows:

> [W]hen G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches and waits in ambush for his victim is most certainly lying in wait.

Id. at 147-48, 257 S.E.2d at 425.

In the instant case defendant went to the victim's home while he was sleeping, armed himself with a loaded gun, and hid in Sherika's bedroom. Defendant remained out of sight while Sherika awakened the victim and told him there was something wrong with the washing machine. Defendant watched for the victim to come out of his bedroom and then followed him as he walked to the laundry room. Defendant shot the victim one time and then ran into another room. Defendant watched through a crack while the victim walked into the kitchen. Defendant remained hidden until he walked in the kitchen and said, "You know it's over now, motherf——-." Defendant saw the victim reach for something behind him and ordered the victim to get on the floor. Defendant then shot the victim two more times. Clearly these facts describe "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim," as well as "[a]n assailant who watches and waits in ambush for his victim." *Id.*

Defendant attempts to distinguish this case from previous lying in wait cases based on the victim's awareness that he had been assaulted after the first shot and the interval of time between the first shot and the fatal shot, during which time defendant confronted the victim and they had a verbal exchange. Again we do not agree. As stated in *Allison*:

> [I]t is not necessary that [an assailant] be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait.

Id. at 148, 257 S.E.2d at 425 (citation omitted). In the instant case defendant revealed himself to the victim only after defendant had

shot the victim one time and just prior to shooting the victim two more times. Although the victim was aware that he had been injured after the first shot, he did not know the identity, whereabouts, or intentions of his assailant. Prior to the fatal shots, the victim did not have time to arm himself or to complete a 911 emergency call. Furthermore, defendant testified that prior to entering the kitchen to confront the victim, he "waited around there for like a minute" and wondered whether he should go in the kitchen or leave. "Even a moment's deliberate pause before killing one unaware of the impending assault and consequently 'without opportunity to defend himself' satisfies the definition of murder perpetrated by lying in wait." *State v. Brown*, 320 N.C. 179, 190, 358 S.E.2d 1, 10 (quoting *State v. Wiseman*, 178 N.C. 784, 790, 101 S.E. 629, 631 (1919)), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

We hold that there was sufficient evidence tending to prove each element of first-degree murder by lying in wait and that it was not error to submit this theory of first-degree murder to the jury. These assignments of error are overruled.

[2] In defendant's next assignment of error, he contends that the trial court erred by denying his request for an instruction on voluntary intoxication. Defendant argues that murder perpetrated by lying in wait is a specific-intent offense to which the defense of voluntary intoxication is applicable. This assignment of error is without merit.

We have previously held that "[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990). Defendant argues that while the specific intent to kill is not an element of murder by lying in wait, the crime still involves a specific intent, namely, the intent to "wait." Defendant acknowledges that we previously rejected this argument in *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992); however, defendant requests that *Baldwin* be reexamined.

In *Baldwin* we stated:

> [L]ying in wait is a physical act. Like poison, imprisonment, starving, and torture—the other physical acts specified in N.C.G.S. § 14-17—lying in wait is a method employed to kill. It does not require a finding of any specific intent. Because voluntary intoxi-

> cation may only be considered as a defense to specific intent crimes, it is therefore irrelevant to a charge of first-degree murder by lying in wait, a crime that does not require a finding of specific intent.

Id. at 461-62, 412 S.E.2d at 40-41 (citations omitted). Defendant offers no argument meriting reconsideration of our position on this issue. Thus, this assignment of error is overruled.

[3] By a further assignment of error, defendant contends that the trial court improperly denied his motion to suppress his confession. Defendant contends that his confession should have been suppressed for two reasons: (i) defendant was not informed prior to waiving his rights that he could be tried as an adult, and (ii) defendant should have been rewarned of his juvenile rights prior to making his confession.

Defendant did not assert these issues in his written motion to suppress filed prior to his trial. Similarly, defendant did not raise these issues during the *voir dire* of Detective Niforos. Defense counsel argued only that defendant, prior to his confession, had indicated that he did not wish to be questioned further and that the confession, therefore, should be suppressed. During the *voir dire* defendant also asked the court to determine whether defendant made a "knowing, willing and understanding waiver of his rights" pursuant to N.C.G.S. § 7A-595. The trial court made findings of fact and concluded that defendant "voluntarily, knowingly, willfully, understandingly and voluntarily waived his rights and gave the statement in question" and that none of defendant's constitutional rights were violated.

Defendant raises the two issues before this Court for the first time on appeal. Having failed to attack the admissibility of his confession on these grounds during the trial, defendant may not do so for the first time on appeal. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). Moreover, assuming *arguendo* that defendant properly preserved this error for appeal, after a review of the record we find that the trial court's findings of fact are supported by competent evidence and the findings of fact support the trial court's conclusions of law. Therefore, this assignment of error is overruled.

[4] By defendant's final assignment of error, he contends that the trial court improperly instructed the jury pursuant to N.C.G.S. § 15A-1235 when the jury foreperson reported that the jury was deadlocked. This assignment of error is also without merit.

In response to the foreperson's announcement that the jury was deadlocked eleven to one, the trial court gave the following supplemental instruction:

> Well, let me preface this by saying that I am certainly in no way trying to coerce you or force you to reach a decision, but let me tell you that it is your duty as jurors to discuss this case, deliberate on it and to keep an open mind and consider the opinions of all the other jurors and, if you can, to reach a unanimous decision if you can do that without the surrender of any conscientious or individual convictions. And that is your duty as a juror. However, no juror should give up his own personal convictions solely for the purpose of reaching a verdict.
>
> We've been in this case all week. It's a fairly long case and maybe two hours and a half is not quite enough deliberation time. So I'm going to let you go back and see if you can reason it over as reasonable men and women and reach a unanimous decision, if you can, without surrendering any individual conscientious convictions. I'm going to let you try just a little more deliberation, but I'm certainly not trying to force you to reach a verdict. But if you'll just go back and talk about it and try to keep an open mind and be reasonable and give every consideration a full and open opportunity and consideration and try a little bit longer. And we'll send for you after a while or you can send a note back. So if you all will step back and resume your deliberations.

Defendant did not object to the court's supplemental instruction, and twenty minutes later the jury returned with a verdict.

Defendant contends that this supplemental instruction did not comply with the statutory requirements of N.C.G.S. § 15A-1235 and thereby coerced a jury verdict in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 24 of the North Carolina Constitution.

Defendant, relying on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), contends that he was not required to object to these instructions at trial because failure to comply with a statutory mandate preserves the error for appellate review even absent an objection at trial. Defendant argues that this error is preserved, since "the trial court has a statutory duty under N.C.G.S. § 15A-1235 to instruct in accordance with the statute."

Defendant's reliance on *State v. Ashe* to overcome his failure to object is misplaced. In *Ashe* the Court held that the statute at issue, N.C.G.S. § 15A-1233(a), mandated that the jury be returned to the courtroom and that the trial judge exercise discretion in determining whether to allow the jurors to review evidence previously presented. The trial court's failure to comply with this mandatory statute relieved defendant of his obligation to object in order to preserve the error for review. In the present case the statute at issue, N.C.G.S. § 15A-1235(c), is permissive rather than mandatory. *State v. Williams*, 315 N.C. 310, 326, 338 S.E.2d 75, 85 (1986). Hence, defendant having failed to object to the instruction, our review is to determine whether the error, if any, constituted plain error. *Id.* at 328, 338 S.E.2d at 86.

Section 15A-1235 of the North Carolina General Statutes provides in pertinent part:

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

> jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C.G.S. § 15A-1235(a)-(c) (1988). Whenever the trial judge gives a deadlocked jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), he must give all of them. *Williams*, 315 N.C. 310, 338 S.E.2d 75. Defendant contends that the trial court's instruction did not contain language tracking subsection 15A-1235(b)(2), which states, "Each juror must decide the case for himself," and subsection 15A-1235(b)(4), which states, "No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict."

We have previously held that "every variance from the procedures set forth in [N.C.G.S. § 15A-1235] does not require the granting of a new trial." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985).

> [I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

Id. We conclude the trial court's instructions addressed all of the concerns set out in N.C.G.S. § 15A-1235(b)(2) and (b)(4). The trial court advised the jury to "keep an open mind and consider the opinions of all the other jurors and, if you can, to reach a unanimous decision if you can do that without the surrender of any conscientious or individual convictions." The trial court further instructed the jury that "no juror should give up his own personal convictions solely for the purpose of reaching a verdict" and instructed the jury to try to reach a verdict "without surrendering any individual conscientious convictions." Furthermore, the trial court twice assured the jurors that it was not trying to force them to reach a verdict. In *Peek* we stated:

> [A]lthough the instructions do not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235, the essence of the instructions was merely to ask the jury to continue to deliberate. The instructions in no way contained any element of coercion that would warrant a new trial in this matter. Indeed we note that the effect of the instructions was not so coercive as to impel defendant's trial counsel to object to the instructions.

Id. at 272, 328 S.E.2d at 253. Similarly, in the instant case, the trial court's instructions were in no way coercive. On the contrary, the trial court repeatedly emphasized to the jurors the importance of their individual convictions. We hold the trial court did not err in its reinstruction. Accordingly, plain error analysis is unnecessary. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM CHRISTOPHER GREGORY

No. 410A94

(Filed 9 February 1996)

1. Appeal and Error § 406 (NCI4th)— capital case—failure to object or allege plain error—consideration of question under plain error analysis

Although defendant failed to object at trial and failed to include the words "plain error" in his brief, the Supreme Court, in the exercise of its discretion under Rule 2 of the Rules of Appellate Procedure and following precedent of the Court electing to review unpreserved assignments of error in capital cases, elected to consider under a plain error analysis defendant's contention that his right to a fair trial was violated by a colloquy between the trial court and a prospective juror where defendant succeeded in presenting and arguing the issue fully and in establishing that fundamental error meeting the standard of plain error had occurred.

Am Jur 2d, Appellate Review §§ 486, 767 et seq.

2. Constitutional Law § 261 (NCI4th)— capital trial—colloquy between court and prospective juror—presence of trial jurors—denial of impartial jury

Defendant's right to an impartial jury was violated in a capital trial when the trial court asked prospective jurors if anyone had a compelling reason for being excused or deferred, and an employee of defendant's former attorney told the court in the

presence of eight persons who served on the jury in defendant's trial, convicted him and recommended a sentence of death that she helped prepare defendant's defense, she had learned confidential information favorable to the State, and the knowledge of such information might influence her decision, since this dialogue between the court and this prospective juror had the potential to lead jurors to rely on assumptions about evidence not presented at trial. This error was not cured by the trial court's curative instruction to the remaining prospective jurors not to consider anything they had heard from this particular prospective juror when viewed in light of the evidence introduced and the issues thereby raised for resolution by the jury.

Am Jur 2d, Criminal Law §§ 649, 838.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. 52 ALR4th 964.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Gray, J., at the 1 August 1994 Criminal Session of Superior Court, Davie County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments for assault with a deadly weapon with intent to kill inflicting serious injury and felonious breaking and entering was allowed 7 June 1995. Heard in the Supreme Court 14 December 1995.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Special Deputy Attorney General, for the State.

Burton Craige and Donnell Van Noppen III for defendant-appellant.

ORR, Justice.

Defendant was indicted for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious breaking and entering. He was tried capitally to a jury that found him guilty of all charges. The charges against defendant arose out of an incident that occurred at the home of defendant's seventeen-year-old former girlfriend, Evette Howell. The State's evidence tended to show that defendant broke into the Howell home and retrieved a .25-caliber handgun belonging to Evette's father from the

father's bedroom closet. Defendant walked into Evette's bedroom and fatally shot her in the head in the presence of their eighteen-month-old child. Defendant then crossed the hall into the bedroom of Evette's fifteen-year-old brother, Fonzie, struck him in the head with the gun and shot him in the forehead. Fonzie survived, suffering life-altering injuries. Although defendant had confessed to shooting Evette, he argued at trial that he did not have a specific intent to kill and that his cousin, who was in the house when the shootings occurred, shot Fonzie.

Defendant contends that he should receive a new trial because his constitutional right to trial by an impartial jury was violated during jury selection. We agree.

On 11 August 1992, the trial court found defendant indigent and appointed Wade Leonard and William Ijames to represent him. During jury voir dire, the trial court relieved attorneys Leonard and Ijames and appointed David Minor and Sam Winthrop as defendant's trial counsel. The case was rescheduled for trial beginning on 1 August 1994.

Jury selection began on 1 August 1994. After the luncheon recess on 2 August, the trial court addressed the prospective jurors called for 2 August. The court welcomed the jurors, stated the offenses with which defendant was charged, introduced the attorneys, and stated the statutory qualifications for jury service. The court then addressed the issue of jury deferment and asked prospective jurors if anyone had a compelling reason for being excused or deferred and, if so, to state the reason in open court.

One of the prospective jurors who stepped forward was Diana Ijames. She asked to be excused because she had assisted defendant's former attorney, William Ijames, in preparing the defense of this case. The discussion between the court and Ms. Ijames occurred in the presence of eight prospective jurors who ultimately were chosen to sit on the petit jury that deliberated on the case. The following is the specific dialogue that took place:

> PROSPECTIVE JUROR: My name is Diana Ijames.
>
> THE COURT: I-j-a-m-e-s?
>
> PROSPECTIVE JUROR: I work for Mr. Bill Ijames, William James Ijames, the attorney on the first case. So I helped prepare the defense for Mr. Chris Gregory.

THE COURT: Do you believe if you were to serve as a juror in this case that you could base your verdict entirely on what you hear from the witness stand over here and the Court's instruction to you on the law?

PROSPECTIVE JUROR: I feel I could, sir.

THE COURT: All right. Do you feel like in connection with the preparation of this case that you learned some things during the course of the preparation that would be confidential and if learned by the State would be favorable to the State?

PROSPECTIVE JUROR: Would be favorable to the State?

THE COURT: To the State.

PROSPECTIVE JUROR: Yes, sir, I do.

THE COURT: Do you feel like those things that you learned in a confidential fashion during the preparation for the trial of the case would influence your decision in the case, your verdict in the case?

PROSPECTIVE JUROR: (No response from prospective juror.)

THE COURT: In other words, you apparently have some information that other jurors would not have; is that right?

PROSPECTIVE JUROR: Yes, your Honor.

THE COURT: Would that influence your decision in the case if you were allowed to serve on the jury?

MR. MINOR [defendant's attorney]: May we approach the bench before you continue with this question?

PROSPECTIVE JUROR: I feel it may influence my decision, yes, sir.

After a bench conference, the court excused Ms. Ijames and gave the remaining prospective jurors the following instruction:

> Ladies and gentlemen of the jury that have been summoned for jury duty, you are instructed at this time anything you have heard from this particular juror you have to strike it from your mind, not to give it any consideration at all.

[1] Defendant argues that this dialogue constituted error that violated his constitutional right to trial by an impartial jury. Although

defendant requested the limiting instruction, he made no objection during the court's questioning of Ms. Ijames and does not specifically claim in his assignment of error that it constituted plain error. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . ."

Under the plain error rule, errors or defects affecting substantial rights may be addressed even though they were not brought to the attention of the trial court. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure provides:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

In limited situations, this Court may elect to review such unpreserved issues for plain error, if specifically and distinctly contended to amount to plain error in accordance with Rule 10(c)(4). This Court has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence. *See State v. Sierra*, 335 N.C. 753, 440 S.E.2d 791 (1994); *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375.

This specific error alleged by defendant involves neither jury instructions nor a ruling on the admissibility of evidence. Moreover, since defendant did not object at trial or allege plain error, he has failed to properly preserve this issue for appeal. *State v. Moseley*, 338 N.C. 1, 36, 449 S.E.2d 412, 433-34 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995); N.C. R. App. P. 10.

However, Rule 2 of the North Carolina Rules of Appellate Procedure provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its

> own initiative, and may order proceedings in accordance with its directions.

In *State v. Moseley*, we elected to apply plain error analysis even though the defendant had neither objected nor alleged plain error. We stated that "since this is a case in which the death penalty was imposed, we will consider the merits of the issue under a plain error analysis." *Moseley*, 338 N.C. at 36, 449 S.E.2d at 434. This reasoning is consistent with prior holdings by this Court in capital cases in which we elected to address an error not properly preserved. *See State v. Payne*, 328 N.C. 377, 394, 402 S.E.2d 582, 592 (1991) (although defendant waived his right to have an issue considered on appeal by failing to object or move for mistrial, because this was a capital case, the Court chose to address the issue); *State v. Price*, 326 N.C. 56, 87, 388 S.E.2d 84, 102 (in a capital case, even though defendant did not object at trial and the assignment of error was improperly submitted to the appellate court, the Court may review the prosecutor's argument), *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990); *State v. Warren*, 289 N.C. 551, 558, 223 S.E.2d 317, 322 (1976) (where defendant did not object or assign error, because this was a capital case, the Court *ex mero motu* took cognizance of the error); *State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) (in capital cases, the Court reviews the record and *ex mero motu* takes notice of prejudicial error), *sentence vacated in part on other grounds*, 408 U.S. 940, 33 L. Ed. 2d 764 (1972); *State v. Fowler*, 270 N.C. 468, 472, 155 S.E.2d 83, 86 (1967) (in a capital case, the Court picks up any errors that appear in the record, whether excepted to and assigned as error or not); *State v. Knight*, 248 N.C. 384, 390, 103 S.E.2d 452, 456 (1958) (where defendant did not assign error, because the Court was dealing with a capital case, it took cognizance of the error *ex mero motu*); *State v. Herring*, 226 N.C. 213, 214, 37 S.E.2d 319, 320 (1946) (although assignments of error were not in compliance with the rules, because this was a capital case wherein the life of the defendant was at stake, these assignments of error were considered).

> In this enlightened age the humanity of the law is such that no man shall suffer death as a penalty for crime, except upon conviction in a trial free from substantial error and in which the constitutional and statutory safeguards for the protection of his rights have been scrupulously observed. Therefore, in all capital cases reaching this Court, it is the settled policy to examine the record for the ascertainment of reversible error. If, upon such an

> examination, error is found, it then becomes the duty of the Court upon its own motion to recognize and act upon the error so found.

State v. McCoy, 236 N.C. 121, 123, 71 S.E.2d 921, 922 (1952) (citations omitted), *quoted in State v. Warren*, 289 N.C. at 558, 223 S.E.2d at 321-22.

In this case, although defendant failed to include the exact words "plain error" in his brief, he succeeded in presenting and arguing the issue fully and in establishing conclusively that fundamental error meeting the standard of plain error enunciated in *State v. Odom* occurred. Therefore, in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure and following the precedent of this Court electing to review unpreserved assignments of error in capital cases, we elect to consider defendant's contention under a plain error analysis. Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial. *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

[2] Defendant claims that he was denied a fair trial because the exchange between the court and Ms. Ijames violated his constitutional right to trial by an impartial jury. The United States Supreme Court has held that the Sixth Amendment and the Fourteenth Amendment's Due Process Clause require the impartiality of any jury impaneled to try a cause:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257[, 92 L. Ed. 682] (1948); *Tumey v. Ohio*, 273 U.S. 510[, 71 L. Ed. 749] (1927). 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136[, 99 L. Ed. 942, 946] (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville*, 362 U.S. 199[, 4 L. Ed. 2d 654] (1960). This is true, regardless of the heinousness of the crime

> charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155[, 25 L. Ed. 244, 246 (1878)]."

Morgan v. Illinois, 504 U.S. 719, 727, 119 L. Ed. 2d 492, 501 (1992) (quoting *Irvin v. Dowd*, 366 U.S. 717, 721-22, 6 L. Ed. 2d 751, 755 (1961) (footnote omitted)).

In applying this principle to the analogous situation of prejudicial pretrial publicity, the court in *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978), stated that "[o]ne of the fundamental rules of criminal law is that the government has the burden of establishing guilt solely on the basis of evidence produced in the courtroom and under the circumstances assuring the defendant the attendant judicial safeguards." *Id.* at 470 (citing *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462, 51 L. Ed. 879, 881 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.")).

In the case at bar, because of the court's questioning of Ms. Ijames, eight of the jurors who determined defendant's guilt and ultimately recommended the death sentence heard Ms. Ijames say, "I helped prepare the defense for Mr. Chris Gregory;" answer "Yes" when the court asked if she had learned confidential information which would be favorable to the State if learned by the State; and say about that confidential information, "I feel it may influence my decision." As aptly argued by defendant, this information left the eight jurors who heard the conversation free to speculate about the nature of the damning information that defendant and his attorneys were presumably hiding from their view. If the jury saw any gaps in the evidence, the colloquy with Ms. Ijames invited them to fill in the gaps on the assumption that the missing information was favorable to the State. Because the dialogue between the court and Ms. Ijames had the potential to lead jurors to rely on assumptions about evidence not presented at trial, we cannot be satisfied that the verdict was based solely upon the evidence developed at the trial. The dialogue was likely to cause the jurors to form an opinion before they heard any evidence at trial, and, as quoted above, a juror who has formed an opinion cannot be impartial.

The State argues that any error was corrected by the trial court's curative instruction. We are not persuaded by this argument. Although the law presumes that jurors will understand and comply with the instructions of the court, *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975); *State v. Long*, 280 N.C. 633, 641, 187 S.E.2d 47, 52 (1972), this Court has held that some errors are so inherently prejudicial that they may not be considered "cured" even though the trial court has given a strong corrective instruction, *State v. Sanderson*, 336 N.C. 1, 18, 442 S.E.2d 33, 43 (1994).

In *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), an armed robbery case, the unresponsive statement of a witness informed the jury that the defendant had been indicted for murder, and the trial court allowed defendant's motion to strike and instructed the jury not to consider what the witness said about defendant having been indicted for murder. There, we stated that whether the prejudicial effect of such incompetent statements should be deemed cured by curative instructions depends upon the nature of the evidence and the circumstances of the particular case. *Id.* at 272-73, 154 S.E.2d at 60-61. After noting that subsequent incidents in the trial tended to emphasize rather than dispel the prejudicial effect of the testimony, we held that the prejudicial effect was not erased by the court's curative instruction and concluded that the court should have granted the defendant's motion for a mistrial. *Id.*

As in *State v. Aycoth*, in the case at bar, the subsequent incidents in the trial below tended to emphasize rather than dispel the prejudicial effect of the statements made by Ms. Ijames. Since the inquiry at issue took place prior to any evidence being offered in the case and no objection was made to the trial court's actions, the trial court's curative instruction may well have seemed a reasonable and prudent course of conduct. However, when viewed in light of the evidence introduced at trial and the questions thereby raised, which were to be resolved by the jury, the potential prejudice to defendant becomes apparent.

Defendant presented only one witness at trial, Dr. Bert Bennett, a psychologist who saw defendant on five occasions. Dr. Bennett testified that in his opinion, defendant did not have the intent to kill Evette Howell when he shot her. Evidence at trial also called into question whether defendant or defendant's cousin, Gabe Wilson, shot Fonzie. That evidence included the following facts introduced at trial: in his statement to police, defendant stated that Wilson shot Fonzie;

in exchange for testifying against defendant, the State promised Wilson to keep his case in juvenile court and to release him from juvenile detention when he reached age eighteen; and the SBI was unable to perform a gunshot residue analysis to determine whether Wilson could have shot Fonzie because more than nine hours had elapsed between the time the weapon was fired and the time the hand-wiping samples were obtained from Wilson. Thus, the issues of defendant's intent to kill Evette and of defendant's role in Fonzie's shooting were both controverted.

Once these subsequent issues in the trial were raised, the significant prejudice of Ms. Ijames' statements became manifest. We cannot know whether Ms. Ijames' declarations that she knew confidential information about the case *favorable to the State* and that the knowledge of such information might "influence" her decision did in fact influence the jury's resolution of these issues, and thereby its decision in either the guilt or the sentencing proceedings. However, the potential for such knowledge to impact the jury's decisions is too great, and the result of such impact too prejudicial to defendant, to hold that the curative instruction prior to the submission of evidence sufficiently removed any adverse impression from the minds of the jurors.

We conclude that this error resulted in the denial to defendant of a fair trial; therefore, it constitutes plain error. For the foregoing reasons, defendant is entitled to a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. TERRY DION JAMES

No. 63A95

(Filed 9 February 1996)

1. Homicide § 573 (NCI4th)— firing into club and parking lot—malice—no instruction on involuntary manslaughter

There was no error in a first-degree murder trial which arose from defendant firing an assault rifle into a club building and parking lot where the court did not instruct the jury on the lesser included offense of involuntary manslaughter. Although defendant contended that the evidence showed that he did not know

that the automobiles were occupied at the time he fired and that he did not intend to shoot into the parking lot, the evidence showed that defendant fired a semiautomatic weapon into the club and its adjoining parking lot; unrefuted testimony showed that he planned to fire a rifle into the club and warned another person not to reenter the club because defendant intended to "shoot it up"; and, after momentarily leaving the area in front of the club, the driver of the automobile in which defendant was riding had to slow down to avoid hitting people exiting the club. The uncontradicted evidence establishes that defendant fired into an area he knew was occupied and all of the evidence clearly shows malice.

Am Jur 2d, Homicide §§ 530, 531.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

Propriety of lesser-included-offense charge to jury in federal homicide prosecution. 101 ALR Fed. 615.

2. Assault and Battery § 82 (NCI4th)— discharging a firearm into occupied property—instructions—knowledge of occupation

The trial court did not err in a prosecution for discharging a firearm into occupied property by using the pattern jury instruction, which informed the jury that it could find defendant guilty if defendant knew or had reasonable grounds to believe that the automobile might be occupied. The interpretation of *State v. Williams*, 284 N.C. 67, is reaffirmed. N.C.G.S. § 14-34.1.

Am Jur 2d, Assault and Battery § 53; Weapons and Firearms § 29.

3. Assault and Battery § 81 (NCI4th); Homicide § 280 (NCI4th)— firing into parking lot—discharging a firearm into occupied property—felony murder—evidence sufficient

There was sufficient evidence to find defendant guilty of discharging a firearm into occupied property, conspiracy to discharge a firearm into occupied property, and first-degree murder under a felony murder theory where intent to shoot into vehicles can be inferred from the fact that defendant fired a semiautomatic weapon into an area where he knew automobiles were

parked and the State presented evidence that defendant knew people were exiting the club and present in the parking lot when he fired the rifle, from which the jury could infer that defendant clearly had reasonable grounds to believe that the automobiles might be occupied by one or more persons.

Am Jur 2d, Assault and Battery §§ 48-53; Homicide § 442; Weapons and Firearms § 29.

4. Criminal Law § 810 (NCI4th)— right not to testify—instructions—not testifying as trial tactic

The trial court did not err in a prosecution for discharging a firearm into occupied property and felony murder by instructing the jury that a defendant does not have to take the stand or present evidence, that the defendant's choice not to do so cannot be used against the defendant, that it is a constitutional right not to be required to take the stand, and that it may also be a trial tactic. While the reference to trial tactics was unnecessary, it was not a comment on defendant's failure to testify, the judge properly informed the jury that defendant's failure to testify was not to be used against him, and, at the conclusion of the trial, the court instructed the jury that defendant's decision not to testify created no presumption against him and that his silence was not to influence the jury's decision.

Am Jur 2d, Criminal Law §§ 705, 940.

Propriety under *Griffin v. California* and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify. 18 ALR3d 1335.

5. Criminal Law § 1233 (NCI4th)— Fair Sentencing Act—IQ of 73—not found as mitigating factor

The trial court did not err when sentencing defendant for discharging a firearm into occupied property and conspiracy to discharge a firearm into occupied property by not finding defendant's IQ of 73 a mitigating factor even though the State stipulated to defendant's limited intelligence and the jury found defendant's IQ to be a mitigating circumstance. To establish that the trial judge erred in failing to find a statutory mitigating factor, the evidence must show conclusively the existence of the statutory mitigating factor and that no other reasonable inference could be drawn from the evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 8 August 1994 Criminal Session of Superior Court, Pender County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed on 17 April 1995. Heard in the Supreme Court 11 December 1995.

Michael F. Easley, Attorney General, by Clarence DelForge III, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

FRYE, Justice.

Defendant, Terry Dion James, was indicted for first-degree murder, two counts of discharging a firearm into occupied property, and two counts of conspiracy to discharge a firearm into occupied property. Defendant was convicted on all counts, except one count of conspiracy to discharge a firearm into occupied property. Defendant's first-degree murder conviction was based on a theory of felony murder, with discharging a firearm into occupied property being the underlying felony.

Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial judge imposed a sentence of life imprisonment for the first-degree murder conviction. The judge also imposed prison sentences of ten years for one count of discharging a firearm into occupied property and three years for conspiracy to discharge a firearm into occupied property, the sentences to run consecutively. Judgment was arrested on one count of discharging a firearm into occupied property.

The State's evidence at trial tended to show the following facts and circumstances:

During the late night hours of Saturday, 6 March 1993, and the early morning hours of 7 March 1993, Valentine Farland was at the American Legion Post in Pender County. He had a Chinese-made SKS semiautomatic rifle with a thirty-round banana clip in his possession.

Upon leaving the American Legion Post, Farland put the rifle in the trunk of a blue, four-door Hyundai automobile owned by Jerrod Watkins. Farland then left the American Legion Post and went to the Bordeaux Club (the club). Defendant, along with Jerrod Watkins, Zollie Watkins, Tyrone Batts, and Williford Farrier, traveled in Jerrod's automobile to the club.

Defendant and the four other men were sitting outside the club in Jerrod's automobile when Cleveland James walked out of the club. Defendant told Cleveland not to go back in the club because "we're going to shoot the place up." Cleveland disregarded defendant's warning and went back into the club to tell others to leave. The people inside the club immediately began to run outside.

At this point, defendant instructed the driver of the automobile to "[g]o down, then come back, and I'll be shooting the place [from the automobile]." The driver followed these directions. Because of the people in the street, the automobile slowed down as it passed the club. Defendant rolled down the window and began firing the SKS rifle in the direction of the club. He continued shooting as the automobile proceeded down the street that ran along the front of the club and adjoining parking lot.

Hartense James had exited the club upon Cleveland's warning. Hartense was in the driver's seat of his Ford Mustang automobile attempting to start his engine when he was struck by a bullet. The bullet penetrated the door of his automobile and struck him in the side, causing severe damage to his right kidney, abdominal aorta, and liver. Several individuals transported Hartense to the hospital, where he died as a result of the gunshot wound. The State Bureau of Investigation ballistics experts confirmed that the bullet that struck and killed Hartense was fired from the SKS semiautomatic rifle that defendant was shooting.

In addition to striking Hartense's automobile, several bullets struck Yolanda Webb's Pontiac Grand Am automobile, which was parked next to Hartense's automobile. The front windshield of Webb's vehicle was broken on the passenger side. There was a hole above the license plate, damage to the rear window, a broken left tail light, and a dent along the back passenger side quarter panel. Two bullets were taken from inside the vehicle. SBI experts could not ascertain with certainty whether either bullet had been fired from the rifle that defendant was shooting.

After the shooting, Jerrod drove defendant to the home of defendant's sister. Defendant took the rifle with him. The police arrested him there the next morning. An officer found the rifle outside of the house. There were only three rounds left in the thirty-round banana clip.

At trial, defendant presented no evidence and did not testify. His motion to dismiss all the charges against him, made at the close of the State's evidence, was denied.

[1] Defendant makes five arguments on appeal to this Court. As his first argument, defendant contends that the trial court erred by not instructing the jury on the lesser included offense of involuntary manslaughter.

In *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), we said:

> Involuntary manslaughter and second-degree murder are lesser-included offenses supported by an indictment charging murder in the first degree. *E.g.*, *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record supporting the lesser offense. *Id.* at 593, 386 [S.E.2d] at 561. Conversely, "[w]here the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* at 594, 386 S.E.2d at 561; *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). "[W]hen the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the Court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983) (quoting *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982)).

Yelverton, 334 N.C. at 544-45, 434 S.E.2d at 190. Thus, the question in this case is whether there was evidence adduced at trial to support a conviction of involuntary manslaughter. We hold there was not.

Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *quoted in State v. Rose*, 335 N.C. 301, 327, 439 S.E.2d 518, 532, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883

(1994). Culpable negligence is defined as an act or omission evidencing a disregard for human rights and safety. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 918 (1978). Defendant argues that the evidence shows that he did not know that the automobiles were occupied at the time he shot into the parking lot and that he did not intend to shoot into the automobiles but into the club. He further argues that the jury could infer from this evidence that the victim's death was caused by defendant's culpably negligent actions.

However, the evidence is clear that defendant acted with malice and therefore could not have been found guilty of manslaughter, which requires the absence of malice. Defendant fired a semiautomatic weapon into the club and its adjoining parking lot. Unrefuted testimony at trial showed that he planned to fire a rifle into the club and even warned another person not to reenter the club because he intended to "shoot [it] up." Defendant then momentarily left the area in front of the club. When defendant returned to do the shooting, there were people exiting the club. The driver of the automobile had to slow down to keep from hitting these people. From the foregoing evidence, no rational fact finder could find defendant was not aware that the bullets would likely enter automobiles parked in the parking lot and that people might be in some of the automobiles. The uncontradicted evidence establishes that defendant fired the weapon into the club, an area he knew was occupied. We therefore conclude that, because all the evidence clearly shows malice, there was no evidence to support an instruction for involuntary manslaughter. Accordingly, we reject defendant's first argument.

[2] In his second argument, defendant contends the trial court erred by refusing to instruct the jury that, in order for defendant to be found guilty of discharging a firearm into occupied property, it must find that defendant knew the automobile was occupied or had reasonable grounds to believe the automobile was occupied. The court, instead, used the pattern jury instructions which informed the jury that it could find defendant guilty "if the members of the jury found that defendant knew that the automobile was occupied or had reasonable grounds to believe that the automobile *might* be occupied." (Emphasis added.)

We note first that the applicable statute does not contain an express knowledge requirement with reference to the building or vehicle being occupied. Instead, the statute provides that any person who "willfully or wantonly discharges or attempts to discharge . . . [a]

firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure *while it is occupied* is guilty of a . . . felony." N.C.G.S. § 14-34.1 (1993) (emphasis added). Nevertheless, in *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973), this Court interpreted the statute so as to add a knowledge requirement, as follows:

> We hold that a person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

Id. at 73, 199 S.E.2d at 412. This interpretation of the statute has been followed in a series of cases decided by this Court and our Court of Appeals. *See, e.g., State v. Wheeler*, 321 N.C. 725, 65 S.E.2d 609 (1988); *State v. Zigler*, 42 N.C. App. 148, 256 S.E.2d 479 (1979); *State v. Furr*, 26 N.C. App. 335, 215 S.E.2d 840 (1975); *State v. Gunn*, 24 N.C. App. 561, 211 S.E.2d 508, *cert. denied*, 286 N.C. 724, 213 S.E.2d 724 (1975); *State v. Williams*, 21 N.C. App. 525, 204 S.E.2d 864 (1974). Although none of these cases emphasize the use of the word "might," we believe our interpretation of the statute in *Williams* was correct, and we now reaffirm that interpretation. The trial judge properly instructed the jury in accordance with this Court's interpretation of the statute. Accordingly, we reject defendant's second argument.

[3] Defendant, in his third argument, contends that the State's evidence was insufficient to persuade a rational fact finder that he intended to shoot into the vehicles. Therefore, defendant argues, the evidence was insufficient to support verdicts of discharging a firearm into occupied property, felony murder, and conspiracy to discharge a firearm into occupied property.

Under N.C.G.S. § 14-34.1 a person who "willfully or wantonly discharges or attempts to discharge . . . [a] firearm into any . . . vehicle . . . while it is occupied is guilty of a . . . felony." N.C.G.S. § 14-34.1. Defendant argues that the State's evidence does not show that he intended to shoot into the vehicles but only illustrates that he intended to shoot into the club. We disagree.

"While intent is a state of mind sometimes difficult to prove, the mind of an alleged offender may be read from his acts, conduct, and inferences fairly deducible from all of the circumstances." *State v.*

Wilson, 315 N.C. 157, 163, 337 S.E.2d 470, 474 (1985). Intent to shoot into the vehicles can be inferred from the fact that defendant fired a semiautomatic weapon into an area where he knew automobiles were parked. The jury could reasonably find from the State's evidence that defendant intended to shoot into the vehicles when he shot into the parking lot adjoining the club.

Defendant also argues there is no evidence he shot into the automobiles knowing they were occupied. However, the State presented evidence that defendant knew people were exiting the club and present in the parking lot when he fired the SKS rifle. From this evidence, the jury could find that, although defendant may not have been sure that the vehicles in the parking lot were occupied, he clearly had reasonable grounds to believe that the automobiles might be occupied by one or more persons. That is all the statute requires. We conclude there was sufficient evidence to find defendant guilty of discharging a firearm into occupied property, conspiracy to discharge a firearm into occupied property, and first-degree murder under a felony murder theory.

[4] In his fourth argument, defendant contends the trial judge committed plain error when instructing the jury on defendant's right not to testify. During preliminary jury instructions, the trial judge stated that

> [t]he defendant in a criminal case, upon entering a plea of not guilty, may rest on the weaknesses in the state's case and require the state to carry its burden to the utmost, and that is beyond a reasonable doubt.
>
> A defendant charged with a criminal offense does not have to take the stand, does not have to present any evidence, and the fact that a defendant may choose to do that can't be used against the defendant. It is a constitutional right that each of us enjoy as citizens of this country not to be required to take the stand in a criminal proceeding and to require the state to carry its burden beyond a reasonable doubt. *It may also be a trial tactic that the defendant not present evidence, for if the defendant makes that decision not to present evidence, not to take the stand, the defendant would get the final argument or closing to the jury.*

(Emphasis added.) According to defendant, these preliminary instructions reduced defendant's constitutional right not to testify to a mere trial tactic.

Article I, Section 23 of the North Carolina Constitution states that a defendant in a criminal prosecution cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Similarly, North Carolina General Statutes section 8-54 provides that no person charged with the commission of a crime shall be compelled to testify or "answer any question tending to criminate himself." N.C.G.S. § 8-54 (1986). We have interpreted this statute as prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. *See, e.g., State v. Randolph*, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984). "[T]he purpose behind the rule prohibiting comment on the failure to testify is that extended reference by the court or counsel concerning this would nullify the policy that the failure to testify should not create a presumption against the defendant." *Id.* at 206, 321 S.E.2d at 869.

We conclude that while the court's reference to trial tactics was unnecessary, it was not a comment on defendant's failure to testify. The judge properly informed the jury that the defendant's failure to testify was not to be used against him. His additional explanation regarding the tactical advantage of a defendant not presenting evidence neither negated that instruction nor created an inference that defendant's failure to testify was an indication of his guilt. In addition, we note, as admitted by defendant in his brief, that the trial court, at the conclusion of the trial, instructed the jury that defendant's decision not to testify created no presumption against him and that his silence was not to influence the jury's decision.

[5] In his fifth argument, defendant contends the trial court erred in not finding defendant's IQ of seventy-three a mitigating factor when it increased the presumptive sentences for defendant's convictions for conspiracy to discharge a firearm into occupied property and discharging a firearm into occupied property. Defendant argues that, since the State stipulated to defendant's limited intelligence and the jury found defendant's IQ to be a mitigating circumstance, the trial judge's failure to also use defendant's limited intelligence as a mitigating factor is error.

To establish that the trial judge erred in failing to find a statutory mitigating factor, the evidence must show conclusively the existence of the statutory mitigating factor and that no other reasonable inference could be drawn from the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). The trial judge could have found that defend-

ant's IQ did not reduce his culpability for these noncapital offenses. Defendant fired a semiautomatic rifle into a populated nightclub and its adjoining parking lot. Defendant knew it was dangerous because he warned Cleveland not to reenter the club because he was going to "shoot . . . up" the club. There was no evidence that defendant's IQ affected his ability to perceive the probable consequences of his actions. The evidence does not show conclusively that defendant's IQ reduced his culpability and that no other reasonable inference could be drawn from the evidence. Accordingly, defendant's fifth argument is rejected.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES RONNIE LINEBERGER

No. 533A94

(Filed 9 February 1996)

1. Constitutional Law § 372 (NCI4th)— first-degree murder prosecution—cash payments to State's witnesses—plea bargain for second-degree murder—not arbitrary or capricious

The district attorney's decision to offer a defendant on trial for first-degree murder a plea bargain allowing him to plead guilty to second-degree murder upon learning that the sheriff's department had made cash payments to two of the State's witnesses was not an arbitrary or capricious decision which could render our capital sentencing scheme unconstitutional.

Am Jur 2d, Criminal Law §§ 609, 628.

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

2. Criminal Law §§ 132, 1299 (NCI4th); Constitutional Law § 372—first-degree murder prosecution—evidence to try case capitally—authority of court to accept plea bargain for second-degree murder

The trial court erred by ruling that it did not have the authority to accept a guilty plea to second-degree murder by a defendant on trial for first-degree murder unless the prosecutor announced that there was no evidence of first-degree murder or of an aggravating circumstance. Nothing in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57, or the cases cited therein limits the district attorney's broad discretion to determine, absent a constitutionally unjustifiable standard, whether to try a defendant for first-degree murder, or to try a defendant for a lesser offense, or to accept a plea to second-degree murder.

Am Jur 2d, Criminal Law §§ 484, 486, 609.

Validity of guilty pleas—Supreme Court cases. 25 L. Ed. 2d 1025.

3. Criminal Law §§ 132, 1314 (NCI4th)— first-degree murder prosecution—acceptance of guilty plea to lesser offense—finding of guilt of first-degree murder—necessity for capital sentencing proceeding

A district attorney who prosecutes a defendant for first-degree murder may accept a plea of guilty of second-degree murder or a lesser offense at any time prior to the jury's return of a verdict finding defendant guilty of first-degree murder. However, once a defendant has been determined to be guilty of first-degree murder either by plea or by jury verdict, the trial court must conduct a capital sentencing proceeding unless there is no evidence to support the finding of an aggravating circumstance.

Am Jur 2d, Criminal Law §§ 484-486, 598, 599, 609.

4. Criminal Law § 129 (NCI4th)— first-degree murder prosecution—plea bargain for second-degree murder—prosecutor's failure to sign transcript—court's misapprehension of law—rejection of plea

Where the trial court in a first-degree murder prosecution repeatedly stated that it did not have the authority to accept a guilty plea to second-degree murder because the district attorney stated there was sufficient evidence to try the case capitally, the district attorney said he was not withdrawing the plea offer, and

the district attorney then refused to sign the transcript of plea only because the trial court "ruled" that it could not accept a guilty plea to second-degree murder, the trial court's misapprehension of the law was the reason the district attorney failed to sign the transcript of plea, and the case should be reviewed as if the offer had been presented to and rejected by the trial court.

Am Jur 2d, Criminal Law §§ 485, 486, 609.

Right of prosecutor to withdraw from plea bargain prior to entry of plea. 16 ALR4th 1089.

Validity of guilty pleas—Supreme Court cases. 25 L. Ed. 2d 1025.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Sitton, J., on 15 December 1993 in Superior Court, Lincoln 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 assault with a deadly weapon with intent to kill was allowed 31 October 1994. Heard in the Supreme Court 12 September 1995.

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

Margaret Creasy Ciardella for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Darrell Eugene Whitesides ("victim"). The jury returned a verdict finding defendant guilty as charged. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment for the murder, and the trial court entered judgment accordingly. The jury also found defendant guilty of assault with a deadly weapon with intent to kill. For this conviction the trial court sentenced defendant to a consecutive term of ten years in prison. For the reasons discussed herein, we conclude that defendant is entitled to a new trial.

The evidence at trial tended to show the following. In the early morning hours of 14 May 1992, defendant went to the victim's home; and the victim let him inside. Defendant and the victim were facing criminal charges for stealing a heat pump, and they discussed the

charges against them. Defendant asked the victim if the victim was going to testify against him at trial, and the victim told defendant that he would not do so.

Shortly thereafter defendant told the victim that he was going outside to get a few beers from his car. Defendant went to his car, retrieved a shotgun, walked back inside, and shot the victim in the chest, killing him. Defendant then went into the victim's bedroom and attempted to shoot the victim's live-in girlfriend, Rena Carpenter. The shotgun would not fire, and Ms. Carpenter was able to escape out a bedroom window.

Additional facts will be presented as necessary to discuss specific issues.

Defendant contends that the trial court erred in refusing to consider a proposed plea agreement in which defendant agreed to enter a plea of guilty to second-degree murder. We agree and hold that the trial court's refusal to consider the plea agreement was prejudicial error entitling defendant to relief.

Defendant's trial began on 29 November 1993. After one week of jury selection and before the jury was impaneled, the district attorney informed the trial court that the parties were considering a second-degree murder plea. The district attorney and counsel for defendant subsequently informed the trial court that defendant had accepted the plea offer. Under the terms of the offer, defendant would have entered a guilty plea to second-degree murder and assault with a deadly weapon with intent to kill; the charges would have been consolidated for judgment; and the prosecutor would recommend that defendant receive a sentence not to exceed forty years' imprisonment to begin at the end of the twenty-five-year sentence of imprisonment which defendant was then serving.

After review of this Court's decision in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991), the trial court concluded that it did not have the authority to accept a second-degree murder plea in that there was sufficient evidence to try the case capitally. The trial court noted that affidavits, briefs, and statements by counsel for both the State and defendant indicated that this was a capital case. The trial court then asked the district attorney whether the district attorney contended that the evidence did not support first-degree murder or the existence of an aggravating circumstance. The district attorney responded that

there was evidence sufficient to support both first-degree murder and several aggravating circumstances.

Based upon its understanding of our decision in *Case*, 330 N.C. 161, 410 S.E.2d 57, and the district attorney's statement that there was evidence sufficient to try this case capitally, the trial court determined that it did not have the authority to accept a plea of guilty to second-degree murder. The trial court reasoned that permitting defendant to plead guilty when the evidence was sufficient to try defendant capitally could render our capital sentencing scheme unconstitutionally arbitrary and capricious. We disagree.

The exercise of prosecutorial discretion does not invalidate the death penalty. *McCleskey v. Kemp*, 481 U.S. 279, 307, 312, 95 L. Ed. 2d 262, 288, 291 (1987); *Proffitt v. Florida*, 428 U.S. 242, 254, 49 L. Ed. 2d 913, 924 (1976); *Gregg v. Georgia*, 428 U.S. 153, 199, 49 L. Ed. 2d 859, 889 (1976). "This Court has consistently recognized that a system of capital punishment is not rendered unconstitutional simply because the prosecutor is granted broad discretion." *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995); *accord State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

In *Noland* the defendant argued that the death penalty was unconstitutional as applied because of the prosecutor's exercise of his discretion in determining that the defendant's case would be tried as a capital case. *Noland*, 312 N.C. at 12, 320 S.E.2d at 649. The defendant relied on several cases, arising out of the same judicial district, in which the prosecutor permitted defendants to plead guilty to second-degree murder when it could be argued that aggravating circumstances existed. *Id.* We rejected the defendant's argument, stating that the "fact that discretionary stages in the legal process exist does not, by itself, show that the death penalty is capriciously imposed." *Id.*

The defendant in *Lawson* contended that our death penalty statute was unconstitutional "because it affords the district attorney 'unbridled' discretion in deciding against whom [to] seek verdicts of first degree murder and the death penalty, and against whom [to] seek verdicts of second degree murder and a lesser punishment." *Lawson*, 310 N.C. at 643, 314 S.E.2d at 500. In rejecting the defendant's argument, we stated:

> "Our courts have recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion or other arbitrary classification.' [*Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962).]"

Id. at 644, 314 S.E.2d at 501 (quoting *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980)). The *Lawson* Court concluded that the "constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification." *Id.*

[1] In this case the district attorney's decision to offer defendant a plea bargain was prompted by the revelation that the Lincoln County Sheriff's Department made cash payments to two of the State's witnesses. After one week of jury selection, Captain Gene Sain informed the district attorney that the Sheriff's Department paid Eddie and Larry Colvert three hundred dollars each in connection with their involvement in this case. The "strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial." *McCleskey*, 481 U.S. at 307 n.28, 95 L. Ed. 2d at 288 n.28. The district attorney's decision to offer defendant a plea bargain upon learning about cash payments to State witnesses was not an arbitrary or capricious decision which could render our capital sentencing scheme unconstitutional.

[2] The trial court, attempting to apply the reasoning in *Case*, 330 N.C. 161, 410 S.E.2d 57, determined that given the forecast of evidence, the court did not have the authority to accept a plea of guilty to second-degree murder. *Case*, however, is distinguishable. In *Case* the prosecutor, in exchange for a plea of guilty to felony murder, agreed that the State would present evidence of only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. *Id.* at 163, 410 S.E.2d at 58. The evidence also supported submission of two other aggravating circumstances, that the defendant committed the murder while engaged in the commission of a kidnapping and that the defendant committed the murder for pecuniary gain. *Id.* The jury recommended a sentence of death. This Court concluded

that it was necessary to order a new trial in order to protect the constitutionality of our capital sentencing scheme. *Id.* at 164, 410 S.E.2d at 59. We stated:

> It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion. *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987). This is so in order to prevent capital sentencing from being irregular, inconsistent and arbitrary. If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional. Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance. *See State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Case, 330 N.C. at 163, 410 S.E.2d at 58.

Relying on *Case*, the trial court reasoned that a prosecutor could not accept a guilty plea to second-degree murder unless the prosecutor announced that there was no evidence of first-degree murder or of an aggravating circumstance. The trial court stated that permitting a prosecutor to accept a guilty plea to second-degree murder when there was sufficient evidence to try the case capitally could render our capital sentencing scheme unconstitutionally arbitrary and capricious. In this ruling the trial court erred.

[2, 3] The reasoning of *Case* and the cases cited therein applies to situations where the prosecutor accepts a plea of guilty of first-degree murder or the defendant is found guilty of first-degree murder by the jury. Nothing in *Case* or the cases cited therein limits the district attorney's broad discretion to determine, absent a constitutionally unjustifiable standard, whether to try a defendant for first-degree murder, or to try a defendant for a lesser offense, or to accept a plea to second-degree murder. *See State v. Lawson*, 310 N.C. 632, 643-44, 314 S.E.2d 493, 500-01. If the district attorney prosecutes a defendant for first-degree murder, the district attorney may accept a plea of

guilty of second-degree murder or a lesser offense at any time prior to the jury's returning a verdict finding defendant guilty of first-degree murder. However, once a defendant has been determined to be guilty of first-degree murder either by plea or by a jury verdict, the trial court must conduct a capital sentencing proceeding unless there is no evidence to support the finding of an aggravating circumstance. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450; *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860; *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597.

[4] The State concedes that the trial court erred by refusing to consider the plea agreement. The State argues, however, that the district attorney withdrew the plea agreement and that the proposed plea bargain is null because it was not approved by the trial court. On this record we conclude that the trial court's misapprehension of the law was the reason that the district attorney failed to sign the transcript of plea. Under this circumstance, even if we assume *arguendo* that the district attorney withdrew his plea offer, we believe that it is necessary and appropriate to review this case as if the offer had been presented to and rejected by the trial court.

A "prosecutor may rescind his offer of a proposed plea arrangement at any time before it is consummated by *actual entry of the guilty plea* and the acceptance and approval of the proposed sentence by the trial judge." *State v. Marlow*, 334 N.C. 273, 280, 432 S.E.2d 275, 279 (1993); *accord State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 175 (1980). Further, a plea agreement involving a sentencing recommendation must have judicial approval before it is enforceable. N.C.G.S. § 15A-1023(b) (1988); *Marlow*, 334 N.C. at 281, 432 S.E.2d at 279.

The trial court, in this case, repeatedly stated that it did not have the authority to accept a guilty plea to second-degree murder. After the trial court stated its interpretation of the law and after noting that the district attorney was not bound by any plea offers, the trial court asked the district attorney whether he had withdrawn the plea offer which had been accepted by defendant. The district attorney responded: "No . . . . I have not withdrawn the negotiations that we had yesterday. I have not withdrawn them."

Defendant later moved for a continuance pursuant to N.C.G.S. § 15A-1023(b) on the ground that the trial court had rejected the proposed plea agreement. The trial court denied defendant's motion, stating that the agreement was not before the court to accept or reject and that it would give the parties time to present an agreement

to the court. The district attorney then informed defendant's attorneys that "[a]t this point . . . in view of the judge's ruling, the State's not going to sign any transcript of plea." The district attorney, after considering the trial court's interpretation of the law, said that he was not withdrawing the plea offer. The district attorney then refused to sign the transcript of plea only because the trial court "ruled" that it could not accept a guilty plea to second-degree murder.

We conclude that the plea agreement was presented to the trial court; that the trial court, acting under a misapprehension of the law, refused to consider the plea agreement; and that the trial court's misapprehension of the law was the reason that the district attorney declined to sign the transcript of plea. We hold that the trial court's refusal to consider the plea bargain arrangement was prejudicial error entitling defendant to a new trial.

A new trial, however, cannot wholly remedy the prejudice to defendant resulting from the trial court's refusal to consider the plea agreement. Since defendant's due process rights have been affected by these unique circumstances, we must fashion a remedy. Accordingly, we instruct the district attorney on remand to renew the plea offer accepted by defendant and presented to the trial court. If defendant accepts the offer, then we instruct the trial court to consider the offer and exercise its discretion whether to approve the plea agreement and enter judgment or, subject to the provisions of N.C.G.S. § 15A-1023(b), to proceed to trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. DANIEL C. MARR

No. 164PA94

(Filed 9 February 1996)

1. Homicide § 486 (NCI4th)— first-degree murder—instruction on premeditation and deliberation but not felony murder—conviction not an acquittal on felony murder

A conviction for first-degree murder based on premeditation and deliberation was not an acquittal of felony murder where the evidence was insufficient to convict based on premeditation and deliberation, there was evidence that defendant was an accessory

before the fact to first-degree murder, and the court did not charge on felony murder.

Am Jur 2d, Homicide §§ 72, 498, 534, 541, 545.

2. Criminal Law § 49 (NCI4th); Burglary and Unlawful Breakings § 57 (NCI4th)— first-degree burglary—accessory before the fact—sufficiency of evidence

There was no error in submitting first-degree burglary to the jury where defendant contended that the State's evidence showed only that he wanted the victim's tools, which were stored in a separate shop, and that there was no need to enter the dwelling house to get what he requested, but there was evidence from which the jury could conclude that an entry into the dwelling house at night was encompassed within the instruction and advice defendant gave the principals.

Am Jur 2d, Burglary § 27.

3. Larceny § 41 (NCI4th)— four convictions—one transaction—judgment arrested

Judgment was arrested on two of the original four convictions for larceny where defendant was tried as an accessory before the fact for murder, arson, robbery, burglary, and larceny arising from the looting of the victim's mobile home and shop and the theft of his cars; convicted of larceny after entering the mobile home, larceny after entering the shop, larceny by taking a Volvo automobile, and larceny by taking a Ford truck; and judgment was arrested by the trial judge on the conviction of larceny after entering the mobile home. The taking of the various items was all part of the same transaction.

Am Jur 2d, Larceny §§ 6, 9.

Series of takings over a period of time as involving single or separate larcenies. 53 ALR3d 398.

4. Criminal Law § 801 (NCI4th)— accessory before the fact—instructions—mens rea

There was no plain error in a prosecution for being an accessory before the fact to murder, burglary, arson, robbery, and larceny in the instructions where defendant contended that the court did not instruct the jury that the crime had to be a part of a common plan or that defendant had the requisite *mens rea* for each crime charged. The jury finding that defendant advised the

principals to commit the crimes proved all the intention and *mens rea* necessary to convict defendant.

Am Jur 2d, Trial §§ 1255, 1256.

5. Criminal Law § 801 (NCI4th)— accessory before the fact—instructions—incidental consequences

The trial court's error in instructing the jury that an accessory is responsible for all of the incidental consequences which might reasonably be expected to result from the intended wrong was harmless because the defendant was not finally convicted of any crime which was incidental to the crimes committed by the principals.

Am Jur 2d, Trial §§ 1255, 1256.

6. Criminal Law § 799 (NCI4th)— accessory before the fact—instructions—multiple crimes

The trial court did not err in a prosecution for being an accessory before the fact to murder, arson, burglary, armed robbery, breaking or entering, and larceny where defendant contended that the court did not require the jury to decide whether defendant was an accessory before the fact to each specific crime but the court instructed the jury as to the elements of each crime and concluded that the jury must find beyond a reasonable doubt that defendant was an accessory before the fact as he had explained the term and then repeated the definition. This required the jury to find in each case that the defendant was an accessory before the fact before convicting him.

Am Jur 2d, Trial §§ 1255, 1256.

7. Appeal and Error § 23 (NCI4th)— first-degree murder—appeal directly to Supreme Court

A conviction for being an accessory before the fact to first-degree murder and a life sentence should have been appealed directly to the Supreme Court rather than to the Court of Appeals. N.C.G.S. § 7A-27; N.C. R. App. P. 4(d).

Am Jur 2d, Appellabe Review § 667.

On writ of certiorari to review the superior court decision and on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 774, 440 S.E.2d 275 (1994), finding no error in the judgments entered upon the defend-

ant's conviction of numerous charges by Saunders, J., on 9 July 1992 in Superior Court, Polk County. Heard in the Supreme Court 10 April 1995.

The defendant was tried as an accessory before the fact to the crimes of first-degree murder, first-degree arson, first-degree burglary, robbery with a dangerous weapon, two counts of felonious entering, two counts of felonious larceny of a motor vehicle, and two counts of felonious larceny after entering.

The State presented evidence through the testimony of Shane Smith that in September 1990, the defendant approached James Edward Jaynes and Smith in regard to stealing property from the premises of Paul Acker. Smith testified that the defendant went with them to show them Mr. Acker's home, which was located on a 250-acre tract in Polk County. Mr. Acker lived in a mobile home, and there was a shop on the premises, which the defendant said was full of tools. Smith testified that the defendant told them that Mr. Acker never locked the doors of the shop or the mobile home and that he always left the keys in a Ford truck and Volvo automobile which he owned. The defendant said that he wanted certain tools from the shop and that he could sell the things he did not need. The defendant told the two men he could not go with them to steal the property because "it would affect his parole."

Smith testified further that he and Jaynes went to Mr. Acker's home several times during a period of weeks in preparation of stealing from him. On the night of 10 October 1990, the two men went to Mr. Acker's home. Smith went to the back of the mobile home, and Jaynes went to the front. Smith heard two shots. He entered the mobile home, and Jaynes was standing over Mr. Acker's motionless body. Jaynes then shot Mr. Acker twice and handed the pistol to Smith, who shot Mr. Acker once.

The two men then placed a comforter over Mr. Acker's body and looted the mobile home and the shop. They placed the stolen property in the Ford truck and a Volvo automobile which belonged to Mr. Acker and left. They returned later to retrieve Smith's car, and while they were there, they burned the mobile home.

Jaynes, who is a nephew by marriage to the defendant, testified that the defendant had never discussed stealing anything from Mr. Acker with Smith and him.

The defendant was convicted of all charges. The Court of Appeals found no error, and we allowed discretionary review.

Michael F. Easley, Attorney General, by James C. Gulick, Special Deputy Attorney General, for the State.

Richard A. Rosen for the defendant-appellant.

WEBB, Justice.

The defendant was convicted as an accessory before the fact of the crimes charged. An accessory before the fact is guilty and punishable as a principal to the felony. N.C.G.S. § 14-5.2 (1993). An accessory before the fact is one who is absent from the scene when the crime is committed but who procures, counsels, commands, or encourages the principal to commit it. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970). The action of a person accused of being an accessory before the fact must have caused the principal to commit the crime before the alleged accessory may be found guilty. *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987).

The State concedes there was no evidence to support a finding that the defendant procured, counseled, commanded, or encouraged the principals to commit arson or armed robbery. We arrest judgment on these two charges.

The superior court arrested judgment on the charge of entering the mobile home. The defendant concedes there was sufficient evidence to support the conviction of entering the shop. We shall not discuss the entering charge in this part of the opinion.

The Murder

[1] The defendant was convicted of first-degree murder. The court charged the jury that it could find the defendant guilty based on a finding of an intentional killing with premeditation and deliberation. It did not charge on felony murder.

The State concedes there was not sufficient evidence to convict the defendant of first-degree murder based on premeditation and deliberation, and it was error to so charge. There was evidence, however, that the defendant was an accessory before the fact to first-degree burglary, as we shall demonstrate later in this opinion. The killing was done during this burglary, which killing would be felony murder. *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976).

In *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), we held that a finding of guilty of first-degree murder based on felony murder did not constitute an acquittal of murder in the first-degree based on premeditation and deliberation or its lesser included offense of involuntary manslaughter. In that case, the superior court charged only on felony murder when there was evidence to support a conviction of involuntary manslaughter. We held there must be a new trial.

In this case, there was evidence which would support a finding of guilty of felony murder, and it was error not to submit this theory to the jury. Pursuant to *Thomas*, the finding of guilty to first-degree murder based on premeditation and deliberation in this case does not constitute an acquittal of felony murder. There must be a new trial on the murder charge.

The Burglary

[2] We next address the question of first-degree burglary. The defendant argues that the evidence does not support a verdict of guilty to this crime because no evidence shows the defendant advised or counseled the principals to enter the dwelling house of Mr. Acker. He says that the State's evidence shows that all he wanted from Mr. Acker's premises were tools, which were stored in the shop. He contends there was no need to enter the dwelling house to get what he requested, and he did not advise the principals to do so.

We believe the jury could conclude from the evidence that breaking into the home was within the scope of the advice given the principals by the defendant. The idea of stealing from Mr. Acker originated with the defendant. He went with the two men to show them the location of Mr. Acker's home. He advised them that Mr. Acker left the doors of the shop and the mobile home unlocked. He also told the principals that Mr. Acker left the keys in his Ford truck and Volvo automobile. He told them that he wanted some tools, which were in the shop, but he said he could sell anything he did not need. This is some indication the defendant contemplated that the principals would steal more than what was located within the shop. It also can be assumed that the principals would steal something for themselves and would likely enter the mobile home to do so. We hold that from this evidence, the jury could conclude that an entry into the dwelling house was encompassed within the instruction and advice the defendant gave the principals.

When the defendant advised and encouraged the principals to enter the premises of Mr. Acker, the advice was not to enter only in daylight. An entry at night while the building was occupied would be encompassed within his instructions.

There was evidence from which the jury could find the principals, acting on advice and encouragement of the defendant, broke and entered an occupied dwelling during the nighttime with the intent to commit larceny. This supports a conviction of first-degree burglary. *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). It was not error to submit first-degree burglary to the jury.

The Larcenies

[3] The defendant was convicted of four separate larcenies, which were larceny after entering the mobile home, larceny after entering the shop, larceny by taking the Volvo automobile, and larceny by taking the Ford truck. Judgment was arrested on the conviction of larceny after entering the mobile home. The defendant concedes the evidence supports a conviction of larceny but contends there was only one larceny. We believe this argument is well taken.

In *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992), we held that a single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. That is the case here. Although there was evidence of two enterings, the taking of the various items was all part of the same transaction. We arrest judgment on two of the convictions of larceny.

[4] In his next assignment of error, the defendant contends there was error in the jury charge as to each of the offenses. He contends this requires a new trial for each offense which we have not ordered dismissed. The defendant did not object at trial to the instructions, and we shall examine them under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

The court correctly defined the meaning of accessory before the fact. It then instructed the jury as to each crime that if it found beyond a reasonable doubt that Jaynes and/or Smith committed the crime and that the defendant was an accessory before the fact "in that he gave instructions, directions, or counsel which were substantially followed and which directly contributed to the action of Jaynes alone or in concert with Smith," it would find the defendant guilty. The

defendant, relying on *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), and *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), says the court did not instruct the jury that the crime had to be a part of a common plan or that the defendant had the requisite *mens rea* for each crime charged. He says this was error.

Blankenship and *Reese* do not help the defendant. In each of those cases, we held that when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included in the common plan. In this case, when the jury found the defendant advised the principals to commit the crimes, this proved all the intention and *mens rea* necessary to convict the defendant.

[5] The court instructed the jury that "[a]n accessory, moveover [sic], is responsible for all of the incidental consequences which might be reasonably expected to result from the intended wrong." This was error. *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727; *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352. The error is harmless, however. None of the convictions we have let stand were incidental consequences of the actions of the principals. All were within the area which the defendant procured, counseled, commanded, or encouraged. The defendant was not finally convicted of any crime which was incidental to the crimes committed by the principals.

[6] The defendant also argues that while the court defined accessory before the fact in general terms, it did not require the jury to decide whether the defendant was an accessory before the fact to each specific crime. The court instructed the jury as to the elements of each crime and concluded that the jury must find beyond a reasonable doubt that the defendant was an accessory before the fact as he had explained the term and then repeated the definition. This required the jury to find in each case that the defendant was an accessory before the fact before convicting him.

This assignment of error is overruled.

[7] We note that the conviction for murder in this case should have been appealed to this Court rather than the Court of Appeals. N.C.G.S. § 7A-27 provides in part:

> (a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death or imprisonment for life.

N.C.G.S. § 7A-27(a) (1989).

North Carolina Rules of Appellate Procedure, Rule 4(d) provides in part:

> An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court.

N.C. R. App. P. 4(d).

The defendant in this case was convicted of first-degree murder and sentenced to life in prison. The statute and the rule provide that in such a case, appeal lies directly to this Court. Because we are granting a new trial on the murder charge, this argument merits no further instruction or discussion.

For the reasons stated in this opinion, we reverse and remand in part and affirm in part the decision of the Court of Appeals, and arrest judgment in the cases indicated. This case is remanded to the Court of Appeals for further remand to Superior Court, Polk County, for further proceedings not inconsistent with this opinion.

NO. 91CRS445, ACCESSORY BEFORE THE FACT TO FELONIOUS LARCENY FROM THE SHOP—AFFIRMED.

NO. 91CRS446, ACCESSORY BEFORE THE FACT TO FIRST-DEGREE MURDER—VACATED AND REMANDED FOR NEW TRIAL.

NO. 91CRS447, ACCESSORY BEFORE THE FACT TO FIRST-DEGREE ARSON—JUDGMENT ARRESTED.

NO. 91CRS448, ACCESSORY BEFORE THE FACT TO FIRST-DEGREE BURGLARY—AFFIRMED.

NO. 91CRS449, ACCESSORY BEFORE THE FACT TO ROBBERY WITH A DANGEROUS WEAPON—JUDGMENT ARRESTED.

NO. 91CRS450, ACCESSORY BEFORE THE FACT TO LARCENY OF FORD TRUCK—JUDGMENT ARRESTED.

NO. 91CRS451, ACCESSORY BEFORE THE FACT TO LARCENY OF THE VOLVO AUTOMOBILE—JUDGMENT ARRESTED.

NO. 91CRS453, ACCESSORY BEFORE THE FACT TO FELONIOUS ENTERING THE SHOP—AFFIRMED.

FORSYTH MEMORIAL HOSPITAL, INC. v. SHIRLEY B. CHISHOLM

No. 60PA95

(Filed 9 February 1996)

1. **Husband and Wife § 9 (NCI4th)— necessaries doctrine—medical expenses—showing by health-care provider**

In order to establish a *prima facie* case against one spouse for the value of necessary medical services provided to the other spouse, the health-care provider must show that (1) medical services were provided to the receiving spouse, (2) the medical services were necessary for the health and well-being of the receiving spouse, (3) the person against whom the action is brought was married to the receiving spouse at the time the medical services were provided, and (4) payment for the necessaries has not been made.

Am Jur 2d, Husband and Wife §§ 183-190, 202.

Wife's liability for necessaries furnished husband. 11 ALR4th 1160.

Necessity, in action against husband for necessaries furnished wife, of proving husband's failure to provide necessities. 19 ALR4th 432.

Modern status of rule that husband is primarily or solely liable for necessaries furnished wife. 20 ALR4th 196.

2. **Husband and Wife § 9 (NCI4th)— necessaries doctrine—separation exception—necessity for modification**

Because the historical purposes underlying the separation exception to the necessaries doctrine are incompatible with current mores and laws governing modern marital relationships in North Carolina, the separation exception previously applied in the courts of this State is "obsolete" within the meaning of N.C.G.S. § 4-1, has no place in the common law, and must be modified.

Am Jur 2d, Husband and Wife §§ 191-199.

Husband's liability to third person for necessaries furnished to wife separated from him. 60 ALR2d 7.

Wife's liability for necessaries furnished husband. 11 ALR4th 1160.

3. Husband and Wife § 9 (NCI4th)— necessaries doctrine—separation exception—modified rule

The spouse seeking to benefit from the separation exception to the necessaries doctrine must show that the provider of necessary services had *actual notice* of the separation at the time the services were rendered, and "fault" for the separation is not a factor to be considered in applying the separation exception.

Am Jur 2d, Husband and Wife §§ 191-199.

Husband's liability to third person for necessaries furnished to wife separated from him. 60 ALR2d 7.

Wife's liability for necessaries furnished husband. 11 ALR4th 1160.

4. Husband and Wife § 9 (NCI4th)— necessaries doctrine—husband and wife separated—absence of notice to hospital—wife's liability for husband's medical expenses

Defendant wife was liable under the necessaries doctrine for medical services rendered to her husband by plaintiff hospital where defendant and her husband were married but living separate and apart when the services were provided; defendant carried her husband to the hospital and admitted him; defendant did not put the hospital on notice of their separation at the time she admitted him to the hospital; it was not until the hospital had been frustrated in its efforts to collect the medical bills from the husband's insurance and from his estate that defendant first informed the hospital that she and her husband had been separated at the time medical care was provided; and the hospital did not have actual notice of defendant's separation from her husband at the time it rendered medical services to him.

Am Jur 2d, Husband and Wife §§ 191-199.

Husband's liability to third person for necessaries furnished to wife separated from him. 60 ALR2d 7.

Wife's liability for necessaries furnished husband. 11 ALR4th 1160.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 608, 452 S.E.2d 323 (1995), affirming an order allowing defendant's motion for summary judgment entered by Hayes, J., on 15 November 1993 in District

Court, Forsyth County. Heard in the Supreme Court 14 November 1995.

Blanco Tackabery Combs & Matamoros, P.A., by John S. Harrison, for plaintiff-appellant.

Bailey & Thomas, P.A., by Wesley Bailey, David W. Bailey, Jr., and John R. Fonda, for defendant-appellee.

Turner Enochs & Lloyd, P.A., by Wendell H. Ott, Laurie S. Truesdell, and Melanie M. Hamilton, on behalf of Duke University Medical Center; Memorial Mission Hospital, Inc.; The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center; The Moses H. Cone Memorial Hospital; The North Carolina Baptist Hospitals, Inc.; and Wake Medical Center, amici curiae.

North Carolina Association of Women Attorneys, by Luellen Curry, President; and The North Carolina Center for Laws Affecting Women, Inc., by Meyressa H. Schoonmaker, Director, amici curiae.

MITCHELL, Chief Justice.

Shirley B. Chisholm and Melvin Chisholm were married in June of 1953. They were separated in January of 1990, at which time they were living in Boone, North Carolina. Ms. Chisholm then moved to Winston-Salem, North Carolina, and has been a continuous resident of Forsyth County since that time. Mr. Chisholm remained in Boone and continued to be a resident of Watauga County until his death on 14 August 1992.

On 31 July 1992, Mr. Chisholm was carried to Forsyth Memorial Hospital, Inc. (the hospital) and admitted by Ms. Chisholm. It is uncontroverted that at the time of Mr. Chisholm's admission, he and Ms. Chisholm were married, that she admitted him, and that insurance information obtained from a previous admission was still applicable. The hospital rendered medical services to Mr. Chisholm from 31 July 1992 until his death on 14 August 1992, which resulted in unpaid medical bills of $45,110.07.

After the hospital attempted to obtain payment from Mr. Chisholm's insurance company, it learned that the insurance company had sent a check to Mr. Chisholm's estate for payment of his

medical bills. However, the estate had been administered and closed without payment having been made to the hospital.

The hospital then filed this action seeking to recover the unpaid hospital bills from Ms. Chisholm under the doctrine of necessaries. Ms. Chisholm served an answer denying liability for her late husband's hospital bills on the ground that at the time the bills were incurred, she and Mr. Chisholm were married but living separate and apart. The trial court granted summary judgment in favor of Ms. Chisholm, and the Court of Appeals affirmed the trial court.

The issue presented on appeal is whether Ms. Chisholm is entitled to benefit from any "separation exception" to the necessaries doctrine. We hold that she is not and reverse the decision of the Court of Appeals.

[1] The necessaries doctrine arose from the common law duty of the husband to provide for the necessary expenses of his wife. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915). The doctrine is now applied equally, holding a wife liable for the necessary expenses of her husband. *N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987). In order to establish a *prima facie* case against one spouse for the value of necessary medical services provided to the other spouse, the health-care provider must show that (1) medical services were provided to the receiving spouse, (2) the medical services were necessary for the health and well-being of the receiving spouse, (3) the person against whom the action is brought was married to the receiving spouse at the time the medical services were provided, and (4) payment for the necessaries has not been made. *Id.* at 353-54, 354 S.E.2d at 475.

In the instant case, it is undisputed that the pleadings and affidavits of record establish the applicability of the necessaries doctrine: Medical services were provided to Mr. Chisholm; the medical services were necessary for the well-being of Mr. Chisholm at the time rendered; Ms. Chisholm was married to Mr. Chisholm at the time the services were rendered; payment has not been made. In addition, it is undisputed that the charges for the services are fair and reasonable. Therefore, unless defendant can establish some exception to the necessaries doctrine, she must be held liable to the hospital for the necessary services it provided her husband.

The sole reason urged by defendant for denying her obligation under the necessaries doctrine is the uncontested fact that she had

been separated from Mr. Chisholm for over two years at the time the medical services were provided. This Court applied what is now known as the "separation exception" to the necessaries doctrine in *Pool v. Everton*, 50 N.C. 241 (1858). In the context of the legal and social principles prevailing in 1858, this Court reasoned that under the common law, "[i]f a wife leaves the 'bed and board' of the husband *without good cause*," the husband would no longer be responsible for the wife's necessaries. *Id.* at 242. This common law rule as applied by this Court in 1858 was based upon the ground that "it is wrong to harbor the wife by doing any act which will make it more easy for her to continue in the violation of her conjugal duties." *Id.* at 243. The husband's right to his wife's conjugal services was so absolute that the common law gave him a cause of action for damages against "any person who administers to her wants and supplies her with necessaries." *Id.* at 242.

This Court has not had occasion to reconsider or apply the separation exception since the *Pool* decision. However, the separation exception was applied in *Cole v. Adams*, 56 N.C. App. 714, 289 S.E.2d 918 (1982), where the Court of Appeals—as that court was required to do—followed the precedent established by this Court in *Pool* decided more than a century earlier. In *Cole*, the court held that in order to hold a husband liable for services furnished to his wife from whom he was separated, the provider of the services had the burden of proving that the separation was due to the fault of the husband. *Id.* at 716, 289 S.E.2d at 920. In the present case, the Court of Appeals simply followed the precedent of its prior decision in *Cole*.

When the necessaries doctrine and the separation exception were first established, the property of a woman vested in her husband at the point of marriage. *O'Connor v. Harris*, 81 N.C. 279 (1878); *Arrington v. Yarbrough*, 54 N.C. 72 (1853). Therefore, even if the parties separated, all of the property of both spouses was subject to the control of the husband. Any creditor bringing a suit against the wife was required to join the husband because the wife was considered incompetent and could not be sued without the joinder of her husband. *See, e.g., Perry v. Stancil*, 237 N.C. 442, 75 S.E.2d 512 (1953). Under current North Carolina law, assets acquired by either spouse during the course of the marriage continue to be owned jointly by the marital unit until or unless a separation agreement divides the property or the marriage is dissolved in divorce. N.C.G.S. § 50-21 (1995). There is also now a statutory presumption that all marital property be

equally divided upon divorce or a claim for equitable distribution. N.C.G.S. § 50-20(c) (1995).

[2] The modern marital relationship is viewed by the law as a partnership of equality, an evolution from the nineteenth century relationship of dominance by a husband and submission by a wife who had little standing as an individual person or legal entity. This Court has rejected such antiquated and obsolete notions concerning women by modernizing the common law necessaries doctrine to impose liability on a gender-neutral basis and, thereby, making either spouse responsible for the necessary services provided to the other. *See N.C. Baptist Hosp., Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471; *see also Nicholson v. Hugh Chatham Mem. Hosp., Inc.*, 300 N.C. 295, 298, 266 S.E.2d 818, 820 (1980) (No longer is the wife viewed as "little more than a chattel in the eyes of the law.").

Further, we have recently emphasized that

> the "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete.

Gwathmey v. State of North Carolina, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995); see also N.C.G.S. § 4-1 (1986). Because the historical purposes underlying the separation exception to the necessaries doctrine are incompatible with current mores and laws governing modern marital relationships in North Carolina, we conclude that the separation exception as previously applied in the courts of this State is "obsolete" within the meaning of N.C.G.S. § 4-1. Being obsolete, that exception has no place in the common law and must be modified.

The Court of Appeals' decision in this case determined that "it is irrelevant whether the hospital had notice of the parties [sic] separation at the time the services were rendered." *Forsyth Mem. Hosp., Inc. v. Chisholm*, 117 N.C. App. 608, 612, 452 S.E.2d 323, 325 (1995). We disagree. Under this expansion of the separation exception by the Court of Appeals, in order to completely evade liability for one's spouse's medical expenses, one need only show that he or she was separated at the time services were provided. This would make separated spouses immune from liability under the necessaries doctrine even where they had presented themselves together at the hospital as

an intact couple, one spouse had admitted the other spouse to the hospital, and the admitting spouse had expressly requested the medical care for the spouse receiving such care. The Court of Appeals' decision places the unreasonable burden on the health-care provider to determine before providing necessary services whether the couple has separated and, if so, whether the separation is due to the fault of the supporting spouse. Answers to these questions are within the knowledge of the spouses, but not the health-care provider.

[3] The interpretation of the separation exception by the Court of Appeals in *Cole* and in the instant case does not reflect modern societal values, sound public policy, or this Court's recent reconsideration and expansion of the necessaries doctrine in *Harris*. Therefore, we must modify the separation exception as applied by the Court of Appeals by rejecting that court's allocation of the burden of proof with regard to the exception. We conclude, instead, that the spouse seeking to benefit from the separation exception to the necessaries doctrine must show that the provider of necessary services had *actual notice* of the separation at the time the services were rendered. Furthermore, "fault" for the separation is not a factor to be considered in applying the separation exception.

[4] In this case, it is clear from the pleadings and forecasts of evidence that the plaintiff hospital had no reason to know that the Chisholms were separated at the time the hospital rendered medical care to Mr. Chisholm. The defendant carried her husband to the hospital and admitted him. She did not put the hospital on notice of their separation at the time she admitted him to the hospital. It was not until the hospital had been frustrated in its efforts to collect the medical bills from Mr. Chisholm's insurance and from his estate that Ms. Chisholm first informed the hospital that she and Mr. Chisholm had been separated at the time medical care was provided.

As the hospital did not have actual notice of her separation from Mr. Chisholm at the time it rendered medical services to him, the trial court erred in applying the separation exception to the necessaries doctrine and in entering summary judgment for the defendant, Ms. Chisholm. Instead, the trial court was required to enter summary judgment in favor of the plaintiff, Forsyth Memorial Hospital, Inc. The decision of the Court of Appeals affirming the order of the trial court must be and is reversed, and this case is remanded to the Court of Appeals for its further remand to the District Court, Forsyth County, for entry of summary judgment for the plaintiff.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. RICKY STRAING

No. 92A95

(Filed 9 February 1996)

1. Criminal Law § 793 (NCI4th); Homicide § 583 (NCI4th)— acting in concert—instructions—specific intent of defendant

The trial court's instructions that the State was required to prove as an element of each of the crimes of first-degree premeditated and deliberated murder, armed robbery, and first-degree kidnapping that "defendant, or someone with whom he was acting in concert" had the specific intent to commit the crime erroneously allowed the jury to convict defendant of those crimes on the theory of acting in concert without requiring the State to establish that defendant had the specific intent to commit those crimes, and defendant is entitled to a new trial on each of those charges. Defendant is also entitled to a new trial on a felony murder charge because the predicate felony which supported that theory was obtained without the State being required to establish defendant's specific intent.

Am Jur 2d, Homicide §§ 498-501, 507; Trial §§ 1251, 1255, 1256.

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

2. Criminal Law § 461 (NCI4th)— prosecutor's closing argument—improper comment on inadmissible evidence

A comment by the prosecutor during her closing argument that it was "interesting how the State cannot get in what Morris told Lawrence" was improper where the trial court had ruled that the statement by Morris was inadmissible.

Am Jur 2d, Trial §§ 615, 616.

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.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Helms, J., on 4 August 1994 in Superior Court, Union County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his convictions for robbery with a dangerous weapon and first-degree kidnapping was allowed by the Supreme Court on 7 March 1995. Heard in the Supreme Court on 17 November 1995.

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

Charles B. Brooks, II, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was indicted for the 12 June 1993 murder, kidnapping, and robbery of Douglas William Efird. He was tried capitally at the 25 July 1994 Criminal Session of Superior Court, Union County, and was found guilty of felonious larceny, robbery with a dangerous weapon, first-degree kidnapping, and first-degree murder under both the theories of premeditation and deliberation and felony murder. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the murder, and the trial court sentenced defendant accordingly. In addition, the trial court entered judgments sentencing defendant to imprisonment of forty years for robbery with a dangerous weapon and forty years for first-degree kidnapping to run consecutively to the murder conviction but concurrently with each other. The trial court arrested judgment for the larceny conviction.

The State's evidence tended to show *inter alia* that in the early morning of 12 June 1993, the victim solicited information from Tyrone Morris on how to purchase cocaine. After speaking to the victim alone, Morris asked Tavis Garland and defendant to ride with the victim and Morris to purchase cocaine in Matthews, North Carolina. The four men entered the victim's automobile. During the trip to Matthews, Morris and the victim began to argue about money, and Morris hit the victim in the neck and face. The victim stopped his vehicle, and Morris continued to beat the victim with his fists. Thereafter, Morris pulled the victim out of the vehicle through the passenger side door and opened the trunk of the vehicle. Morris asked defendant to assist him in lifting the victim into the trunk of the car. Defendant grabbed the victim's legs and helped Morris put the

victim in the trunk. Garland testified at trial that after defendant and Morris put the victim in the trunk, he noticed that defendant was holding the victim's billfold in his hand.

Morris drove the victim's vehicle to Matthews, where the three men purchased cocaine. At some point after smoking the cocaine, the men heard a beating noise coming from the trunk. Garland testified at trial that he and defendant said, "we've got to let this guy out," and Morris replied, "we're going to let him out." According to Garland's testimony, Morris then stopped the car and opened the trunk alone. Although Garland did not see Morris pull the victim out of the vehicle, he testified that he heard loud noises that sounded like the victim had been pulled out of the car and beaten. Morris then called for defendant to assist him, and the two men disposed of the victim's body in a field. The victim's body was discovered in a decomposed state on 14 July 1993.

[1] In an assignment of error, defendant argues the trial court erred by giving an incorrect instruction on the doctrine of acting in concert. We agree with defendant and conclude that there was reversible error in the trial court's instructions.

Before instructing the jury on the substantive elements of each of the crimes charged, the trial court defined acting in concert as follows:

> Now, there's a principle in our law known as acting in concert. For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principle [sic] if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence of the common purpose.
>
> However, the mere presence of the defendant at the scene of a crime, even though he is in sympathy with a criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To sustain a conviction of the defendant, the State's evidence must show and prove to you that the defendant was present actually or constructively with the intent to aid the perpetrator in the commission of the offense should his assist-

> ance become necessary, and that such intent was . . . communicated to the actual perpetrator.

Thereafter, the trial court enumerated the substantive elements of first-degree murder, robbery with a dangerous weapon, and first-degree kidnapping. The trial court instructed on first-degree murder on the basis of malice, premeditation, and deliberation in the following manner:

> Now, I charge that for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt.
>
> First, that the defendant, or someone with whom he was acting in concert, intentionally and with malice killed the victim.
>
> . . . .
>
> Now, second, the State must prove that the defendant's act or the act of someone with whom he was acting in concert was a proximate cause of the victim's death. . . .
>
> Third, that the defendant, or someone with whom he was acting in concert, intended to kill the victim. . . .
>
> Fourth, that the defendant, or someone with whom he was acting in concert, acted after premeditation. That is, that he formed the intent to kill the victim over some period of time, however short, before he acted.
>
> And fifth, that the defendant, or someone with whom he was acting in concert, acted with deliberation, which means that he acted while he was in a cool state of mind.

In an identical manner, the trial court inserted the clause "defendant, or someone with whom he was acting in concert," in each of the definitive elements of robbery with a dangerous weapon and first-degree kidnapping.

A premise of our criminal law is that no person charged with a crime will be held criminally responsible unless the State proves beyond a reasonable doubt that the person possessed the *mens rea* or mental state forming an element of the crime charged. One substantive element of numerous offenses in this state is that the person charged possessed "specific intent" to commit the very crime for

which the person is charged. Our legislature has included a specific intent element in each of the offenses of which defendant in the case *sub judice* was found guilty—first-degree murder based on premeditation and deliberation, robbery with a dangerous weapon, and first-degree kidnapping. Thus, before the jury could properly render a verdict of guilty as to any of these specific intent crimes, it was required to find that defendant possessed the requisite specific intent. *State v. Blankenship*, 337 N.C. 543, 559, 447 S.E.2d 727, 736 (1994); *State v. Reese*, 319 N.C. 110, 141, 353 S.E.2d 352, 370 (1987); *State v. Westbrook*, 279 N.C. 18, 41, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

Where two or more persons are acting together in pursuit of a common plan, all may be found criminally responsible for the offenses included within the common plan committed by any one of the persons. *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Under this theory of criminal culpability, known as acting in concert, each person acting pursuant to a common plan may be criminally responsible for all offenses that are a part of the course of criminal conduct pursuant to the common plan, even if each person does not commit the act or acts himself. However, a majority of this Court[1] recently held that the theory of acting in concert does not dispense with the requirement that the State prove that the defendant had the specific intent to commit the particular offense for which he is charged. *Blankenship*, 337 N.C. at 559, 447 S.E.2d at 736.

The jury instructions given by the trial court in the case *sub judice* allowed the jury to convict defendant of premeditated and deliberated murder, robbery with a dangerous weapon, and first-degree kidnapping on the theory of acting in concert without requiring the State to establish that the defendant had the specific intent to commit those crimes. Therefore, under the controlling authority of *State v. Blankenship*, defendant is entitled to a new trial on each of these charges. We also are required under *Blankenship* to vacate the verdict and judgment against defendant for first-degree murder on the felony murder theory, as the verdict against defendant for the underlying predicate felony which supported that theory was obtained without the State being required to establish defendant's specific intent.

1. The author of this opinion dissented in *State v. Blankenship*. Although the author of this opinion still believes that *Blankenship* was wrongly decided, he is now required by *stare decisis* to apply that precedent in the case *sub judice*.

[2] Although not determinative in light of the above error in the jury instructions, we also agree with defendant that a comment made by the prosecutor during her closing argument was improper. Despite an order by the trial court declaring a statement allegedly made by Tyrone Morris to be inadmissible, the prosecutor stated to the jury during closing arguments, "isn't it interesting how the State can not get in what Morris told Lawrence." We will not speculate as to the prosecutor's motivations for attempting to place before the jury evidence that the trial court had ruled inadmissible. However, we admonish our trial judges to utilize their discretionary powers to sanction such arguments in the future.

For the foregoing reasons, defendant must receive a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. ERVY LEE JONES, JR.

No. 123A95

(Filed 9 February 1996)

1. Homicide § 253 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution where the State's evidence tended to show that at some point during an argument, the victim told defendant that she was going to call the police; defendant thereafter shot the victim, inflicting a fatal tight contact gunshot wound with his rifle; defendant had to move from the hallway into the living room to retrieve his gun from its usual location behind a bar and then return to the hallway to shoot the victim; the bar was seven or eight arm lengths from the location where defendant shot the victim; and, after the murder, defendant concealed the victim's body in sheets, carried it and the rifle to the victim's car, discarded the car and body in a ditch, and threw the rifle into a river.

Am Jur 2d, Homicide §§ 152, 439.

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.

2. Homicide § 482 (NCI4th)— first-degree murder—premeditation and deliberation—pattern jury instructions

The trial court did not err in a first-degree murder prosecution by giving the pattern jury instruction on premeditation and deliberation rather than the instructions requested by defendant, which were drawn from the pre-pattern *State v. Buchanan*, 287 N.C. 408. Language in *Buchanan* defining premeditation and deliberation was cast in doubt in *State v. Leach*, 340 N.C. 236.

Am Jur 2d, Homicide § 501.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Jenkins, J., at the 13 October 1994 Criminal Session of Superior Court, Cumberland County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 14 December 1995.

Michael F. Easley, Attorney General, by Elizabeth Rouse Mosley, Assistant Attorney General, for the State.

Nora Henry Hargrove for the defendant-appellant.

MITCHELL, Chief Justice.

Defendant was indicted on 16 May 1994 for the first-degree murder of Nanette Groves. He was tried noncapitally, found guilty as charged, and sentenced to a mandatory term of life imprisonment. Defendant appealed to this Court asserting two assignments of error.

Evidence presented by the State tended to show that on 11 July 1993 defendant Jones was with James Wilkerson, Jose Ramirez, and two other men known as "Tyrone" and "T" at defendant's house in Eureka Springs, North Carolina. Nanette Groves, the twenty-five-year-old victim, went to defendant's house and was prostituting herself in exchange for crack cocaine. Wilkerson testified at trial that after Tyrone gave the victim drugs in exchange for sex, Wilkerson heard defendant arguing with the victim. Ramirez testified that in the

course of this argument, he heard the victim say she was going to call the police. Shortly thereafter, both men heard gunfire from inside the house. Wilkerson went into the hallway of the house and saw the victim lying on the floor with defendant standing over her holding a sawed-off .22-caliber rifle. Wilkerson testified that he recognized the rifle as the weapon defendant kept on a bar in the living room, which he estimated to be seven or eight arm-lengths from the location of defendant and the victim in the hallway.

After the shooting, defendant wrapped the victim's body in sheets and placed it into the victim's car. With Wilkerson and Ramirez following in Ramirez's truck, defendant drove the victim's car to Lillington, North Carolina, where he abandoned the car and body in a roadside ditch. Defendant then joined the two other men in Ramirez's truck and returned to his house, stopping only to throw the rifle into the Cape Fear River.

The medical examiner testified at trial that the victim died as a result of a tight contact gunshot wound to her head. The examiner explained that a tight contact gunshot wound is a wound inflicted when the muzzle of a gun is in contact with the surface of the victim's body. Defendant presented no evidence at trial.

[1] In an assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder. Defendant contends the evidence was insufficient to establish premeditation and deliberation. When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). 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. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826,

835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. A defendant's conduct before and after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation. *State v. Vaughn*, 324 N.C. 301, 305, 377 S.E.2d 738, 740 (1989); *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *sentence vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1995).

The State's evidence tended to show that at some point during an argument, the victim told defendant that she was going to call the police. Thereafter, defendant shot the victim, inflicting a fatal tight contact gunshot wound with his rifle. Taken in the light most favorable to the State, the evidence tends to show that defendant had to move from the hallway into the living room to retrieve his gun from its usual location and then return to the hallway to shoot the victim. Wilkerson testified that the bar in the living room was a distance of seven or eight arm-lengths from the location where defendant shot the victim in the hallway. In addition, the evidence tends to show that after the murder, defendant concealed the victim's body in sheets, carried it and the rifle to the victim's car, drove to Lillington, discarded the car and body in a ditch, and threw the rifle into the river. Such evidence, taken in the light most favorable to the State, permits a reasonable inference that defendant premeditated and deliberated the killing, and the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

[2] In another assignment of error, defendant argues the trial court committed reversible error by failing to give the jury his requested instructions on premeditation and deliberation. The trial court instead gave the pattern instructions on these elements of first-degree murder. *See* N.C.P.I.—Crim. 206.13 (1995).

The relevant portion of the instructions defendant requested are as follows:

> Premeditation means thought beforehand for some length of time, however short. However, since the intent to kill must be turned over in the mind in order for the process of premeditation and deliberation to transpire, it is clear that some period of time must necessarily elapse. The true test is not the duration of time as much as it is the extent of the reflection.

> For premeditation the killer must ask himself the question, "Shall I kill him?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "What about the consequences? Well, I'll do it anyway."
>
> Though the mental process constituting premeditation and deliberation may require only a moment of thought, the State must still satisfy you beyond a reasonable doubt that the Defendant, Ervy Lee Jones, Jr., weighed and balanced the matter of killing Nanette Groves in his mind long enough to consider the reason or motive which caused him to shoot Nanette Groves and to form a fixed purpose of fixed design in his mind to kill Nanette Groves in order to accomplish his purpose or motive for killing him [sic].

Defendant argues that because these instructions were drawn almost verbatim from an opinion of this Court in *State v. Buchanan*, 287 N.C. 408, 418, 215 S.E.2d 80, 85-86 (1975), the trial court erred by denying defendant's request. On appeal, defendant argues that the submitted instructions clarified two crucial points: "(1) that premeditation and deliberation require some reflection, however short, followed by a deliberate choice to commit the crime with the specific intent to kill the victim; and (2) that the State has the burden of proving premeditation and deliberation and the defendant has no burden to disprove premeditation and deliberation."

In denying defendant's request to give the submitted instructions, the trial court reasoned that even if the submitted instructions were correct statements on premeditation and deliberation, *Buchanan* predated the pattern jury instructions. The trial court also found that the pattern instructions were in substantial conformity with the submitted instructions. *See* N.C.P.I.—Crim. 206.13.

We have held on several occasions that "a trial court is not required to give a requested instruction verbatim. Rather, when the request is correct in law and supported by the evidence, the court must give the instruction in substance." *State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989); *accord State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). We conclude that the trial court committed no error in giving the pattern jury instructions contained in N.C.P.I.—Crim. 206.13. In fact, we have recently cast doubt on the validity of certain language from *Buchanan* that defined premeditation and deliberation. *State v. Leach*, 340 N.C. 236, 241-42, 456 S.E.2d 785, 788 (1995) (holding that to the extent *Buchanan* does not comport with

N.C.P.I.—Crim. 206.10, *Buchanan* is disapproved). We reach this conclusion mindful of our duty to continuously scrutinize the pattern instructions for federal and state constitutional and statutory infirmities. *See, e.g., State v. McCoy*, 303 N.C. 1, 29, 277 S.E.2d 515, 534-35 (1981).

NO ERROR.

STATE OF NORTH CAROLINA v. KENNETH EDGAR PATTON

No. 255PA95

(Filed 9 February 1996)

Criminal Law § 1284 (NCI4th)— habitual felon—separate indictment for each felony not required

A separate habitual felon indictment is not required for each substantive felony indictment since the plain meaning of N.C.G.S. § 14-7.3 is that the habitual felon indictment must be a separate document, not that a separate habitual felon indictment is required for each substantive felony charge; a defendant charged as an habitual felon is defending himself against a charge that he has at least three prior felony convictions, not against the predicate substantive felony; and a single habitual felon indictment in compliance with § 14-7.3 provides adequate notice of the State's intention to prosecute a defendant as a recidivist, regardless of the number of substantive felonies for which the defendant is being tried at that time. The decision of *State v. Netcliff*, 116 N.C. App. 396, 448 S.E.2d 311, is overruled to the extent that it can be read as being contrary to this holding.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20, 21.

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, 119 N.C. App. 229, 458 S.E.2d 230 (1995), vacating the sentences on defendant's convictions of five counts of forgery, five counts of uttering a forged instrument, one count of conspiracy to commit forgery, one count of conspiracy to

utter a forged instrument, and being an habitual felon, all entered by Guice, J., at the 14 March 1994 special session of Superior Court, Caldwell County, and remanding for resentencing. Heard in the Supreme Court 13 December 1995.

Michael F. Easley, Attorney General, by Jeffrey P. Gray and Sue Y. Little, Assistant Attorneys General, for the State-appellant.

C. Gary Triggs, P.A., by C. Gary Triggs, for defendant-appellee.

WHICHARD, Justice.

Defendant was charged with five counts of forgery, five counts of uttering forged paper, one count of conspiracy to commit forgery, one count of conspiracy to commit uttering forged paper, and one count of habitual felon status. In June 1992 he was convicted by a jury of all twelve substantive felonies and was subsequently convicted of being an habitual felon based on previous convictions of second-degree murder, voluntary manslaughter, and possession of a firearm by a convicted felon. The trial court consolidated the charges and sentenced defendant to six consecutive life sentences.

Upon defendant's appeal, the Court of Appeals, in an unpublished opinion, remanded for resentencing for the trial court's failure to make the required written findings of factors in aggravation and mitigation. *State v. Patton*, 112 N.C. App. 546, 436 S.E.2d 415 (1993). Following a resentencing hearing in March 1994, the trial court found factors in aggravation and mitigation and sentenced defendant to five consecutive life sentences. Defendant again appealed, and the Court of Appeals again remanded for resentencing, holding that there must be a separate habitual felon indictment for each separate felony indictment. *State v. Patton*, 119 N.C. App. 229, 458 S.E.2d 230 (1995). For reasons that follow, we reverse and remand for reinstatement of defendant's sentences.

Any person who has been convicted of or pled guilty to three felony offenses is declared by statute to be an habitual felon. N.C.G.S. § 14-7.1 (1993). N.C.G.S. § 14-7.3 provides for the charging of a person as an habitual felon, in pertinent part, as follows:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the

> defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

The Court of Appeals construed this language as requiring a "one-to-one correspondence" between substantive felony indictments and habitual felon indictments. *Patton*, 119 N.C. App. at 232, 458 S.E.2d at 233.

Based on our reading of N.C.G.S. § 14-7.3, we conclude that a separate habitual felon indictment is not required for each substantive felony indictment. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995) (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). The requirement in § 14-7.3 that the habitual felon indictment be a separate document from the predicate felony indictment is consistent with the bifurcated nature of the trial. *See* N.C.G.S. § 14-7.5 (1993) (after defendant commits a fourth felony, trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury). Therefore, the statute's plain meaning is only that the habitual felon indictment must be a separate document, not that a separate habitual felon indictment is required for each substantive felony charge.

Being an habitual felon is not a crime but rather a status which subjects the individual who is subsequently convicted of a crime to increased punishment for that crime. *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). Nevertheless, because § 14-7.3 requires two separate indictments to sentence an individual as an habitual felon, *id.* at 435, 233 S.E.2d at 587, and because the habitual felon indictment is ancillary to the indictment for the substantive felony, *id.* at 433-34, 233 S.E.2d at 587, the Court of Appeals reasoned that one habitual felon indictment is required for each substantive felony indictment. *Patton*, 119 N.C. App. at 231, 458 S.E.2d at 232. The court relied upon *State v. Netcliff*, 116 N.C. App. 396, 448 S.E.2d 311 (1994),

in which the defendant was indicted for four substantive felonies and charged in four habitual felon indictments. At issue in *Netcliff* was whether the defendant's three previous felony convictions were sufficient to support habitual felon status, not whether the number of habitual felon indictments properly mirrored the number of substantive felony indictments. *Id.* at 401-02, 448 S.E.2d at 314. To the extent that it can be read to require a separate habitual felon indictment for each substantive felony indictment, however, *Netcliff* is overruled.

Our recent decision in *State v. Cheek*, 339 N.C. 725, 453 S.E.2d 862, further suggests this result. In *Cheek*, we held that "[n]othing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment." *Id.* at 728, 453 S.E.2d at 864. As further support for holding that no reference to the substantive felony is required in the habitual felon indictment, we noted that a defendant charged as an habitual felon is defending himself against a charge that he has at least three prior felony convictions, not against the predicate substantive felony. *Id.* at 729, 453 S.E.2d at 864. Each of these reasons supports our holding in this case that a separate habitual felon indictment is not required for each predicate substantive felony indictment. Such a requirement would exceed the intent of the legislature and undermine the holding in *Cheek*.

One fundamental purpose of § 14-7.3 is to provide notice to a defendant that he is being prosecuted for his substantive felony as a recidivist. *Allen*, 292 N.C. at 436, 233 S.E.2d at 588. A single habitual felon indictment in compliance with § 14-7.3 provides adequate notice of the State's intention to prosecute a defendant as a recidivist, regardless of the number of substantive felonies for which the defendant is being tried at that time. The statute and our case law require nothing further.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, Caldwell County, for reinstatement of the sentences previously entered.

REVERSED AND REMANDED.

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

CAROLYN DALE TREXLER v. K-MART CORPORATION

No. 323PA95

(Filed 9 February 1996)

Negligence § 140 (NCI4th)— slip and fall—invitee—summary judgment motion—inspection of premises—burden of coming forward with evidence

The Court of Appeals decision that in slip and fall cases involving injury to an invitee in which defendant moves for summary judgment, it is appropriate to place upon defendant the initial burden of gathering information about whether, when, and by whom the premises were last inspected prior to plaintiff's injury is reversed based upon the authority of *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339.

Am Jur 2d, Premises Liability § 29.

Store or business premises slip-and-fall: Modern status of rules requiring showing of notice of proprietor of transitory interior condition allegedly causing plaintiff's fall. 85 ALR3d 1000.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow. 20 ALR4th 438.

Liability of operator of store, office, or similar place of business to invitee slipping on spilled liquid or semiliquid substance. 26 ALR4th 481.

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision of the Court of Appeals, 119 N.C. App. 406, 458 S.E.2d 720 (1995), reversing an order allowing summary judgment for defendant, entered on 16 November 1993 by Webb, J., in Superior Court, Rowan County. Heard in the Supreme Court 14 December 1995.

Wallace and Whitley, P.A., by Michael S. Adkins, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Allen C. Smith, for defendant-appellant.

Davis, Murrelle & Lumsden, P.A., by Janet M. Lyles, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

Based upon the authority of *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 414 S.E.2d 339 (1992), the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Rowan County, for reinstatement of the trial court's order allowing summary judgment for defendant.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. CURTIS BALDWIN SHOFF

No. 244PA95

(Filed 9 February 1996)

Appeal and Error § 115 (NCI4th)— order denying double jeopardy claim—no immediate appeal

The Court of Appeals correctly held that an order denying defendant's motion to dismiss a driving while impaired charge on double jeopardy grounds was interlocutory and nonappealable.

Am Jur 2d, Appellate Review § 239.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 118 N.C. App. 724, 456 S.E.2d 875 (1995), dismissing as interlocutory and nonappealable defendant's attempted appeal from an order entered by Allen (C. Walter), J., on 23 February 1994 in Superior Court, Buncombe County, denying defendant's motion to dismiss (on double jeopardy grounds) a charge that defendant was driving while impaired. Heard in the Supreme Court 15 December 1995.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Wade Hall for defendant-appellant.

PER CURIAM.

The Court of Appeals correctly held that the order at issue was interlocutory and nonappealable. *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986). The decision of the Court of Appeals is therefore

AFFIRMED.

BERKELEY FEDERAL SAVINGS BANK (F/K/A BERKELEY FEDERAL SAVINGS AND LOAN ASSOCIATION), A FEDERALLY CHARTERED SAVINGS BANK v. TERRA DEL SOL, INC., A KENTUCKY CORPORATION, STEVEN K. SMITH, A NATURAL PERSON; LINDENWOOD LAND COMPANY, LTD., A KENTUCKY LIMITED PARTNERSHIP; ILEX PROPERTY SERVICES, INC., A KENTUCKY CORPORATION; HORIZON RESORTS, INC., A NORTH CAROLINA CORPORATION; FOXFIRE RESORTS, INC., A NORTH CAROLINA CORPORATION; FIRST RESORT PROPERTIES OF N.C., INC., A NORTH CAROLINA CORPORATION; RANCH RESORTS OF N.C., INC., A NORTH CAROLINA CORPORATION; GULF COAST LAND COMPANY, AN ADMINISTRATIVELY DISSOLVED FLORIDA CORPORATION, AND PREMIER RESORTS, INC., AN INVOLUNTARILY DISSOLVED MASSACHUSETTS CORPORATION

No. 271PA95

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 249, 457 S.E.2d 736 (1995), reversing an order dismissing plaintiff's action entered by Hooks, J., on 12 April 1994 in Superior Court, Moore County, and remanding this case to the trial court. Heard in the Supreme Court 15 December 1995.

Brown & Bunch, by Charles Gordon Brown and Scott D. Zimmerman, for plaintiff-appellee.

Patton Boggs, L.L.P., by Eric C. Rowe and Allen Holt Gwyn, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STRICKLAND v. CAROLINA CLASSICS CATFISH

[342 N.C. 640 (1996)]

JENNIE LOU STRICKLAND, MOTHER AND JERRY STRICKLAND, FATHER, OF GORDON G. STRICKLAND, EMPLOYEE, PLAINTIFF v. CAROLINA CLASSICS CATFISH, INC., EMPLOYER; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 281A95

(Filed 9 February 1996)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 119 N.C. App. 97, 458 S.E.2d 10 (1995), affirming the judgment of the North Carolina Industrial Commission entered on 11 April 1994. Heard in the Supreme Court on 12 December 1995.

Harrington, Edwards & Braddy, by Peter J.M. Romary, for the plaintiff-appellees.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., for the defendant-appellants.

PER CURIAM.

AFFIRMED.

AGEE v. THOMASVILLE FURNITURE PRODUCTS

[342 N.C. 641 (1996)]

JOHN PAUL AGEE, EMPLOYEE v. THOMASVILLE FURNITURE PRODUCTS, EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 240A95

(Filed 9 February 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 119 N.C. App. 77, 457 S.E.2d 886 (1995), affirming an opinion and award of the North Carolina Industrial Commission, entered 18 May 1994. Calendared for argument in the Supreme Court 12 December 1995; determined on the briefs without oral argument.

Donaldson & Horsley, P.A., by Kathleen G. Sumner, for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by G. Thompson Miller, for defendant-appellees.

PER CURIAM.

AFFIRMED.

MARK JONATHAN BUCHANAN v. ATLANTIC INDEMNITY COMPANY

No. 541PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 116 N.C. App. 735, 450 S.E.2d 355 (1994), reversing an order entered by Saunders, J., on 13 September 1993, in Superior Court, Buncombe County, and remanding to the trial court. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Ball, Barden, Contrivo & Bell, P.A., by Ervin L. Ball, Jr., for plaintiff-appellee.

Steven D. Cogburn and Wyatt S. Stevens for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995).

VACATED AND REMANDED.

ALICE R. HARPER, ADMINISTRATRIX OF THE ESTATE OF WILLIAM P. HARPER, JR. v. ALLSTATE INSURANCE COMPANY

No. 614PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 117 N.C. App. 302, 450 S.E.2d 759 (1994), affirming an order entered by Brewer, J., on 14 December 1993, in Superior Court, Wake County. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Edwards & Kirby, by Tiana H. Irvin, for plaintiff-appellee.

Smith & Holmes, P.C,. by Robert E. Smith, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996).

VACATED AND REMANDED.

BRENDA BAINS REASON v. NATIONWIDE MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 547PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 116 N.C. App. 491, 448 S.E.2d 875 (1994), affirming an order entered by Brown (Franklin R.), J., on 12 November 1993 in Superior Court, Wilson County. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Thomas, Farris, Turner and Smith, P.A., by Allen G. Thomas, Page Thomas Smith, and James F. Rogerson, for plaintiff-appellee.

Ragsdale, Liggett & Foley, by Stephanie Hutchins Autry and Cristina I. Flores, for defendant-appellee Nationwide Mutual Insurance Company.

Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendant-appellant State Farm Mutual Automobile Insurance Company.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996).

VACATED AND REMANDED.

RUTH A. EURY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 535PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 116 N.C. App. 490, 448 S.E.2d 389 (1994), affirming an order entered by Helms, J., on 19 August 1993, in Superior Court, Union County. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Smith, Follin & James, L.L.P., by J. David James, for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996).

VACATED AND REMANDED.

GREGORY LEE HUSSEY v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 445PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 464, 445 S.E.2d 63 (1994), affirming a judgment entered by Stephens (Donald W.), J., on 30 April 1993 in Superior Court, Wake County. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Law Offices of Paul Devendel Davis, by Paul D. Davis, for plaintiff-appellee.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996), and *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995).

VACATED AND REMANDED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. ANDREW JESSE YOUNG, MARY CORTEZ WIMBERLY, NICHOLAS YOUNG, A MINOR, AND MAY GEE YOUNG, A MINOR

No. 335PA94

(Filed 9 February 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 115 N.C. App. 68, 443 S.E.2d 756 (1994), reversing a judgment entered by Beaty, J., on 4 January 1993, in Superior Court, Forsyth County, and remanding to the trial court. Pursuant to Rule 30(f)(1) of the North Carolina Rules of Appellate Procedure, this case was reviewed without oral argument.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for plaintiff-appellant.

Robinson Maready Lawing & Comerford, by W. Thompson Comerford, Jr., and Jerry M. Smith, for defendant-appellees.

PER CURIAM.

The decision of the Court of Appeals is vacated, and the case is remanded for further consideration in light of the authority of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996).

VACATED AND REMANDED.

DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF V. ELPIS SAKARIA, DEFENDANT; DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF V. RAJ ALEXANDER TRUST, ELPIS J.G.B. SAKARIA, TRUSTEE, DEFENDANT; DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF V. JERA ASSOCIATES, A MARYLAND PARTNERSHIP, DEFENDANT; DARE COUNTY BOARD OF EDUCATION, A BODY OF POLITIC AND CORPORATE, PLAINTIFF V. JACK HILLMAN AND WIFE, LILLIAN HILLMAN, DEFENDANTS

No. 229A95

(Filed 9 February 1996)

Appeal by defendants as of right pursuant to N.C.G.S. § 7A-30(1) of a decision by the Court of Appeals which affirmed judgments for the plaintiff by the Superior Court, Dare County, 118 N.C. App. 609, 456 S.E.2d 842 (1995), and which involves substantial questions arising under the Constitution of the United States and the Constitution of this State. Heard in the Supreme Court 12 December 1995.

W. Brian Howell and Deveau & Norcross, P.A., by Ronald E. DeVeau, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin, by Robert L. O'Donnell, for defendants-appellants.

PER CURIAM.

AFFIRMED.

STATE v. HARDEN

[342 N.C. 649 (1996)]

State of North Carolina	)	
	)	
v.	)	ORDER
	)	
Alden Jerome Harden	)	

No. 427A94

(Filed 24 January 1996)

Upon consideration of defendant's motion for order requiring clerk to disclose evidence & records in this case, the motion is allowed in part as follows:

The Clerk of Superior Court of Mecklenburg County is ordered to disclose to counsel for the defendant and counsel for the State any and all materials in this case other than those that the trial court placed under seal. Materials under seal shall be forwarded to this Court for its review prior to any review by counsel. Counsel for defendant and the State are directed to review the disclosed materials and seek to arrive at agreement as to any amendments to be made to the record on appeal. Any and all amendments shall be subject to further orders of this Court to be entered upon appropriate motions filed by the parties.

By order of the Court in Conference, this the 24th day of January, 1996.

Orr, J.
For the Court

State of North Carolina	)	
	)	
v.	)	ORDER
	)	
Sherman Elwood Skipper	)	

No. 122A92-3

(Filed 24 January 1996)

Defendant's petition for writ of certiorari is allowed for the limited purpose of entering the following order:

The motion for appropriate relief which defendant would have filed in the trial court and which is attached to the petition for certiorari to this Court is treated as a motion for appropriate relief filed with this Court.

The Court, having thoroughly considered the matters raised in the motion for appropriate relief and having determined that none require an evidentiary hearing for determination and that none allow defendant any grounds for relief, the motion is therefore denied.

By order of the Court in Conference, this the 24th day of January, 1996.

Orr, J.
For the Court

BAKER v. CITY OF SANFORD

No. 569P95

Case below: 120 N.C.App. 783

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

BASS v. SIDES

No. 494P95

Case below: 120 N.C.App. 485

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

BEAM v. KERLEE

No. 506P95

Case below: 120 N.C.App. 203

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

BELL v. BUILDERS TRANSPORT

No. 490P95

Case below: 120 N.C.App. 642

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

BIVENS v. COTTLE

No. 496PA95

Case below: 120 N.C.App. 467

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996.

BOARD OF EDUCATION OF HICKORY v. BLICKENSDERFER

No. 565PA95

Case below: 120 N.C.App. 645

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 February 1996.

BOARD OF EDUCATION OF HICKORY v. BRITTAIN

No. 563PA95

Case below: 120 N.C.App. 645

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 February 1996.

BOARD OF EDUCATION OF HICKORY v. LATTA

No. 564PA95

Case below: 120 N.C.App. 645

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 February 1996.

BOARD OF EDUCATION OF HICKORY v. SEAGLE

No. 518PA95

Case below: 120 N.C.App. 566

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996.

BRADSHAW v. BOLCH

No. 492P95

Case below: 120 N.C.App. 642

Petition by unnamed defendant (N.C. Farm Bureau Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

BRANTLEY v. PHILLIPS

No. 451P95

Case below: 120 N.C.App. 407

Petition by Attorney General for defendants for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

BURTON-JUNIOR v. BURTON

No. 7P96

Case below: 121 N.C.App. 219

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

CANNON v. CITY OF DURHAM

No. 510P95

Case below: 120 N.C.App. 612

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

CARRIER v. STARNES

No. 520P95

Case below: 120 N.C.App. 513

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

CORNELIUS v. HELMS

No. 430P95

Case below: 120 N.C.App. 172

Petition by defendants (Helms and Parham, Helms and Kellam) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996. Motion by plaintiffs to dismiss petition for discretionary review dismissed as moot 8 February 1996.

CROCKETT v. ALLSTATE INSURANCE CO.

No. 441P95

Case below: 120 N.C.App. 407

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

DARE COUNTY BD. OF EDUCATION v. SAKARIA

No. 229A95

Case below: 118 N.C.App. 609

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 8 February 1996.

DEVANE v. CHANCELLOR

No. 519P95

Case below: 120 N.C.App. 636

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

FINK v. FINK

No. 515P95

Case below: 120 N.C.App. 412

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

GATHINGS v. DAWSON CONSUMER PRODUCTS

No. 541P95

Case below: 121 N.C.App. 216

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

GODWIN v. NATIONWIDE MUTUAL INS. CO.

No. 291P95

Case below: 119 N.C.App. 303

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

GRIFFIN v. SWEET

No. 501P95

Case below: 120 N.C.App. 166

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

HAYWOOD STREET REDEVELOPMENT CORP. v. PETERSON CO.

No. 34P96

Case below: 120 N.C.App. 832

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

HERITAGE POINTE BLDRS. v. N.C. LICENSING BD. OF GENERAL CONTRACTORS

No. 493P95

Case below: 120 N.C.App. 502

Petition by respondent (N.C. Licensing Board of General Contractors) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

JOHNSON v. AMETHYST CORP.

No. 521PA95

Case below: 120 N.C.App. 529

Petition by defendants (Amethyst Corp. & Amethyst Charlotte, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996. Petition by defendant (Bartolotta) for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996.

JOHNSON v. BARNHILL CONTRACTING CO.

No. 19P96

Case below: 121 N.C.App. 55

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

JONES v. WILLAMETTE INDUSTRIES, INC.

No. 495P95

Case below: 120 N.C.App. 591

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

JUSTICE v. N.C. DEPT. OF TRANSPORTATION

No. 54A96

Case below: 121 N.C.App. 314

Petition by Attorney General for writ of supersedeas allowed 8 February 1996. Motion by Attorney General for temporary stay dismissed as moot 8 February 1996.

KRYDER v. CHAPEL HILL-CARRBORO BD. OF EDUCATION

No. 522P95

Case below: 120 N.C.App. 646

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

LAVELLE v. SCHULTZ

No. 558P95

Case below: 120 N.C.App. 857

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

LEWIS v. YONKERS CONTRACTING/DIVERSIFIED CONCRETE PRODUCTS

No. 529P95

Case below: 120 N.C.App. 646

Petition by plaintiff (Kemmerlyn Dawn Lawrence by and through her Guardian Ad Litem, Alexis P. Lawrence) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

LIN v. CITY OF GOLDSBORO

No. 5P96

Case below: 121 N.C.App. 220

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

McLEAN v. GENERAL SPRAY & MAINTENANCE SERVICE

No. 533P95

Case below: 120 N.C.App. 646

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

MIESCH v. OCEAN DUNES HOMEOWNERS ASSN.

No. 523P95

Case below: 120 N.C.App. 559

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

MILLER v. BETZ

No. 538P95

Case below: 120 N.C.App. 646

Petition by appellant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

MOORE v. CITY OF CREEDMOOR

No. 435A95

Case below: 120 N.C.App. 27

Notice of appeal by plaintiffs (substantial constitutional question) dismissed 8 February 1996. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996.

NATIONWIDE MUTUAL INS. CO. v. LANKFORD

No. 193P95

Case below: 118 N.C.App. 368

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

N.C. DEPT. OF CORRECTION v. HARDING

No. 491P95

Case below: 120 N.C.App. 451

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

N.C. DEPT. OF CORRECTION v. PATTERSON

No. 481P95

Case below: 120 N.C.App. 408

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996. Alternative petition filed by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

NOBLES v. FIRST CAROLINA COMMUNICATIONS

No. 436P95

Case below: 120 N.C.App. 200

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

OWENS v. MASSIE FURNITURE CO.

No. 477P95

Case below: 120 N.C.App. 643

Petition by plaintiff (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

PARSONS v. THE PANTRY, INC.

No. 528P95

Case below: 121 N.C.App. 216

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

REGAN v. AMERIMARK BUILDING PRODUCTS

No. 170P95-2

Case below: 118 N.C.App. 328

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

SHARP v. GULLEY

No. 549P95

Case below: 120 N.C.App. 878

Petition by plaintiff (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. BOULWARE

No. 472P95

Case below: 120 N.C.App. 643

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. CRENSHAW

No. 16P96

Case below: 121 N.C.App. 217

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996. Petition by defendant (Pro Se) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

STATE v. DAMMONS

No. 556P95

Case below: 121 N.C.App. 61

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 27 December 1995.

STATE v. HAMILTON

No. 517P95

Case below: 121 N.C.App. 217

Motion by Attorney General for temporary stay allowed 12 December 1995 pending receipt and determination of a timely filed petition for discretionary review. Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 8 February 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. HARMON

No. 20P96

Case below: 121 N.C.App. 218

Petition by defendant for writ of certiorari to review the decision of the Court of Appeals denied 8 February 1996.

STATE v. HINTON

No. 445P95

Case below: 120 N.C.App. 408

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. JACKSON

No. 56P96

Case below: 121 N.C.App. 398

Motion by defendant for temporary stay allowed 8 February 1996 pending receipt and determination of defendant's petition for discretionary review.

STATE v. KEEL

No. 134A93-3

Case below: Edgecombe County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Edgecombe County Superior Court denied 27 December 1995. Petition by defendant for writ of supersedeas denied 27 December 1995. Motion by defendant for stay of execution denied 27 December 1995.

STATE v. LARRY

No. 189A95

Case below: Forsyth County Superior Court

Petition by defendant for writ of certiorari to review the decision of the Forsyth County Superior Court allowed 8 February 1996.

STATE v. LEDFORD

No. 423P95

Case below: 120 N.C.App. 409

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. LEWIS

No. 570P95

Case below: 120 N.C.App. 884

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. LOCKLEAR

No. 32P96

Case below: 121 N.C.App. 355

Petition by plaintiff (Attorney General) for writ of supersedeas and motion for temporary stay denied 23 January 1996.

STATE v. LUCAS

No. 552P95

Case below: 120 N.C.App. 884

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 February 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. McABEE

No. 530P95

Case below: 120 N.C.App. 674

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. MILLS

No. 15P96

Case below: 121 N.C.App. 218

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. MILTON

No. 482P95

Case below: 120 N.C.App. 644

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 February 1996.

STATE v. PULLEY

No. 499P95

Case below: 120 N.C.App. 648

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. SIDES

No. 471P95

Case below: 120 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. SMITH

No. 6P96

Case below: 121 N.C.App. 41

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 February 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. STEELE

No. 542P95

Case below: 121 N.C.App. 218

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

STATE v. WORLEY

No. 488P95

Case below: 120 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

SWORD v. STATE OF N.C. DEPT. OF TRANSPORTATION

No. 42P96

Case below: 121 N.C.App. 213

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

TAYLOR v. COLLINS

No. 402P95

Case below: 342 N.C.196

120 N.C.App. 202

Motion by plaintiff for reconsideration of petition for discretionary review dismissed 8 February 1996.

THOMPSON v. SOUTHWESTERN FREIGHT CARRIERS

No. 537P95

Case below: 120 N.C.App. 884

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

TOWER DEVELOPMENT PARTNERS v. ZELL

No. 432PA95

Case below: 120 N.C.App. 136

Petition by defendant (Samuel Zell) for discretionary review pursuant to G.S. 7A-31 allowed 8 February 1996.

TRIPP v. PERDUE FARMS, INC.

No. 486P95

Case below: 120 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

VILLAGE OF RAINTREE HOMEOWNERS v.
RAINTREE COUNTRY CLUB

No. 480P95

Case below: 120 N.C.App. 411

Petition by plaintiff (Village of Raintree Homeowners, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

WALTERS v. BLAIR

No. 462A95

Case below: 120 N.C.App. 398

Notice of appeal by defendants (substantial constitutional question) retained 8 February 1996.

WILLIAMS v. BURLINGTON INDUSTRIES

No. 4P96

Case below: 121 N.C.App. 221

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

WINGO v. WINGO

No. 511P95

Case below: 120 N.C.App. 649

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

WINNER v. INTEGON INDEMNITY CORP.

No. 461A95

Case below: 120 N.C.App. 645

Notice of appeal by plaintiffs (substantial constitutional question) dismissed 8 February 1996.

WRENN v. BYRD

No. 567P95

Case below: 120 N.C.App. 761

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

ZANONE v. RJR NABISCO, INC.

No. 560P95

Case below: 120 N.C.App. 768

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 February 1996.

PETITIONS TO REHEAR

MUSE v. CHARTER HOSPITAL OF WINSTON-SALEM

No. 73A95

Case below: 342 N.C. 403

Petition by defendant to rehear pursuant to Rule 31 denied 8 February 1996.

POOLE v. MILLER

No. 525PA94

Case below: 342 N.C. 349

Petition by defendant to rehear pursuant to Rule 31 denied 8 February 1996. Petition by North Carolina Association of Defense Attorneys to rehear pursuant to Rule 31 denied 8 February 1996.

ROBINETTE v. BARRIGER

No. 527A94

Case below: 342 N.C. 181

Petition by plaintiff to rehear pursuant to Rule 31 denied 8 February 1996.

STATE v. DECASTRO

[342 N.C. 667 (1996)]

STATE OF NORTH CAROLINA v. EUGENE TYRONE DECASTRO

No. 221A93

(Filed 8 March 1996)

1. Evidence and Witnesses § 1473 (NCI4th)— first-degree murder—knife—discovered three months after crime—some distance from scene

The trial court did not err in a first-degree murder prosecution by admitting into evidence a kitchen knife found approximately three months after the murders and some distance from the crime scene along the path of flight which officers were able to follow from the scene of the crime to the spot where defendant was found. Water in the pond where the knife was found had receded since the murders, and the medical examiner found the wounds on both victims consistent with the length and width of the knife. The lapse of time and the distance from the crime scene merely go to the weight of the evidence.

Am Jur 2d, Evidence §§ 1464, 1467.

2. Criminal Law § 461 (NCI4th)— first-degree murder—prosecutor's argument—presence of State's witness at scene—physical evidence distinguished from testimonial

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's argument that no physical evidence connected the State's key witness to the scene. Although defendant contended that the prosecutor travelled outside the evidence, the prosecutor's argument was supported by the evidence and the prosecutor was clearly attempting to distinguish the physical evidence from the testimonial evidence, which does not appear to be inappropriate considering the large amount of physical evidence admitted.

Am Jur 2d, Trial §§ 609, 632.

3. Evidence and Witnesses § 1240 (NCI4th)— defendant's statement—made during booking into jail

The trial court did not err in a first-degree murder prosecution by admitting a defendant's statement that some of the money he had was his where the statement was not the result of an interrogation but in response to a question from a detective to an SBI agent and in the general course of turning over defendant's cloth-

ing and property in exchange for an inmate jumpsuit. The exchange between the officers did not constitute an initiation of questioning or badgering of defendant with words or actions reasonably likely to elicit an incriminating response from defendant.

Am Jur 2d, Criminal Law § 788; Evidence §§ 719, 749.

4. Evidence and Witnesses § 173 (NCI4th)— first-degree murder—witness's fear of defendant

The trial court did not err in a capital first-degree murder prosecution by admitting testimony that the witness was afraid of defendant. This testimony did not constitute inadmissible character evidence under N.C.G.S. § 8C-1, Rule 404(a), because it was essentially *res gestae* in that it explained why the witness was found walking away from the crime scene and provided evidence confirming the state of mind, method of operation, and course of conduct of defendant and his cohorts.

Am Jur 2d, Evidence § 556.

5. Criminal Law § 1325 (NCI4th)— capital sentencing—Issues Three and Four—instructions

There was no plain error in a capital sentencing hearing by instructing the jury that it must be unanimous in its answers to Issue Three and Issue Four on the Issues and Recommendation as to Punishment form where defendant and the State agree that the wording on the form and the original instructions were correct; after beginning deliberations, the jury sent the court a question which read, "I put down an answer we did not unanimously agree on. Do we need another copy for the record?"; the court instructed the jury that it could mark through a previous answer and record the correct answer, and that the jury must be unanimous as to issues one, three, and four; and the jury then changed a "no" to a "yes" on Issue Three. Although defendant argues that the supplemental instruction was in conflict with the initial instruction, the jury's question demonstrates that the jury understood that its answer to Issue Three must be unanimous.

Am Jur 2d, Trial §§ 1441, 1444.

6. Criminal Law § 1361 (NCI4th)— capital sentencing—mitigating circumstances—impaired capacity

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance that defend-

ant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired based on alcohol consumption where defendant requested only the nonstatutory mitigating circumstance that defendant was under the influence of alcohol. The only evidence of intoxication was testimony that defendant was "acting crazy," that defendant and another were driving wildly, that the group had purchased and drunk a bottle of wine, and that an almost empty wine bottle bearing defendant's fingerprint was found at the scene. Nothing in the record suggests how much alcohol defendant consumed and no expert testimony or other evidence was introduced to show that defendant's capacity to appreciate the criminality of his conduct was impaired. The mere consumption of alcohol is not enough to warrant submission of the N.C.G.S. § 15A-2000(f)(6) circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

7. Criminal Law § 1363 (NCI4th)— capital sentencing—catchall mitigating circumstance—supplemental instructions

The trial court did not err in a capital sentencing hearing in the supplemental instruction given in response to the jury question "Was 13 based on proven evidence or anything that we feel like could arise from the evidence that have [sic] mitigating value?" where 13 was the catchall mitigating circumstance. Viewed in the context of the language of the catchall, the court's answer was proper and in no way contradicted the earlier instruction that the jurors could take into consideration anything they had observed in the courtroom which they deemed to have mitigating value. Defendant's contention that the supplemental instruction prohibited the jury from considering demeanor evidence as it relates to remorse is without merit since the question specifically pertained to number 13, while 12 related to remorse, which no juror found. Finally, at least one juror found the catchall mitigating circumstance as to both murders.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 514, 552-555.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 73 ALR3d 195.

8. Criminal Law § 1322 (NCI4th)— capital sentencing—possibility of parole

The trial court did not err in a capital sentencing hearing by answering a jury question as to whether life meant life in prison without the possibility of parole with the pattern jury instruction. The amendment to N.C.G.S. § 15A-2002 which became effective 1 October 1994 applies prospectively and has no applicability in this case.

Am Jur 2d, Trial §§ 286, 1443.

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

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

9. Criminal Law § 1362 (NCI4th)— capital sentencing—mitigating circumstances—age of defendant

There was no prejudicial error in a capital sentencing hearing where defendant contended that the court erred by instructing the jury that it could determine whether defendant's age had mitigating value but did not submit the statutory circumstance. Defendant relies on his chronological age of 28 and the testimony of his mother, which did not show any special or unusual circumstances suggesting that defendant possessed the limited intellectual or emotional maturity necessary to require submission of the age mitigating circumstance. Although defendant dropped out of high school, he had normal intelligence and academic success. An error in allowing the jury to consider whether defendant's chronological age alone had mitigating value was beneficial to defendant.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

10. Criminal Law § 1348 (NCI4th)— capital sentencing—mitigation—instructions

The trial court did not err in a capital sentencing hearing in its instruction on the concept of mitigation. Although defendant contended that the instruction focused on the killing rather than on defendant as an individual, the instruction was virtually identical to the pattern jury instructions.

Am Jur 2d, Criminal Law § 598.

11. Criminal Law § 1320 (NCI4th)— capital sentencing—aggravating circumstances—especially heinous and course of conduct—different evidence

The trial court did not err in a sentencing hearing for two first-degree murders by allowing the jury to find and consider as to the killing of one victim that the killing was especially heinous, atrocious, or cruel and that the killing occurred during a course of conduct which included the commission by defendant of other crimes of violence against another person or persons. Although defendant contended that the two circumstances were based on the same evidence in that the especially heinous circumstance centered around the victim witnessing the murder of her husband as she too was beaten, stabbed, and killed, the evidence supporting these aggravating circumstances is entirely different.

Am Jur 2d, Trial §§ 1441, 1444.

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.

12. Criminal Law § 1343 (NCI4th)— capital sentencing—aggravating circumstances—especially heinous—instruction—not unconstitutional

The instruction on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing hearing was not constitutionally flawed.

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

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.

13. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstances—previous conviction involving violence—disjunctive instruction

There was no error in a capital sentencing hearing in an instruction on the aggravating circumstance of previous conviction of a crime involving the use or threat of violence to another person where the court instructed the jury to find this circum-

stance if it found that defendant had been convicted of common law robbery or voluntary manslaughter involving the use or threat of violence. So long as the crimes for which defendant had been previously convicted were felonies and involved the use or threatened use of violence against another person, the specific crime which supports the aggravating circumstance is immaterial. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.

14. Criminal Law § 1326 (NCI4th)— capital sentencing—mitigating circumstances—instructions—burden of proof—satisfaction of jury

There was no error in a capital sentencing hearing where the trial court instructed the jury that defendant must "satisfy" the jury that a mitigating circumstance exists. Defendant specifically requested the instruction, and "satisfies" has been held in *State v. Payne*, 337 N.C. 505, to denote a burden of proof consistent with a preponderance of the evidence.

Am Jur 2d, Trial §§ 1441, 1444.

15. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances—instructions—unanimity

There was no plain error in a capital sentencing hearing where the jurors were instructed regarding Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it had mitigating value, and regarding Issue Three that they must weigh the aggravating circumstances against the mitigating circumstances if *the jury* found from the evidence one or more mitigating circumstances. It is impossible to discern whether the trial court had a *lapsus linguae* or whether the transcript contains an error. The instruction did not preclude any juror from considering in Issue Three mitigating evidence that juror had found in Issue Two. Defendant did not object to this instruction; even assuming that the instruction

was error, defendant has not met the heavy burden of demonstrating that the error was so fundamental and grave that a different result was likely to have occurred had the error not been committed.

Am Jur 2d, Trial §§ 1441, 1444.

16. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstance—unanimity

The trial court did not err in a capital sentencing hearing by not instructing that the jury as a whole could consider any mitigating circumstance found by any one juror at Issue Four. The court gave the pattern jury instruction and the issue was resolved contrary to defendant's position in *State v. Lee*, 335 N.C. 244.

Am Jur 2d, Trial § 1441.

17. Criminal Law § 1363 (NCI4th)— capital sentencing—instructions—nonstatutory mitigating circumstances

The trial court did not err in a capital sentencing hearing by instructing the jury as to nonstatutory mitigating circumstances that it must first determine the existence of the circumstance and then whether it had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

18. Jury § 262 (NCI4th)— peremptory challenges—jurors ambivalent about death penalty

The State in a first-degree murder prosecution did not improperly use peremptory challenges to remove jurors who expressed hesitancy or reservations about the death penalty.

Am Jur 2d, Jury §§ 234, 279.

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

19. Jury § 235 (NCI4th)— death qualification of jury—no error

The trial court did not err in a first-degree murder prosecution by allowing the death qualification of the jury.

Am Jur 2d, Jury § 279.

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

20. Criminal Law § 1327 (NCI4th)— capital sentencing—instructions—duty to recommend death

There is no error in the pattern jury instruction imposing a duty upon the jury to return a recommendation of death if it finds that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty

Am Jur 2d, Trial §§ 1441, 1444.

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

21. Homicide § 175 (NCI4th)— knife—dangerous weapon as a matter of law

There was no error in a first-degree murder prosecution in instructing the jury that a knife is a dangerous weapon as a matter of law.

Am Jur 2d, Homicide § 5.

22. Constitutional Law § 371 (NCI4th)— death penalty—constitutional

The North Carolina death penalty is not unconstitutional.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

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

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

23. Criminal Law § 1340 (NCI4th)— capital sentencing—aggravating circumstances—murder committed in commission of robbery—felony murder and premeditation and deliberation

There was no error in a capital sentencing hearing for two murders where the trial court submitted an aggravating circum-

stance that the murder of one victim was committed while defendant was engaged in the commission of a robbery. Defendant argues that the instructions on the aggravating circumstance did not differentiate between applying the aggravating circumstance to murder based upon premeditation and deliberation and murder based upon felony murder. The merger rule has been consistently held inapplicable where defendant is found guilty under theories of both premeditation and deliberation and felony murder; the instruction required by defendant's argument would be unworkable.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

24. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

The evidence supported the aggravating circumstances found in a capital sentencing hearing, the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentences were not excessive or disproportionate. None of the seven cases in which the death sentence was found to be disproportionate involved a double murder and this case has the characteristics of first-degree murder cases for which the death penalty has been upheld as proportionate.

Am Jur 2d, Criminal Law § 628; Homicide § 556.

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

Justice FRYE concurring in part and dissenting in part.

Justice WHICHARD joins in this concurring and dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Stephens (Donald W.), J., at the 12 April 1993 Criminal Session of Superior Court, Johnston

County. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed on 15 March 1994. Heard in the Supreme Court 12 October 1994.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

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

PARKER, Justice.

Defendant Eugene Tyrone DeCastro was tried capitally on indictments charging him with the murders of Leon and Margaret Batten and the robbery with a dangerous weapon of Leon Batten. The jury returned verdicts finding defendant guilty of two counts of first-degree murder and one count of robbery with a dangerous weapon. After a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for each murder conviction. The trial court imposed the death sentences as recommended and imposed an additional consecutive sentence of forty years' imprisonment for the robbery conviction.

Defendant appeals to this Court, asserting twenty-four assignments of error. For the reasons discussed herein, we conclude defendant's trial and capital sentencing proceeding were free from prejudicial error and the death sentences were not disproportionate. Accordingly, we uphold defendant's convictions and sentences on two counts of first-degree murder and his conviction and sentence for robbery with a dangerous weapon.

The evidence introduced at the guilt phase, when viewed in the light most favorable to the State, showed the following: At approximately 5:20 p.m. on 29 February 1992, defendant, George Goode, his brother Chris Goode, and Glenn Troublefield went for a ride together in George Goode's automobile. In Smithfield they saw a man walking along the road, and George stopped the vehicle. Defendant, George, and Chris got out of the vehicle and assaulted and robbed the man. The three men then returned to the vehicle, and George drove away at a high speed. At this point Troublefield requested that he be taken home, but George refused.

George began playing "chicken" with other vehicles and eventually lost control of his vehicle and ran into a ditch. After freeing the vehicle, defendant, George, and Chris went to a store and bought a bottle of wine. Troublefield again asked to be taken home. George's reckless driving continued until he lost control of the vehicle again, stranding it in a ditch near the Dallas Mobile Home Park. After unsuccessfully attempting to remove the vehicle from the ditch, defendant, George, and Chris began walking toward the Dallas Mobile Home Park, where George and his wife rented a mobile home. Troublefield left the area. About 6:35 p.m. a friend of George Goode's wife saw George and several other men at the Goodes' mobile home.

Earlier that day the owner of the Dallas Mobile Home Park, Leon Batten, had informed one of the Goodes' neighbors that the Goodes' mobile home was vacant and that he was seeking new tenants. Apparently, the Goodes had been delinquent in paying their rent. Between 6:30 and 7:30 p.m. this neighbor saw a strange man in the mobile home and went to inform Leon. Leon drove his truck to the Goodes' mobile home. A few minutes later witnesses saw several black men standing over Leon in the Goodes' yard, beating him. Some witnesses recalled seeing four men beating Leon, while others recalled seeing only three. A park resident drove to the Batten residence and informed Leon's wife, Margaret, of the skirmish at the park, and Mrs. Batten drove to the Goodes' mobile home. Other witnesses drove to the nearby home of a sheriff's deputy and informed him of the trouble.

At approximately 7:30 p.m. a sheriff's deputy arrived at the Goodes' mobile home and saw three black males standing in the yard. At trial the deputy positively identified two of the men as defendant and George Goode. The men fled, and the deputy was unable to catch them. The deputy then discovered the bodies of Leon and Margaret Batten in the cargo bed of Leon's truck. Multiple stab wounds were apparent on both victims, and neither victim had any vital signs.

Another deputy sheriff approaching the crime scene spotted George Goode two-tenths of a mile from the mobile home park, walking quickly away from the area. When taken into custody George was in possession of Leon's wallet. Within an hour after George was taken into custody, his brother Chris Goode approached the crime scene asking for George. After noticing bloodstains on Chris' clothes, officers placed him in custody and discovered Leon Batten's partial den-

tal plate in his pocket. Glenn Troublefield was picked up by a sheriff's deputy as he walked down the road.

Investigators continued their search for a fourth suspect. At approximately 6:00 a.m. the next morning, investigators, with the aid of a State Bureau of Investigation (SBI) airplane equipped with an infrared tracking device, spotted defendant walking along a dirt road in the area. Officials found defendant lying at the base of a tree, and he was then arrested.

Investigators later found three sets of human tracks leading from an area near the Goodes' mobile home, which they were able to follow despite several gaps of up to two hundred yards. The tracks diverged, and one set of tracks ended approximately fifty yards from where defendant was arrested.

A wine bottle was found in the passenger compartment of Leon's truck. Defendant's fingerprints matched one of two fingerprint lifts taken from the wine bottle. The inside portion of the truck tailgate was smeared with a blood-like substance and had a handprint impressed in it. The handprint matched defendant's. In addition, blood taken from the camouflage jacket defendant was wearing when he was arrested was consistent with Leon's blood.

An SBI agent and a sheriff's detective testified regarding a statement made by defendant while they were collecting defendant's clothing at the jail. The officers took defendant's clothing and told defendant to remove everything from his pockets and to place the items on a nearby bench. Defendant removed $13.00 from his pockets. After defendant had completely disrobed and the officers had collected all of his clothing, the detective asked the agent "if it was okay for [defendant] to keep the money." The agent then turned back toward defendant and saw some money in defendant's top pocket. Before the agent could say anything, defendant said, "I had some of my own money, too, now."

The medical examiner who conducted the autopsies on both victims described the eight knife wounds to Margaret Batten's head and neck and the fifteen stab wounds to her chest and abdomen as well as the numerous defensive wounds on the back of her hands. In addition to the external cuts, the autopsy revealed a variety of internal injuries, including six to seven broken ribs and cuts through the heart, lungs, esophagus, stomach, large intestine, spleen, kidney, and liver. Margaret died from the multiple stab wounds to her chest and

abdomen. The medical examiner testified that Margaret did not die a quick and painless death because the wounds she suffered were not severe enough to be instantly fatal and that Margaret probably remained conscious during the five to ten minutes it took for her to die.

Regarding the autopsy of Leon Batten, the medical examiner testified that she observed several stab and puncture wounds on his body. The evidence also showed blunt trauma to the head and face, which could have resulted from traumatic blows with a human fist or kicking-type blows with a foot. Leon's head and face were covered with abrasions, contusions, lacerations, bruises, and scrapes. In addition, Leon sustained several internal injuries, including broken ribs and puncture wounds of the chest. Leon also suffered damage to his hyoid bone, a horseshoe-shaped bone in the very uppermost part of the neck below the chin, which could have been caused by a severe blow to the neck with a human fist, a hard kick in the neck, or manual strangulation. Leon died as a result of a stab wound to the heart.

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

During the sentencing proceeding at defendant's trial, the State offered testimony from the medical examiner regarding the painful nature of the victims' deaths. The State also introduced evidence that in 1982, when defendant was seventeen years old, he was convicted of voluntary manslaughter and common law robbery. Defendant received a six-year sentence for these offenses.

Defendant offered the testimony of several witnesses during the sentencing proceeding. A police detective testified regarding the circumstances surrounding defendant's 1982 conviction for voluntary manslaughter. The detective testified that defendant had been at a birthday party when one of his friends got into a fight. Defendant handed his friend a knife, and the friend stabbed the other person and ran. Defendant did not stab anyone and was very cooperative during the investigation of the crime.

Prison and jail officials testified that defendant was well behaved and cooperative while awaiting trial in this case. Defendant appeared to have adjusted to prison life in a satisfactory fashion.

Defendant's mother and aunt testified regarding his childhood and family life. When defendant was young, his mother and father separated; and defendant had no significant contact with his father

for several years. His parents eventually reconciled; and in 1981 when defendant was about fifteen years old, they moved from New York to North Carolina. Defendant had an especially good relationship with his aunt. He had also been regularly employed at the time of this incident.

At the close of the sentencing proceeding, defendant addressed the jury personally. Defendant explained that he was very sorry about the Battens' deaths.

GUILT PHASE

[1] In his first assignment of error, defendant contends that the trial court committed reversible error in overruling his objections to the admission of a kitchen knife found approximately three months after the murders and some distance away from the crime scene. Defendant contends that because the State failed to associate the knife with defendant, it bore absolutely no relevance to whether he committed the offense and should have been excluded. We disagree.

Defendant relies primarily on cases analyzing the sufficiency of the evidence to withstand a motion to dismiss in arguing that the evidence linking the kitchen knife to defendant and the murders is too speculative or tenuous. *See, e.g., State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979); *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977); *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971); *State v. Davis*, 74 N.C. App. 208, 328 S.E.2d 11, *disc. rev. denied*, 313 N.C. 510, 329 S.E.2d 406 (1985); *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), *aff'd*, 311 N.C. 299, 316 S.E.2d 72 (1984); *State v. Lee*, 34 N.C. App. 106, 237 S.E.2d 315 (1977), *aff'd*, 294 N.C. 299, 240 S.E.2d 449 (1978). These decisions analyze on a case-by-case basis the sufficiency of the evidence to take the case to the jury on the identity of the defendant as the perpetrator of the charged offenses. These cases do not control the evidentiary question presented in this case: the relevancy and admissibility of the kitchen knife as one of the possible murder weapons in the prosecution of the charges against defendant.

The law of the admissibility of a possible murder weapon is well established, and the general principles were recently stated in *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992):

> Under our rules of evidence, unless otherwise provided, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1988).

> " '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 criminal cases, " '[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.' " *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)).

In *Felton* we held that four bullets found in a water heater behind the defendant's house and which were the same caliber and had rifling characteristics matching the fatal bullet were properly admitted as circumstantial evidence linking the defendant to the murder. *Felton*, 330 N.C. at 638, 412 S.E.2d at 356. The fact that bullets of this manufacture and rifling were commonly available and the State's expert could not conclude that the bullets were actually fired from the same gun as the fatal bullet impacted the weight of the evidence, not its admissibility. *Id.*; *see also State v. King*, 287 N.C. 645, 660, 215 S.E.2d 540, 549 (1975) (admission of hammer "similar to" one with which the victim was hit was proper, even though it was found some time later and some distance away from scene of crime), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976); *State v. Minton*, 234 N.C. 716, 723, 68 S.E.2d 844, 849 (1952) (while testimony did not directly show that the pistol was the murder weapon, admission of the evidence was proper since the pistol was the same caliber as the fatal bullet and "might well have been the weapon").

The knife in question was found on 5 June 1992 by a boy while fishing in a pond some distance away from the crime scene. The knife was found along the path of flight which officers were able to follow roughly from the scene of the crime to the spot where defendant was located after the murders. The fact that the knife was found about three months after the murders could be explained by the changing water levels of the pond. At the time of the murders, the water level of the pond was high, but the water had receded at the time the knife was found. Furthermore, while the knife had no bloodstains and was not tested for fingerprints, the medical examiner who conducted the victims' autopsies expressed the opinion that some of the fatal knife wounds found on both victims were consistent with the length and width of the knife and that the knife could have been one of the murder weapons.

Accordingly, we conclude that the trial court did not err in denying defendant's motion to exclude the knife and in allowing the prosecution to present it to the jury. Defendant's arguments regarding the lapse of time in finding the knife and its distance from the crime scene merely go to the weight or probative value of the evidence. These matters were fully argued to the jury by defendant. Defendant's first assignment of error is rejected.

[2] In his second assignment of error, defendant contends that the trial court committed reversible error in overruling his objection to "a grossly improper argument referring to matters beyond the scope of the evidence." More specifically, defendant contends that the prosecutor's argument that "no physical evidence" connected the State's key witness, Glenn Troublefield, to the commission of the crimes was beyond the scope of the evidence and deprived him of a fair trial. We disagree.

By statute in this jurisdiction, counsel cannot argue matters beyond the scope of the established evidence. N.C.G.S. § 15A-1230 (1988). Under this provision, "[d]uring a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record." *Id.* However, while it is error for a prosecutor to argue as evidence matters not established at trial, *see State v. Tuten*, 131 N.C. 701, 42 S.E. 443 (1902), in hotly contested cases, prosecutors are given wide latitude in arguments to the jury and are permitted to argue the evidence which has been presented as well as all reasonable inferences which may be logically drawn from the evidence, *see State v. Shank*, 327 N.C. 405, 394 S.E.2d 811 (1990).

Defendant contends that the prosecutor traveled outside the record when he argued there was no physical evidence of any sort that connected Troublefield to the crimes; however, this statement by the prosecutor was supported by the evidence presented at trial. There was no fingerprint evidence linking Troublefield to the crime scene, no property belonging to the victims found in Troublefield's possession, and no human bloodstains on Troublefield's clothes or shoes. In contrast, these types of physical evidence linked defendant and two others directly to the murders. The circumstantial evidence suggesting Troublefield's involvement was not physical evidence, but eyewitness testimony.

The prosecutor was clearly attempting to distinguish the physical evidence presented in the case from the testimonial evidence. This distinction does not appear to be inappropriate considering the large

amount of physical evidence admitted: clothing, shoes, weapons, blood samples, fingerprints, and the victims' possessions. Furthermore, it is obvious that the prosecutor's argument was drawing a distinction between the direct physical evidence and testimonial evidence, since he immediately pointed out to the jury that the various sightings of Troublefield walking on the road some distance away from the crime scene and the location where he was picked up by a sheriff's deputy made it "virtually impossible for Glenn Troublefield to have been present when the victims were killed." Finally, the prosecutor argued: "But even if some part of you still nags at you and tells you that Glenn Troublefield in some way was involved, that still in no way expiates Eugene DeCastro." Viewed in the context of the evidence presented in this case, the prosecutor's argument did not violate defendant's statutory or constitutional rights. Consequently, this assignment of error is rejected.

[3] In his third assignment of error, defendant contends that the trial court committed reversible error in overruling his objection to the admission of a statement defendant made while he was in police custody at the Sheriff's Department. Defendant contends that this statement, made after he had requested an attorney, was prompted by police conduct of an interrogating nature in violation of his federal and state constitutional rights to be free from self-incrimination and to have the assistance of counsel. We disagree.

Detective Berube and SBI Agent McDougall testified regarding the circumstances and substance of an inculpatory statement made by defendant at the jail. After defendant was arrested during the early morning hours of 1 March 1992, he was brought to the Johnston County Sheriff's Department for processing. Defendant was informed of his right to counsel before questioning, and he requested a lawyer. Detective Berube took defendant to the jail area of the Johnston County Sheriff's Department to collect his clothing as evidence. Defendant was instructed to remove everything from his pockets. According to Detective Berube, when defendant placed $13.00 on a bench and was asked how much money he had, defendant made the statement that some of the money was his. Defendant made a bare objection to Detective Berube's testimony regarding defendant's statement but gave no basis for the objection and did not request *voir dire.*

Agent McDougall also testified regarding defendant's statement. According to Agent McDougall, after defendant had completely dis-

robed and the officers had collected all of his clothing, Detective Berube asked Agent McDougall "if it was okay for [defendant] to keep the money." Agent McDougall turned back toward defendant and saw some money in defendant's top pocket. Before McDougall could say anything, defendant said, "I had some of my own money, too, now." Defendant contends that because the detective's question, made in defendant's presence while he was in police custody, could have been perceived by defendant as seeking a response, it was the functional equivalent of police interrogation in violation of his constitutional rights.

The law is well established that once an accused expresses the desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d, 378, 386 (1981); *accord State v. Clark*, 324 N.C. 146, 154, 377 S.E.2d 54, 60 (1989). Once the right to counsel has been invoked, the admissibility of defendant's in-custody statement hinges on whether the statement was made in response to improper questioning or its functional equivalent. The test for determining whether improper interrogation occurred was established in *Rhode Island v. Innis*, 446 U.S. 291, 64 L. Ed. 2d 297 (1980):

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-02, 64 L. Ed. 2d at 308 (footnotes omitted).

Applying this test to the instant case, defendant's statement that he had some of his "own money, too," was not the result of interrogation in derogation of defendant's right to have an attorney present during questioning. The question by Detective Berube regarding whether defendant could keep the money from his pocket was not directed to defendant, but to Agent McDougall. Furthermore, defendant made his statement in the course of general conversation while turning over his clothing and property in exchange for an inmate jumpsuit. The exchange between the officers about the money in defendant's possession did not constitute an initiation of questioning or badgering of defendant with words or actions reasonably likely to

elicit an incriminating response from defendant. *Id.* Therefore, defendant's statement was properly admitted into evidence, and this assignment of error is rejected.

[4] In his fourth assignment of error, defendant contends that the trial court committed reversible error in admitting Glenn Troublefield's testimony that he was afraid of defendant. Defendant contends that this testimony constituted inadmissible character evidence which greatly prejudiced him in the eyes of the jury and entitles him to a new trial. We disagree.

Glenn Troublefield testified for the State regarding defendant's activities hours before the murders in this case. Troublefield testified that he, defendant, and Chris Goode went for a ride with George Goode around 5:20 p.m. on the day of the murders. Troublefield described the other three men assaulting and robbing a stranger on the road. He further described how the vehicle's driver, George Goode, was playing "chicken" with other vehicles as he sped down the road. When George's vehicle ended up in a ditch, he had some men in a pickup truck pull it out. Then, George, Chris, and defendant went to a store and bought some wine. When Troublefield asked to be taken home, George refused and told him to stay with them and not be scared. The Goode brothers and defendant drank the wine as they drove down the road and began acting "crazy." Eventually, George drove his vehicle into a ditch near the Dallas Mobile Home Park. Troublefield testified that he refused to help the others get the vehicle out of the ditch.

The prosecutor then asked Troublefield why he did not help defendant and the other men remove the vehicle from the ditch. Troublefield explained that he refused to help the men because he "wanted to go home" and was "scared to death." The prosecutor next asked Troublefield why he was scared. Defendant objected to this question, and the trial court overruled the objection. Troublefield answered, "Because they were acting crazy."

After examining the totality of Troublefield's testimony, we cannot agree with defendant that this testimony constituted inadmissible character evidence under N.C. R. Evid. 404(a). Rather than signalling to the jury that defendant was a violent person or impermissibly showing his bad character as defendant contends, this testimony was essentially *res gestae* evidence, or evidence establishing the context or chain of circumstances of the crimes.

Troublefield's testimony explained why he was found walking away from the crime scene and provided evidence confirming the state of mind, method of operation, and course of conduct of defendant and his cohorts. Evidence of a criminal defendant's prior bad acts is admissible if it constitutes part of the history of the event or enhances the natural development of the facts. *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990). Accordingly, we reject defendant's fourth assignment of error.

SENTENCING PROCEEDING

[5] In his first sentencing issue, defendant contends the trial court erred in instructing the jury that it must be unanimous in its answers to Issue Three and Issue Four on the Issues and Recommendation as to Punishment form (herein Issues and Recommendation form). Defendant contends that the trial court committed reversible error in responding to a question from the sentencing jury because the court's supplemental instruction incorrectly informed the jury that it could not answer "no" to Issue Three or Four on the written Issues and Recommendation form unless all twelve jurors concurred in the negative answer. Defendant contends that this instruction: (i) violated the law of North Carolina, (ii) irreparably prejudiced him by reducing the State's burden of proof to justify a death sentence, (iii) improperly coerced a sentencing recommendation of death, and (iv) deprived him of his federal and state constitutional rights to due process of law and freedom from cruel and unusual punishment. Defendant argues that these violations entitle him to a new sentencing proceeding.

Defendant and the State both agree that the wording on the Issues and Recommendation form and the original jury instructions in this case were correct. Issue Three on the Issues and Recommendation form submitted to the jury was as follows:

> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?

The trial court instructed the jury:

> If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances are insufficient to outweigh the aggravating circumstances found, you would answer issue number three yes. If you do not so find, or if you have a reasonable doubt as to whether or not they do, you would answer issue three no.

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?

The trial court instructed the jury:

> The State 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 four yes, you must agree unanimously that they are.

After approximately four hours and twenty minutes of deliberations, the jury sent a question to the trial court regarding nonunanimous answers. This question, as written by the jury foreperson, read: "I put down an answer we did not unanimously agree on. Do we need another copy for the record?" The trial court addressed the jury's question as follows:

> Mr. Flood, I'm going to let y'all retire and resume your deliberations. To the extent that you need to strike through some answer you've already recorded, just mark through it and record the correct answer when you reach a point where you feel like the jurors are unanimous in their agreement on what you [sic] answer is.
>
> With regard to the issues, issues one, two, three and four. *The jury must be unanimous in their decision on what the answer to that issue is, as to one, three and four.* Number two, if a single juror finds a single mitigating circumstance, then obviously you would answer that yes. So, the jury does not have to be unanimous about the second issue, but *you do have to be unanimous about your answer to the other three issues.*

(Emphases added.) The record discloses that the jury then changed a "no" answer to a "yes" on Issue Three of the Issues and Recommendation form for the murder of Leon Batten. Defendant contends that the trial court erred in giving this supplemental instruction because the instruction incorrectly informed the jury that *any* answer to Issue Three or Issue Four must be unanimous.

Since defendant did not object to the challenged supplemental instruction, we consider the merits of this issue under a plain error analysis. *State v. Allen*, 339 N.C. 545, 555, 453 S.E.2d 150, 155 (1995). To constitute plain error, an instructional error must have had a probable impact on the jury's decision. *Id.* at 555, 453 S.E.2d at 155-56 (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379-80 (1983)). Defendant, therefore, " 'must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *Id.* at 555, 453 S.E.2d at 156 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

The unanimity question raised in this issue was recently decided by this Court in *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996), and *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996). Based on our decisions in *McCarver* and *McLaughlin*, we hold that when responding to the jury's question, the trial court did not err in informing the jurors that they must be unanimous in their answers to Issues Three and Four. Although defendant argues that the supplemental instruction was in conflict with the initial instruction, the jury's question demonstrates that the jury understood that its answer to Issue Three must be unanimous. The written question sent to the judge by the foreman read: "I put down an answer we did not unanimously agree on. Do we need another copy [referring to the Issues and Recommendation form] for the record?" The trial judge, of course, did not know on what issue or in what manner an answer had been incorrectly recorded and appropriately made no effort to ascertain this information. Obviously, had the jurors thought a "no" answer did not have to be unanimous, they would not have asked the specific question they asked. This assignment of error is overruled.

[6] Defendant next contends that the trial court erred by failing to submit the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. N.C.G.S. § 15A-2000(f)(6) (Supp. 1995). This argument is based on the evidence of defendant's alcohol consumption. At trial defendant did not request submission of this statutory mitigating circumstance, but requested a nonstatutory mitigating circumstance that defendant was under the influence of alcohol on the date of the murders. The trial court submitted this requested nonstatutory mitigating circumstance.

The rule is that the trial court must submit any statutory mitigating circumstance supported by the evidence. N.C.G.S. § 15A-2000(b); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). In the present case the only evidence of defendant's intoxication was Glen Troublefield's testimony that defendant was "acting crazy," that he and the Goodes were driving wildly, and that the group had purchased and drunk a bottle of wine. An almost empty wine bottle with defendant's fingerprint on it was found at the scene. Nothing in the record suggests how much alcohol defendant consumed, and no expert testimony or other evidence was introduced to show that defendant's capacity to appreciate the criminality of his conduct was impaired. The mere consumption of some alcohol is not enough to warrant submission of the (f)(6) mitigating circumstance. *State v. Goodman*, 298 N.C. 1, 32, 257 S.E.2d 569, 589 (1979); *see also State v. Hunt*, 330 N.C. 501, 514-15, 411 S.E.2d 806, 813 (holding that it was not error not to submit alcohol consumption as a mitigating circumstance where the evidence showed defendant shared a fifth of whiskey with others on the day of the murder, but no evidence showed how much defendant had consumed, and the jury could only speculate as to the effect of defendant's alcohol consumption on his abilities), *cert. denied*, 505 U.S. 1226, 120 L. Ed. 2d 913 (1992); *State v. Allen*, 323 N.C. 208, 230, 372 S.E.2d 855, 868 (1988) (holding that the fact defendant consumed some beers and took some drugs was insufficient evidence to demonstrate defendant's impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Williams*, 305 N.C. 656, 687, 292 S.E.2d 243, 262 (stating the legislature did not intend that the mere ingestion of alcohol be a mitigating circumstance), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). On this record the trial court did not err in failing to submit the statutory (f)(6) mitigating circumstance.

[7] Defendant next argues that the trial court erred in its supplemental instruction to the jury given in response to a question from the jury. During jury deliberations, the jury asked the following question in writing:

> Was 13 based on proven evidence or anything that we feel like could arise from the evidence that have [sic] mitigating value?

Number 13 on each of the Issues and Recommendation forms was the catchall mitigating circumstance and read, "[a]ny other circumstance or circumstances arising from the evidence which one or more jurors

deems to have mitigating value." *See* N.C.G.S. § 15A-2000(f)(9). In response to the jury's question, the trial court instructed:

> In that regard, ladies and gentlemen, you are to consider all of the evidence that has been presented in the trial, both the first part of the trial and the sentencing portion of the trial, and you are to evaluate that evidence, and you may consider any fact that can be reasonably and logically inferred from that evidence. You may consider any fact that can reasonably and logically be inferred from evidence that you've heard. And if in doing so one or more of you find that a particular [fact] exists and that it has mitigating value, and you find that by a preponderance of the evidence, then you would answer issue 13 yes. Therefore, whether it's been mentioned or not, anything that can reasonably and logically be inferred to be true as a fact in this case, from the evidence that you've heard, you may consider in deciding the answer to issue number 13. That's about all I can tell you in terms of answering your question.

Defendant contends that the trial court should have repeated the portion of its original sentencing charge which informed the jury that it could consider anything as mitigating that arose "from the evidence, and the totality of this case, anything . . . that you have seen in this courtroom that you deem to have mitigating value." Defendant argues that the instruction given unfairly limited the jury's consideration of potential mitigation and impinged on defendant's state and federal constitutional rights to a fair sentencing hearing and to freedom from cruel and unusual punishment. We disagree.

The question submitted by the jury was limited to number 13 under Issue Two, namely, the catchall mitigating circumstance. Further, the question clearly related to inferences to be drawn from the evidence as opposed to direct proof of a fact. Viewed in the context of the language of the catchall, the trial court's answer was proper and in no way contradicted the earlier instruction that the jurors could take into consideration anything they had observed in the courtroom which they deemed to have mitigating value. The present case is distinguishable from *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991), relied upon by defendant. In *McNeil* the jury gave only one answer as to all the possible mitigating circumstances including the catchall. In this case, however, the jury gave thirteen separate answers, one for each mitigating circumstance submitted. Number 12 under Issue Two

related to whether defendant had shown remorse, and no juror found this mitigating circumstance. Hence, defendant's contention that the supplemental instruction prohibited the jury from considering demeanor evidence as it relates to remorse is without merit since the question asked by the jury specifically pertained to number 13, the catchall. Finally, we note that at least one juror found the catchall mitigating circumstance as to both murders. This assignment of error is overruled.

[8] Defendant next argues that the trial court erred in answering the jury inquiry whether life meant life in prison without the possibility of parole. The trial court answered in accordance with the pattern jury instructions as follows:

> I instruct you that the question of eligibility for parole is not a proper matter for you to consider in recommending punishment, and it should be eliminated entirely from your consideration and dismissed from your minds. In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says, imprisonment for life in the State's prison.

Defendant argues that this instruction did not accurately respond to the question and suggested that a life sentence did not mean imprisonment for life. The amendment to N.C.G.S. § 15A-2002 which became effective 1 October 1994 applies prospectively and has no applicability to this case. This Court has repeatedly addressed the effect of *Simmons v. South Carolina*, —— U.S. ——, 129 L. Ed. 2d 133 (1994), and has determined that the pattern jury instruction given by the trial court is not constitutionally infirm since prior to the effective date of the amendment to N.C.G.S. § 15A-2002, a defendant could not be parole ineligible in North Carolina. *See State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 224 (1995). Defendant has offered no new argument persuading us to depart from the Court's earlier decisions, and this assignment of error is overruled.

[9] In his next argument defendant contends the trial court erred in instructing the jury that it could determine if defendant's age had mitigating value. Defendant argues that if the evidence was sufficient to submit age as a mitigating circumstance, then the trial judge was required as a matter of law to submit the statutory circumstance since the legislature has determined that age has mitigating value.

To support this argument defendant relies on his chronological age, twenty-eight, and the testimony by his mother concerning his background and development. "The trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance." *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Moreover, chronological age is not determinative of this mitigating circumstance. *Id.* at 113, 381 S.E.2d at 628. In the present case defendant's mother's testimony did not show any special or unusual circumstances suggesting that defendant possessed limited intellectual or emotional maturity necessary to require submission of the age mitigating circumstance. To the contrary, the evidence shows that although defendant dropped out of high school, he had normal intelligence and academic success. Accordingly, we conclude that on the record before this Court, defendant failed to produce the necessary substantial evidence to warrant submission of the (f)(7) statutory mitigating circumstance. Hence, error, if any, by the trial court in allowing the jury to consider whether defendant's chronological age alone had mitigating value was error which benefited defendant. This assignment of error is overruled.

[10] In his next argument defendant contends the trial court erroneously instructed the jury on the concept of mitigation. The judge instructed the jury as follows:

> A mitigating circumstance is a fact or a group of facts which do not constitute a justification or an excuse for a killing, nor 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, or making this defendant less deserving of the extreme punishment than other first degree murderers.

Defendant contends that this definition unfairly limited the jury's consideration of defendant's character and background as well as the circumstances surrounding the killing which a juror might find to be a basis for a sentence less than death. The instruction, according to defendant, focused the jurors' attention toward the killing itself rather than on the defendant as an individual.

The instruction as given was virtually identical to the pattern jury instructions and included in addition to the above-quoted language an instruction that in considering Issue Two, the jurors were "to consider as a mitigating circumstance any aspect of the defendant's character or his record." The jury was also given an instruction on the catchall circumstance which permitted consideration of any other circumstance or circumstances arising from the evidence which one or more jurors deemed to having mitigating value.

Based on the authority of *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995), where defendant made essentially the same contentions regarding the pattern jury instruction on mitigation, we hold that the instruction as given was a correct statement of the law. *Id.* at 121-22, 443 S.E.2d at 327-28. Accordingly, the trial court did not err, and defendant is entitled to no relief on this assignment of error.

[11] Defendant's next contention is that the trial court erred in allowing the jury to find and consider two aggravating circumstances based on the same evidence. Specifically, defendant argues that as to the killing of Margaret Batten, the jury should not have been permitted to find that the killing was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and also that the killing occurred during a course of conduct which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). Defendant asserts that the evidence supporting the (e)(9) circumstance as to Margaret Batten's death "centered around her witnessing the murder of her husband as she too was beaten, stabbed, and killed." According to defendant this "same conduct provided the impetus for the submission and finding of a murder in the course of a violent act perpetuated on another person." We disagree.

Submission of the (e)(9) aggravating circumstance may be appropriate where the evidence shows that the killing was "physically agonizing or otherwise dehumanizing to the victim" or the killing was " 'conscienceless, pitiless, or unnecessarily torturous to the victim.' " *State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 356 (1993) (quoting *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994). In the present case the evidence showed that Margaret Batten had been repeatedly stabbed with two different knives. The medical examiner who per-

formed the autopsy testified that there were twenty-three stab wounds on Margaret Batten's body. Eight of the wounds were on the head and neck; the remainder were in the chest and abdominal area. Her abdomen was ripped open, exposing her intestines. Injuries resulting from the stabbings included broken ribs; cuts through the esophagus; and cuts through the stomach, large intestines, spleen, right kidney, and liver. The medical examiner testified that Margaret Batten did not die a quick, painless death, but rather she probably remained conscious during the five to ten minutes it took for her to die. Besides the wounds, Margaret Batten's blue jeans and panties had been pulled to her ankles; her shirt had been torn open and her fastened brassiere pulled up above her breasts, leaving her breasts, torso, and lower body bare. Hence, abundant evidence supports the especially heinous, atrocious, or cruel aggravating circumstance without considering the violent course of conduct which resulted in Leon Batten's murder or the emotional trauma Margaret Batten must have experienced when she saw what had happened to her husband.

The evidence supporting the (e)(11) course of conduct aggravating circumstance is also entirely different from the evidence recited above supporting the (e)(9) circumstance. The evidence that defendant engaged in a course of conduct involving violence to another person was that prior to killing Margaret Batten, defendant robbed, beat, and murdered Leon Batten. *See Gibbs*, 335 N.C. at 60-61, 436 S.E.2d at 355.

Defendant's efforts to stretch the reasoning of *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), to provide him relief misses the mark. *Quesinberry* involved application of the same evidence to find both the (e)(5) aggravating circumstance that the capital felony was committed while defendant was committing robbery and the (e)(6) aggravating circumstance that the capital felony was committed for pecuniary gain. In the present case different evidence supports the (e)(9) and the (e)(11) aggravators, and submission of both was entirely proper.

[12] Defendant next contends that the instruction on the especially heinous, atrocious, or cruel aggravating circumstance was constitutionally flawed in that the instruction (i) did not limit this circumstance to defendant's personal conduct or culpability, (ii) was unconstitutionally vague, and (iii) offered no guidance to the sentencing jury. The argument concerning individualized consideration in the sentencing process has previously been addressed and resolved

against defendant in *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). In *McCollum* the Court stated:

> As authority for his argument, the defendant relies upon *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982). In *Enmund*, the Court held that capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt. *Enmund*, 458 U.S. at 801, 73 L. Ed. 2d at 1154. However, the defendant's reliance on *Enmund* is misplaced. *Enmund* involved the propriety of a death sentence, based upon a felony murder conviction, imposed upon a defendant who did not commit the homicide, was not physically present when the killing took place, and did not intend that a killing take place or that lethal force be employed.

McCollum, 334 N.C. at 222, 433 S.E.2d at 151. In the present case, based on the trial court's instructions, the jury had determined that defendant personally or acting with his partners had a common purpose to murder Margaret Batten and had the specific intent to commit the murder. The evidence showed that defendant was present and actively participated in the murder.

Further, as to defendant's arguments that the instruction was unconstitutionally vague and failed to provide guidance in that the term "brutality" was facially vague and the narrowing phrases were referenced in the disjunctive, this Court has again previously addressed and rejected each of these contentions. *See State v. Sexton*, 336 N.C. 321, 372-73, 444 S.E.2d 879, 908, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994); *State v. Syriani*, 333 N.C. 350, 390-92, 428 S.E.2d 118, 140-41, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993). Defendant has offered no new argument persuading this Court to overturn established precedent, and this assignment of error is overruled.

[13] Defendant next assigns as error the trial court's instruction on the (e)(3) aggravating circumstance, whether defendant had previously been convicted of a crime involving the use or threat of violence to another person. N.C.G.S. § 15A-2000(e)(3). In instructing on this aggravating circumstance, the trial court stated:

> This appears as number one on both the Margaret Batten form and the Leon Batten form. I instruct you that voluntary manslaughter and common law robbery are, by definition,

> felonies involving the use or threat of violence to the person of another. A felony involves the use or threat of violence to the person [of] another if the perpetrator kills or inflicts physical injury on the victim or threatens to do so in order to accomplish his criminal act.
>
> A person has been previously convicted if he has been convicted and not merely charged, and if his conviction is based on conduct which occurred before the events out of which this murder, or these murders, arose.
>
> If you find from the evidence, beyond a reasonable doubt, that prior to February 29th of 1992, the defendant had been convicted of common law robbery or voluntary manslaughter, or both, and that the defendant used or threatened to use violence to the person in order to accomplish these criminal acts, and that the defendant killed Margaret and Leon Batten after he committed and was convicted of these prior felony offenses, then you would find this aggravating circumstance. I say again, if you find all those things from the evidence, beyond a reasonable doubt, then you would find this aggravating circumstance to exist, and you would so indicate by having your foreman write "yes" in the space provided after the first listed aggravating circumstance on both forms.

Defendant contends that the jury must be unanimous as to the theory upon which an aggravating circumstance is based and that giving the instruction in the disjunctive denied defendant's state constitutional right to a unanimous verdict. Defendant also contends that failure to require unanimity as to the specific act defendant committed also violates defendant's right to proof beyond a reasonable doubt. Defendant further asserts that the disjunctive instruction failed to genuinely narrow the class of death-eligible defendants. To support these arguments defendant cites cases requiring a unanimous verdict to convict a defendant of the offense charged, particularly *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). Defendant's reliance on these cases is misplaced. That defendant had been previously convicted of common law robbery and voluntary manslaughter is not disputed, nor is the fact that both common law robbery and voluntary manslaughter involve the use or threatened use of violence against another person. Hence, the criteria upon which this aggravating circumstance depends have been met. *See State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583. So long as the crimes for which defendant had been

previously convicted were felonies and involved the use or threatened use of violence against another person, the specific crime which supports this aggravating circumstance is immaterial. This assignment of error is overruled.

[14] In his next assignment of error, defendant contends the trial court erred by failing to instruct the jurors that "preponderance of the evidence" means proof that it is more likely than not that a mitigating circumstance exists. In instructing the jury, the trial court gave the following instruction:

> The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstances 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 a mitigating circumstance exists.

Defendant argues that the jury might have misunderstood the term "satisfies" to mean a greater degree of proof than "more likely than not." Defendant contends that this ambiguous instruction violated defendant's procedural due process rights and his Eighth Amendment rights as the instruction did not give the "guided discretion" required by *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976). Defendant's argument fails for two reasons.

First, defendant specifically requested the following instruction:

> [T]he evidence, taken as a whole must satisfy you—not beyond a reasonable doubt, but simply satisfy you—that any mitigating circumstance exist[s].

Second, this Court has addressed these very arguments and decided this issue contrary to defendant's position. *See State v. Payne*, 337 N.C. 505, 532-33, 448 S.E.2d 93, 109 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). Defendant has offered no new argument persuading this Court that the use of the word "satisfy" increases defendant's burden of proof. Therefore, we "continue to adhere to our view that 'satisfies' denotes a burden of proof consistent with a preponderance of the evidence. It is for the jury to determine what evidence satisfies it, and the jury is presumed to have understood the term 'satisfy,' which is plain English." *Id.* at 533, 448 S.E.2d at 109.

[15] Defendant next contends that the trial court's instructions for weighing mitigating and aggravating circumstances in Issue Three unconstitutionally prohibited an individual juror from considering mitigating circumstances found in Issue Two. Issue Three is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?" The instruction given by the trial court was as follows:

> I instruct you, if you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the jury determines to exist by a preponderance of the evidence in issue two.

The trial court was giving the pattern jury instruction which has been approved by this Court and which reads in pertinent part: "[E]ach juror may consider any mitigating circumstance or circumstances that the juror determined to exist . . . ." N.C.P.I.—Crim. 150.10, at 42 (1995).

In this case, as in *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306, it is impossible to discern whether the trial court had a *lapsus linguae* or whether the transcript contains an error. Just as in *Robinson* the jurors here were clearly instructed regarding Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it had mitigating value. For Issue Three the jurors were then told, "if you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances." This instruction did not preclude any juror from considering in Issue Three mitigating evidence that that juror alone found in Issue Two. Defendant failed to object to this instruction; hence, error, if any, is reviewable only for plain error, *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378. Even assuming *arguendo* that the instruction was error, defendant has not met the heavy burden of demonstrating that the error was so fundamental and grave that a different result was likely to have occurred had the error not been committed. Defendant is not entitled to relief based on this assignment of error.

[16] Defendant next contends that the trial court erred in its instruction on Issue Four by failing to instruct that the jury as a whole could consider any mitigating circumstance found by any one juror at Issue

Two. Defendant argues that this instruction violates the rule in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), that a sentencing jury may not be precluded from giving full and free consideration to evidence of mitigation. Again, this issue has been resolved contrary to defendant's position by this Court. In *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994), the Court stated:

> Nor are we persuaded by the defendant's contention that *McKoy* requires a juror to consider, at Issue Three and Issue Four, those mitigating circumstances which he or she did not find, but which were found by one or more other jurors. Were we to adopt this reading of *McKoy* and its progenitors, we would create an anomalous situation where jurors are required to consider mitigating circumstances which are only found to exist by a single holdout juror. We do not believe that the decisions in *McKoy* or *Mills* intended this anomalous result. The jury charge given in this case did not preclude the jurors from giving effect to all mitigating evidence they found to exist. This charge eliminates the defect found unconstitutional in *McKoy*.

Id. at 287, 439 S.E.2d at 570; *see also State v. Robinson*, 336 N.C. at 119-21, 443 S.E.2d at 326. In the present case, as in *Lee* and *Robinson*, the trial court gave the pattern jury instruction as to Issue Four. Defendant having presented no new argument, we adhere to our prior decisions on this issue; and this assignment of error is overruled.

[17] By his next assignment of error, defendant contends that the trial court erred in instructing the jury that as to nonstatutory mitigating circumstances, it must first determine whether the circumstance existed and then whether that circumstance had mitigating value. Defendant contends that once jurors find that a nonstatutory mitigating circumstance exists, they cannot under *Eddings v. Oklahoma*, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 11 (1982), give it no weight. This Court has previously rejected this argument. *See State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). This assignment of error is overruled.

[18] By his next assignment of error, defendant argues that the State improperly used peremptory challenges to remove jurors who expressed hesitancy or reservations about the death penalty, thereby violating defendant's constitutional rights under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). Defendant concedes,

however, that this Court has previously rejected this argument in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855. *See also State v. Jones*, 336 N.C. 229, 260, 443 S.E.2d 48, 64, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994); *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990). As defendant has cited no new argument persuading this Court to overrule its established precedent, this assignment of error is overruled.

[19] Defendant next argues that the trial court erred in allowing death-qualification by excusing for cause certain jurors who expressed an unwillingness to impose the death penalty and by denying defendant's request for a separate sentencing jury. Defendant argues that the process of death-qualification results in a jury that is biased in favor of the prosecution and prone to find defendant guilty. Defendant acknowledges, however, that this Court has previously ruled against defendant's position on this issue. *See State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980). Defendant has presented no compelling reason why this Court should reexamine this issue, and this assignment of error is overruled.

[20] Defendant next argues that the pattern jury instruction imposing a duty upon the jury to return a recommendation of death if it finds that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty is unconstitutional. Defendant acknowledges that this Court has ruled to the contrary in *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). This assignment of error is overruled.

[21] By his next assignment of error, defendant argues that the trial court erred in instructing the jury that a knife was a dangerous weapon as a matter of law in that the instruction created a conclusive presumption on an element of the offense and relieved the State of its burden of proof in violation of defendant's right to due process of law. Defendant requests this Court to reconsider its prior decision rejecting this argument in *State v. Torain*, 316 N.C. 111, 340 S.E.2d 465, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986), but defendant has offered no new argument in support of this request. This assignment of error is overruled.

[22] Defendant next contends that the North Carolina death penalty statute is unconstitutional; is applied arbitrarily, capriciously, and whimsically; and is imposed in a racially discriminatory manner. Defendant concedes, however, that this Court has consistently upheld the constitutionality of the death penalty statute against such challenges. *See State v. Jones*, 336 N.C. 229, 443 S.E.2d 48. This assignment of error is overruled.

[23] Defendant next contends that the trial court committed reversible error by submitting an aggravating circumstance that the murder of Leon Batten was committed while defendant was engaged in the commission of a robbery since this aggravating circumstance duplicated elements of the murder conviction in violation of defendant's constitutional and statutory rights. Defendant argues that for the jury to find an aggravating circumstance based upon evidence supporting a theory of guilt for the murder was inappropriate. Defendant acknowledges that in this case the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and felony murder. Defendant argues, though, that the instructions on the aggravating circumstance did not differentiate between applying the aggravating circumstance to murder based upon premeditation and deliberation and murder based upon the felony rule. This Court has consistently held that the merger rule applicable where defendant is convicted of felony murder does not apply when defendant is found guilty under the theories of both premeditation and deliberation and felony murder. *See State v. Rook*, 304 N.C. 201, 230-31, 283 S.E.2d 732, 750 (1981), *cert. denied*, 455 U.S. 1032, 72 L. Ed. 2d 155 (1982). The type instruction required by defendant's argument would be unworkable. *See, e.g., State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985). This assignment of error affords defendant no relief.

PROPORTIONALITY

[24] Having found no error in the guilt-innocence phase or the capital sentencing proceeding, we must undertake our statutory duty to determine whether (i) the evidence supports the aggravating circumstances found by the jury; (ii) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (iii) the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

As to the murder of Margaret Batten, the jury found defendant guilty based on premeditation and deliberation. The jury found as

aggravating circumstances that defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and the murder was part of a course of conduct in which defendant engaged which included the commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury found the statutory mitigating catchall circumstance, N.C.G.S. § 15A-2000(f)(9). As to the murder of Leon Batten, the jury found defendant guilty based on both premeditation and deliberation and felony murder. The jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3); the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); and the murder was part of a course of conduct in which the defendant engaged which involved the commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). The jury found two nonstatutory mitigating circumstances, that defendant "has a close and loving relationship with his mother" and that defendant "was under the influence of alcohol on February 29, 1992." The jury also found the catchall.

We conclude that the evidence supported the aggravating circumstances which the jury found. We further conclude from our review of the record that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor. We must now determine whether the sentences of death in this case are 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 purpose 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 (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 (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). In seven cases this Court has determined that the death sentence was disproportionate. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). These cases are distinguishable from the present case inasmuch as none of these cases involved a double murder.

The fact that juries in other cases similar on their facts to the present case have returned life sentences is not, standing alone, determinative. *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994). To support his argument that this case is more nearly analogous to cases in which juries have returned life sentences, defendant relies on *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986), and *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983). Both these cases are, however, distinguishable from the present case. In *King* the defendant was convicted of two counts of first-degree murder based on felony murder; whereas, in the present case as to both murders defendant was convicted of premeditated and deliberate murder. In *Whisenant* the defendant was convicted of one count of first-degree murder and one count of second-degree murder; whereas, this defendant was convicted of two counts of first-degree murder. Defendant also cites the case of *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979). Although the jury in *Crews* found that the murders were especially heinous, atrocious, or cruel, each victim died of a gunshot or rifle wound; whereas, here both victims in the instant case were brutally beaten and stabbed.

The aggravating circumstances found in this case have also been present in other cases in which this Court has found the sentence of death proportionate. *See State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994) (jury found 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 the commission of a first-degree rape; and that defendant had been previously convicted of a violent felony), *cert. denied*, — U.S. —, 131 L. Ed. 2d 738 (1995); *State v. Ingle*, 336 N.C. 617, 445 S.E.2d 880 (1994) (jury found aggravating circumstances that the murder was especially heinous,

atrocious, or cruel and that the murder was part of a course of conduct including other violent crimes), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 222 (1995). Finally, we note that the death sentence of defendant's accomplice, George Goode, was determined by this Court to be proportionate. *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995).

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the characteristics of first-degree murders for which we have previously upheld the death penalty as proportionate. Considering the crimes and this defendant, we cannot conclude that the death sentences were excessive or disproportionate. We hold that defendant received a fair trial and sentencing proceeding free of prejudicial error.

NO ERROR.

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

Justice FRYE concurring in part, dissenting in part.

I concur in the Court's decision finding no prejudicial error in defendant's trial and convictions on two counts of first-degree murder and his conviction and sentence for robbery with a dangerous weapon. I dissent only as to the capital sentencing proceeding.

Defendant contends that he is entitled to a new capital sentencing proceeding because of several errors which occurred during his capital sentencing proceeding. I find merit in one of defendant's assignments of error and therefore vote for a new sentencing proceeding on that basis.

Defendant contends that the trial court committed reversible error in responding to a question from the sentencing jury because the court's supplemental instruction incorrectly informed the jury that it could not answer "no" to Issue Three or Issue Four on the written Issues and Recommendation As To Punishment form unless all twelve jurors concurred in the negative answer. Defendant contends the trial court erred in its supplemental instruction to the jury. Defendant argues that this error entitles him to a new sentencing proceeding. For the reasons stated in my dissenting-in-part opinion in *State v. McCarver*, I agree with defendant's argument. *See State v. McCarver*, 341 N.C. 364, 409-16, 462 S.E.2d 25, 51-55 (1995) (Frye, J., concurring in part and dissenting in part).

As the majority notes, defendant and the State both agree that the wording on the Issues and Recommendation As To Punishment form and the original jury instructions in this case were correct. Issue Three on the Issues and Recommendation As To Punishment form submitted to the jury was as follows:

> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?
>
> ANSWER: _____

The trial court instructed the jury:

> If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances are insufficient to outweigh the aggravating circumstances found, you would answer issue number three yes. If you do not so find, or if you have a reasonable doubt as to whether or not they do, you would answer issue three no.

Issue Four on the Issues and Recommendation As To Punishment 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 trial court instructed the jury:

> The State 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 four yes, you must agree unanimously that they are.

After approximately four hours and twenty minutes of deliberations, the jury sent a question to the trial court regarding nonunanimous answers. This question, as written by the jury foreperson, read: "I put down an answer we did not unanimously agree on. Do we need another copy for the record?" The trial court addressed the jury's question as follows:

> Mr. Flood, I'm going to let y'all retire and resume your deliberations. To the extent that you need to strike through some

> answer you've already recorded, just mark through it and record the correct answer when you reach a point where you feel like the jurors are unanimous in their agreement on what you [sic] answer is.
>
> With regard to the issues, issues one, two, three and four. *The jury must be unanimous in their decision on what the answer to that issue is, as to one, three and four.* Number two, if a single juror finds a single mitigating circumstance, then obviously you would answer that yes. So, the jury does not have to be unanimous about the second issue, but *you do have to be unanimous about your answer to the other three issues.*

(Emphases added.) The record discloses that the jury then changed a "no" answer to a "yes" on Issue Three of the Issues and Recommendation As To Punishment form for the murder of Leon Batten. Defendant contends that the trial court erred in giving this supplemental instruction because the instruction incorrectly informed the jury that *any* answer to Issue Three or Issue Four must be unanimous.

The State apparently agreed with defendant that only an affirmative answer to Issue Three or Four had to be unanimous. However, the State argued that the supplemental instruction did not change the previous instructions given the jury and did not require that the jury be unanimous in order to answer Issue Three or Issue Four in the negative. In the State's brief, filed prior to the majority's reinterpretation of the unanimity requirement as to capital sentencing proceedings in *McCarver*, the State argued:

> Between the pattern jury instructions and the verdict sheet itself, the jurors could have had no confusion in their minds that only an *affirmative* response to Issues Three and Four had to be unanimous. The trial court's supplemental instructions in no way contradicted or vitiated that requirement. There is no hint in the supplemental instructions that contrary to everything previously explained, the jury now had to be unanimous in its *rejection* of the findings required by Issues Three and Four. Although only a shorthand reference to the previous instructions, the court's supplemental instructions were an important reminder that unanimity was required with respect to three issues. . . . Thus, the trial court did not in any way change the original charge to the jury to require that *any* answer, yes or no, to Issues Three and Four had to be unanimous.

In determining whether the supplemental instruction entitles defendant to a new capital sentencing proceeding, the controlling question is whether the trial court's instructions, construed as a whole, would have misled a reasonable juror. *State v. Conner*, 335 N.C. 618, 641, 440 S.E.2d 826, 839 (1994) (holding that the trial court's instruction that ascertainment of the truth was the highest aim of a criminal trial did not mislead the jurors on the premise of reasonable doubt) (citing *State v. Garner*, 330 N.C. 273, 296, 410 S.E.2d 861, 874 (1991)).

I am unable to conclude, as the State contends, that the jurors could not have understood the supplemental instruction to require that they be unanimous in order to reject the findings required by Issues Three and Four and to answer these issues in the negative. The supplemental instruction did not inform the jury that only an affirmative answer was required to be unanimous, but rather stated that the jury must be unanimous *in its answer* to Issues One, Three, and Four. Contrary to the State's argument, a reasonable juror may well have been misled by this instruction to believe that the jury was required to be unanimous in order to answer Issue Three or Four in the negative. Indeed, this is exactly what a majority of this Court now says the instruction means.

In this case, the jury was given two alternative theories upon which to base 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, based on the record before the Court, I conclude that the supplemental instruction had a probable impact on the jury's recommendation of death and thus constituted error under the plain error rule. *State v. Allen*, 339 N.C. 545, 555, 453 S.E.2d 150, 155-56

(1995) (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379-80 (1983)). As noted earlier, the jury sent a note to the trial court stating that it had marked a nonunanimous answer on the Issues and Recommendation form and requesting instruction on how to correct this mistake. The record reveals that, after receiving the challenged supplemental instruction, the jury changed a "no" answer to a "yes" on Issue Three of the Issues and Recommendation As To Punishment form for the murder of Leon Batten. In addition, while there is no such extrinsic evidence to indicate the jury's reliance on the supplemental instruction in its deliberations regarding the murder of Margaret Batten, I am unable to assume that the jury did not also rely on this instruction in answering Issues Three and Four on the Issues and Recommendation As To Punishment form for her murder. Accordingly, because the supplemental instruction had a probable impact upon the jury's recommendations of death for the murders of Leon Batten and Margaret Batten, these death sentences should be vacated.

For the foregoing reasons, I find no error in the guilt phase of defendant's trial. Accordingly, I would uphold defendant's convictions on two counts of first-degree murder and his conviction and sentence for robbery with a dangerous weapon. However, because I find error in defendant's capital sentencing proceeding, I vote to vacate defendant's death sentences and remand to Superior Court, Johnston County, for a new capital sentencing proceeding.

JUSTICE WHICHARD joins in this concurring and dissenting opinion.

WILLIAM F. MAREADY, PLAINTIFF v. THE CITY OF WINSTON-SALEM; THE BOARD OF ALDERMEN OF THE CITY OF WINSTON-SALEM; FORSYTH COUNTY; THE BOARD OF COUNTY COMMISSIONERS OF FORSYTH COUNTY; AND WINSTON-SALEM BUSINESS, INC., DEFENDANTS, AND STATE OF NORTH CAROLINA *EX REL.* MICHAEL F. EASLEY, ATTORNEY GENERAL, DEFENDANT-INTERVENOR

No. 422PA95

(Filed 8 March 1996)

1. Taxation § 4 (NCI4th)— economic development incentive grants—public purpose

The statute which authorizes local governments to expend public moneys for economic development incentive grants to pri-

vate corporations, N.C.G.S. § 158-7.1, does not violate the public purpose clause of the North Carolina Constitution since the purpose of the statute is to increase the population, taxable property, agricultural industries and business prospects of a city or county; the activities authorized by § 158-7.1 are in keeping with those accepted as within the scope of permissible governmental action and invoke traditional governmental powers and authorities in the service of economic development; and the public advantages of the statute are not indirect, remote, or incidental but are directly aimed at furthering the general economic welfare of the people of the affected communities. N.C. Const. art. V, § 2(1).

Am Jur 2d, State and Local Taxation §§ 42 et seq.

2. Constitutional Law §§ 37, 38 (NCI4th)— economic development incentive grants—authority given to cities and counties—statute not unconstitutionally vague

The statute which authorizes local governments to make economic development incentive grants to private corporations, N.C.G.S. § 158-7.1, is not unconstitutional as impermissibly vague, ambiguous, and without reasonably objective standards since restrictions with respect to the delegation of power to an agency of the State do not apply to cities and counties; cities and counties have authority to exercise broad discretion within statutory limits; the General Assembly could constitutionally give local governments considerable flexibility and discretion to execute the perceived public purpose of economic development in communities within their jurisdictions; and the meaning and intent of § 158-7.1 are sufficiently clear to pass constitutional muster.

Am Jur 2d, Constitutional Law §§ 332, 350, 351.

3. Municipal Corporations § 157 (NCI4th); State § 9 (NCI4th)— economic development incentive grants—closed meetings—no violation of Open Meetings Law

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the Open Meetings Law by meeting in closed sessions to discuss the amount of economic development incentives to offer private corporations pursuant to N.C.G.S. § 158-7.1 and by reaching a group decision in private since N.C.G.S. § 143-318.11(a)(4) allows closed meetings for economic development discussions; each closed session held to discuss economic development expendi-

tures was preceded by a motion and approving vote at an open public meeting to go into closed session for the discussion of matters relating to the location or expansion of business or industry; no action was taken during the closed sessions which would authorize any city or county official to sign a contract or to make any expenditures of funds; and all actions authorizing or approving the signing of an economic development contract or commitment and the payment of economic development expenditures were taken in regularly scheduled public meetings. Because the Open Meetings Law authorizes a closed session to discuss the acquisition of an interest in real property and N.C.G.S. § 158-7.1(c) requires that the notice of the public hearing thereon describe the intention to approve it, it follows that the intent to approve the acquisition which is the subject of the notice may be formed in a closed session.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 155 et seq.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

4. Municipal Corporations § 157 (NCI4th); State § 9 (NCI4th)— economic development grants—closed meetings—minutes reflecting only "sessions"—full and accurate minutes

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the "full and accurate minutes" requirement of the Open Meetings Law set out in N.C.G.S. § 143-318.10(e) because the minutes of two closed sessions pertaining to economic development grants only stated "discussions" where no action was taken at the closed meetings.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 155 et seq.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

Justice ORR dissenting.

Justice LAKE joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of a judgment entered on 28

August 1995 by Rousseau, J., in Superior Court, Forsyth County, enjoining defendants from making incentive grants or otherwise committing public funds for economic incentive purposes pursuant to N.C.G.S. § 158-7.1. Heard in the Supreme Court 16 February 1996.

Robinson Maready Lawing & Comerford, L.L.P., by William F. Maready and Michael L. Robinson, for plaintiff-appellant and -appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Roddey M. Ligon, Jr., for City and County; P. Eugene Price, Jr., Forsyth County Attorney; Ronald G. Seeber, Winston-Salem City Attorney; and Petree Stockton, L.L.P., by J. Robert Elster and Julia C. Archer, for Winston-Salem Business, Inc., defendant-appellants and -appellees.

Michael F. Easley, Attorney General; John R. McArthur, Chief Counsel; Andrew A. Vanore, Jr., Chief Deputy Attorney General; and W. Wallace Finlator, Jr., and Jane T. Friedensen, Assistant Attorneys General, for defendant-intervenor-appellant and -appellee.

Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel III, Assistant General Counsel, for the North Carolina League of Municipalities; and James B. Blackburn III, General Counsel, and Kimberly M. Grantham, Assistant General Counsel, for the North Carolina Association of County Commissioners, amici curiae.

Everett Gaskins Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, for Piedmont Publishing Company and The North Carolina Press Association, amici curiae.

Harry Pavilak & Associates, by David C. Harr, for Southeastern Legal Foundation, amicus curiae.

The Sanford Law Firm, P.L.L.C., by Ernest C. Pearson, Robert M. Jessup, Jr., and Ellen D. Andrews, for The North Carolina Economic Developers Association, amicus curiae.

Poyner & Spruill, L.L.P., by S. Ellis Hankins, for ElectriCities of North Carolina, Inc., amicus curiae.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr., for John Locke Foundation, Inc., amicus curiae.

Kary L. Moss for The Corporation for Enterprise Development, The Calumet Project for Industrial Jobs, Share the Wealth, The Grass Roots Policy Project, The Maurice and Jane Sugar Law Center for Economic and Social Justice, and The Federation for Industrial Retention and Renewal, amici curiae.

WHICHARD, Justice.

[1] Plaintiff-appellant, William F. Maready, instituted this action against the City of Winston-Salem, its Board of Aldermen, Forsyth County, its Board of Commissioners, and Winston-Salem Business, Inc. Plaintiff contends that N.C.G.S. § 158-7.1, which authorizes local governments to make economic development incentive grants to private corporations, is unconstitutional because it violates the public purpose clause of the North Carolina Constitution and because it is impermissibly vague, ambiguous, and without reasonably objective standards. Plaintiff also argues that the local governing bodies violated the State's Open Meetings Law by voting on and deciding grant matters in closed sessions.

Following a three-day evidentiary hearing and oral argument, the trial court found N.C.G.S. § 158-7.1 unconstitutional, enjoined defendants from making further incentive grants or otherwise committing public funds pursuant to that statute, denied plaintiff's motion for a mandatory injunction to require the City and County to recover incentive grants from recipients thereof, and dismissed the claim that defendants violated the Open Meetings Law. All parties appealed, and on 2 November 1995 this Court granted defendant-appellants' petition for discretionary review prior to a determination by the Court of Appeals.

Plaintiff is a citizen and resident of Winston-Salem and Forsyth County. He owns real and personal property upon which Winston-Salem and Forsyth County levy property taxes. Defendants are the City of Winston-Salem, its Board of Alderman, Forsyth County, and its Board of County Commissioners. Winston-Salem Business, Inc. ("WSBI"), also a defendant, is the name under which the Forsyth County Development Corporation does business. It is a not-for-profit corporation formed by private individuals in Forsyth County and is an arm of the Winston-Salem Chamber of Commerce. The State of North

Carolina, *ex rel.* Michael F. Easley, Attorney General, is a party defendant by way of voluntary intervention as a matter of right pursuant to Rule 24(a)(1) of the North Carolina Rules of Civil Procedure and N.C.G.S. § 1-260, in that the action seeks to have an act of the General Assembly of the State of North Carolina declared unconstitutional.

This action challenges twenty-four economic development incentive projects entered into by the City or County pursuant to N.C.G.S. § 158-7.1. The projected investment by the City and County in these projects totals approximately $13,200,000. The primary source of these funds has been taxes levied by the City and County on property owners in Winston-Salem and Forsyth County. City and County officials estimate an increase in the local tax base of $238,593,000 and a projected creation of over 5,500 new jobs as a result of these economic development incentive programs. They expect to recoup the full amount of their investment within three to seven years. The source of the return will be revenues generated by the additional property taxes paid by participating corporations. To date, all but one project has met or exceeded its goal.

The typical procedures the City and County observe in deciding to make an economic development incentive expenditure are as follows: A determination is made that participation by local government is necessary to cause a project to go forward in the community. Officials then apply a formula set out in written guidelines to determine the maximum amount of assistance that can be given to the receiving corporation. The amounts actually committed are usually much less than the maximum. The expenditures are in the form of reimbursement to the recipient for purposes such as on-the-job training, site preparation, facility upgrading, and parking. If a proposal satisfies the guidelines as well as community needs, it is submitted to the appropriate governing body for final approval at a regularly scheduled public meeting. If a project is formally approved, it is administered pursuant to a written contract and to the applicable provisions and limitations of N.C.G.S. § 158-7.1.

Article V, Section 2(1) of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only." In *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968), Justice (later Chief Justice) Sharp, writing for a majority of this Court, stated:

> The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent.

Id. at 143, 159 S.E.2d at 749-50.

In determining whether legislation serves a public purpose, the presumption favors constitutionality. *State v. Furmage*, 250 N.C. 616, 621, 109 S.E.2d 563, 567 (1959). Reasonable doubt must be resolved in favor of the validity of the act. *Wells v. Housing Auth. of Wilmington*, 213 N.C. 744, 749, 197 S.E. 693, 696 (1938). The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961).

In exercising the State's police power, the General Assembly may legislate for the protection of the general health, safety, and welfare of the people. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 45, 175 S.E.2d 665, 674 (1970). It may "experiment with new modes of dealing with old evils, except as prevented by the Constitution." *Redevelopment Comm'n of Greensboro v. Security Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960). The initial responsibility for determining what constitutes a public purpose rests with the legislature, and its determinations are entitled to great weight. *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 285 (1982).

The enactment of N.C.G.S. § 158-7.1 leaves no doubt that the General Assembly considers expenditures of public funds for the promotion of local economic development to serve a public purpose. Under this statute,

> [e]ach county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county; encouraging the building of railroads or other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, *will increase the population, taxable property, agricultural industries and business*

> *prospects of any city or county.* These appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

N.C.G.S. § 158-7.1(a) (1994) (emphasis added). When making amendments to chapter 158 and adding other provisions designed to promote economic development, the General Assembly mandated: "This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect these purposes." Act of July 23, 1993, ch. 497, sec. 25, 1993 N.C. Sess. Laws 1932, 1961 (amending the Constitution to permit cities and counties to issue bonds to finance the public portion of economic development projects and to authorize counties and cities to accept as consideration for a conveyance or lease of property to a private party the amount of increased tax revenue expected to be generated by the improvements to be constructed on the property). The General Assembly has further demonstrated its commitment to economic development by enacting several other statutes that permit local governments to appropriate and spend public funds for such purposes. These include, *inter alia*:

> N.C.G.S. §§ 158-8 through -15, which establish regional economic development commissions and authorize local governments to create or join economic development commissions and to support them with their funds.
>
> N.C.G.S. § 160A-209(c), which provides: "Each city may levy property taxes for one or more of the following purposes . . . : (10b) Economic Development—To provide for economic development as authorized by G.S. 158-12. . . . (17a) Industrial Development.—To provide for industrial development as authorized by G.S. 158-7.1."
>
> N.C.G.S. § 153A-149(c), which provides: "Each county may levy property taxes for one or more of the purposes listed in this subsection . . . : (10b) Economic Development—To provide for economic development as authorized by G.S. 158-12. . . . (16a) Industrial Development—To provide for industrial development as authorized by G.S. 158-7.1."

These enactments clearly indicate that N.C.G.S. § 158-7.1 is part of a comprehensive scheme of legislation dealing with economic development whereby the General Assembly is attempting to authorize exercise of the power of taxation for the perceived public purpose of pro-

moting the general economic welfare of the citizens of North Carolina.

While legislative declarations such as these are accorded great weight, ultimate responsibility for the public purpose determination rests with this Court. *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 644-45, 386 S.E.2d 200, 206 (1989). If an enactment is for a private purpose and therefore inconsistent with the fundamental law, it cannot be saved by legislative declarations to the contrary. It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith. *State v. Felton*, 239 N.C. 575, 578, 80 S.E.2d 625, 628 (1954); *Nash v. Town of Tarboro*, 227 N.C. 283, 290, 42 S.E.2d 209, 214 (1947).

This Court has addressed what constitutes a public purpose on numerous occasions. It has not specifically defined "public purpose," however; rather, it has expressly declined to "confine public purpose by judicial definition[, leaving] 'each case to be determined by its own peculiar circumstances as from time to time it arises.' " *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973) (quoting *Keeter v. Town of Lake Lure*, 264 N.C. 252, 264, 141 S.E.2d 634, 643 (1965)). As summarized by Justice Sharp in *Mitchell*:

> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

Mitchell, 273 N.C. at 144, 159 S.E.2d at 750 (citations omitted).

Plaintiff requests that we take judicial notice of the 1993 proposed constitutional amendment regarding economic development financing bonds which was soundly defeated by the voters of North Carolina. Were we to do so, his argument concerning the constitu-

tionality of N.C.G.S. § 158-7.1 would not be bolstered thereby. The proposed amendment would have authorized "any county, city, or town to define territorial areas in the county, city, or town, and borrow money, without need of voter approval, to be used to finance public activities associated with private economic development projects within territorial areas." Ch. 497, sec. 1, 1993 N.C. Sess. Laws at 1933. This amendment would have been conceptually different from N.C.G.S § 158-7.1. Section 158-7.1 allows local governments to appropriate funds for the purpose of economic development. Such appropriations involve money the government already has or readily will have. The proposed amendment, by contrast, would have allowed local governments to *borrow* money in order to issue economic development financing bonds, thereby spending money not already obtained and incurring debt that must ultimately be repaid with interest. The bonds would not have been secured by the full faith and credit of the governing body; thus, the governing body would essentially have been borrowing and spending on unsecured credit. Any resulting deficit would have directly affected the taxpayers, who would not even have been entitled to vote on the projects. Unlike N.C.G.S. § 158-7.1, the proposed amendment had few internal safeguards and had the potential for adverse financial repercussions to the taxpayers. Thus, the public's rejection of the proposed amendment has no bearing on the constitutionality of N.C.G.S. § 158-7.1, which is the question before us.

Plaintiff also argues, and the trial court apparently agreed, that this question falls squarely within the purview of *Mitchell v. North Carolina Industrial Development Financing Authority.* There we held unconstitutional the Industrial Facilities Financing Act, a statute that authorized issuance of industrial revenue bonds to finance the construction and equipping of facilities for private corporations. The suit was filed as a test case, before any bonds were issued, to enjoin the appropriation of $37,000 from the State Contingency and Emergency Fund for the purpose of enabling the Authority to organize and begin operations. We find *Mitchell* distinguishable.

One of the bases for the *Mitchell* decision was that the General Assembly had unenthusiastically passed the enacting legislation, declaring it to be bad policy. The opinion stated:

> At the time the General Assembly passed the Act, it declared in Resolution No. 52 that it considered the Act bad public policy. It explained that it felt compelled to authorize industrial revenue

> bonds in order to compete for industry with neighboring states which use them. As proof of its reluctance to join the industry-subsidizing group of states, the General Assembly requested the President and the other forty-nine states to petition Congress to make the interest on all such bonds thereafter issued subject to all applicable income-tax laws.

Mitchell, 273 N.C. at 146, 159 S.E.2d at 751. The resolution recited that the General Assembly passed the act reluctantly, with reservations, and as a defensive measure. *Id.* at 141, 159 S.E.2d at 748. The Assembly's obvious apprehension over using public funds to benefit private entities in this manner clearly served to undermine the Court's confidence in the constitutionality of the legislation. The converse is true here in that the Assembly has unequivocally embraced expenditures of public funds for the promotion of local economic development as advancing a public purpose.

Further, and more importantly, the holding in *Mitchell* clearly indicates that the Court considered private industry to be the primary benefactor of the legislation and considered any benefit to the public purely incidental. Notwithstanding its recognition that any lawful business in a community promotes the public good, the Court held that the "Authority's primary function, to acquire sites and to construct and equip facilities for private industry, is not for a public use or purpose." *Id.* at 159, 159 S.E.2d at 761. The Court rightly concluded that direct state aid to a private enterprise, with only limited benefit accruing to the public, contravenes fundamental constitutional precepts. In reiterating that it is not the function of the government to engage in private business, the opinion quoted with approval the following language from the Supreme Court of Idaho:

> "An exemption which arbitrarily prefers one private enterprise operating by means of facilities provided by a municipality, over another engaged, or desiring to engage, in the same business in the same locality, is neither necessary nor just. . . . It is obvious that private enterprise, not so favored, could not compete with industries operating thereunder. If the state-favored industries were successfully managed, private enterprise would of necessity be forced out, and the state, through its municipalities, would increasingly become involved in promoting, sponsoring, regulating and controlling private business, and our free private enterprise economy would be replaced by socialism. The constitutions of both state and nation were founded upon a capitalistic private

> enterprise economy and were designed to protect and foster private property and private initiative."

Id. at 153, 159 S.E.2d at 756 (quoting *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 349-50, 353 P.2d 767, 775 (1960)). Thus, the Court implicitly rejected the act because its primary object was private gain and its nature and purpose did not tend to yield public benefit.

These concerns also influenced the Court in *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641, which plaintiff also contends is binding precedent. In *Stanley* this Court was asked to determine the constitutionality of the Pollution Abatement and Industrial Facilities Financing Act, which allowed the creation of county authorities to finance pollution control or industrial facilities for private industry by the issuance of tax-exempt revenue bonds. The Court held the Act unconstitutional. The result in *Stanley* turned on the fact that the Act in question was "[p]atently . . . designed to enable industrial polluters to finance, at the lowest interest rate obtainable, the pollution abatement and control facilities which the law is belatedly requiring of them." *Id.* at 32, 199 S.E.2d at 653. The Court noted that "[i]n determining what is a public purpose the courts look not only to the end sought to be attained but also 'to the means to be used.' " *Id.* at 34, 199 S.E.2d at 653 (quoting *Turner v. City of Reidsville*, 224 N.C. 42, 44, 29 S.E.2d 211, 213 (1944)). As in *Mitchell*, the Court repeatedly asserted that direct assistance to a private concern by the use of tax-exempt revenue-bond financing could not be the means used to effect a public purpose. The Court concluded that "[p]ollution control facilities are single-purpose facilities, useful only to the industry for which they would be acquired." *Id.* at 39, 199 S.E.2d at 657. Therefore, "[t]he conclusion is inescapable that [the private corporation] is the only direct beneficiary of the tax-exempt revenue bonds which the . . . Authorities propose to issue and that the benefit to the public is only incidental or secondary." *Id.* at 38, 199 S.E.2d at 656.

Thus, as in *Mitchell*, the outcome flowed inexorably from the fundamental concept underlying the public purpose doctrine, *viz*, that the ultimate gain must be the public's, not that of an individual or private entity. Significantly, the direct holdings of these cases—that industrial revenue bond financing is unconstitutional—were overturned by a specific constitutional amendment. In 1973 the North Carolina Constitution was amended to add Article V, Section 9, which

allows counties to create authorities to issue revenue bonds for industrial and pollution control facilities. While this amendment was narrowly tailored to address a specific situation, it nonetheless diminishes the significance of *Mitchell* and *Stanley* in the context presented here.

Moreover, the Court's focal concern in *Mitchell* and *Stanley*, the means used to achieve economic growth, has also been removed by constitutional amendment. In 1973 Article V, Section 2(7) was added to the North Carolina Constitution, specifically allowing direct appropriation to private entities for public purposes. This section provides:

> The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.

N.C. Const. art. V, § 2(7). "[U]nder subsection (7) *direct disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation." *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E.2d 898, 904 (1979). Hence, the constitutional problem under the public purpose doctrine that the Court perceived in *Mitchell* and *Stanley* no longer exists.

While *Mitchell* and its progeny remain pivotal in the development of the doctrine, they do not purport to establish a permanent test for determining the existence of a public purpose. The majority in *Mitchell* posed the question: "Is it *today* a proper function of government for the State to provide a site and equip a plant for private industrial enterprise?" *Mitchell*, 273 N.C. at 145, 159 S.E.2d at 751 (emphasis added). This explicit recognition of the importance of contemporary circumstances in assessing the public purpose of governmental endeavors highlights the essential fluidity of the concept. While the *Mitchell* majority answered the question in the negative, the passage of time and accompanying societal changes now suggest a positive response.

This Court is no stranger to the question of what activities are and are not for a public purpose. The following cases demonstrate the great variety of facilities, authorities, and activities which have been deemed to be public purposes. **Aid to Establish a Teachers Training School**: *Cox v. Commissioners of Pitt Co.*, 146 N.C. 584, 60

S.E. 516 (1908); **Aid to Railroad**: *Wood v. Commissioners of Oxford*, 97 N.C. 227, 2 S.E. 653 (1887); **Airport Facilities**: *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946) (regional airport); *Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (municipal airport); *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937) (municipal airport); **Education Generally**: *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970) (a state revenue bond issue for loans to residents of slender means to facilitate their post-secondary education); *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948) (expenditure of tax revenues for a policeman to attend a training course); **Grain Handling Facility Financed by Revenue Bonds and to be Leased to a Private Concern**: *North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955); **Moderate Income Housing**: *In re Housing Bonds*, 307 N.C. 52, 296 S.E.2d 281; **Municipal Appropriation of Non-tax Revenues to the Chamber of Commerce to Advertise the Advantages of Raleigh**: *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960); **Municipal Hospital**: *Trustees of Rex Hosp. v. Board of Comm'rs of Wake Co.*, 239 N.C. 312, 79 S.E.2d 892 (1954); *Burleson v. Board of Aldermen of Spruce Pine*, 200 N.C. 30, 156 S.E. 241 (1930); **North Carolina Housing Corporation, Low-Income Housing**: *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665; **Off-Street Parking Under Certain Circumstances**: *Henderson v. City of New Bern*, 241 N.C. 52, 84 S.E.2d 283 (1954); **Port Terminal Facilities**: *Webb v. Port Comm'n of Morehead City*, 205 N.C. 663, 172 S.E. 377 (1934); **Public Auditorium**: *Adams v. City of Durham*, 189 N.C. 232, 126 S.E. 611 (1925); **Public Housing Authority Under Federal Housing Acts**: *Mallard v. Eastern Carolina Regional Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281 (1942); **Public Library**: *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954); **Public Park**: *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946) (public parks, playgrounds, and recreational facilities are not a necessary expense, although a public purpose; *Atkins v. City of Durham*, 210 N.C. 295, 186 S.E. 330 (1936), will not "be followed as a precedent"); *Twining v. City of Wilmington*, 214 N.C. 655, 200 S.E. 416 (1939) (parks and playgrounds were not a necessary expense for Wilmington, although they were for a public purpose); *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 145 S.E. 563 (1928) (playgrounds and parks were "necessary expenses" within constitutional limitation on pledging credit without a vote of the people); **Public Schools**: *Collie v. Commissioners of Franklin Co.*, 145 N.C. 170, 59 S.E. 44 (1907);

Purchase of a Lake and a Generating Plant: *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634; **Railway Terminal Facilities**: *Hudson v. City of Greensboro*, 185 N.C. 502, 117 S.E. 629 (1923); **State Fair**: *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928); **Urban Renewal Project**: *Horton v. Redevelopment Comm'n of High Point*, 262 N.C. 306, 137 S.E.2d 115 (1964); **Voter-Approved Sale of Municipal Bonds for the Construction of an Armory Outside the Corporate Limits**: *Morgan v. Town of Spindale*, 254 N.C. 304, 118 S.E.2d 913 (1961); **World War I Veterans' Loan Fund**: *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927). While these cases are not necessarily consistent and may not have involved industrial development as the challenged project, they reflect a trend toward broadening the scope of what constitutes a valid public purpose that permits the expenditure of public revenues. The General Assembly may provide for, *inter alia*, roads, schools, housing, health care, transportation, and occupational training. It would be anomalous to now hold that a government which expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation.

This Court most recently addressed the public purpose question in *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200, where it unanimously held that N.C.G.S. § 160A, art. 16, part 1, which authorizes cities to finance, acquire, construct, own, and operate cablevision systems, does not violate the public purpose clause of Article V, Section 2(1). The Court stated that "[t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons." *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted). Application of these principles here mandates the conclusion that N.C.G.S. § 158-7.1 furthers a public purpose and hence is constitutional.

As to the first prong, whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action. We conclude that the activities

N.C.G.S. § 158-7.1 authorizes are in keeping with those accepted as within the scope of permissible governmental action.

Economic development has long been recognized as a proper governmental function. In *Wood v. Town of Oxford*, 97 N.C. 227, 2 S.E. 653, this Court upheld the statutory, voter-approved borrowing of money for the purchase of railroad capital stock and donations by towns located along a privately owned, for-profit railroad. The Court stated:

> It may not always be easy to apply the rule of law to determine what is a legitimate object of such expenditures. It is clear, however, that they may be made for such public improvements and advantages as tend directly to provide for and promote the general good, convenience and safety of the county or town making them, as an organized community, although the advantage derived may not reach every individual citizen or taxpayer residing there.

Id. at 231, 2 S.E. at 655. Even subsequent to *Mitchell*, this Court declared that stimulation of the economy involves a public purpose. *State ex rel. Util. Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978), involved a challenge to Utilities Commission approval of a rate increase to subsidize exploration for natural gas by private companies. In upholding the Commission's action, the Court said:

> Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision . . . .
>
> . . . .
>
> We hold here . . . that the severe adverse economic effects sought to be avoided by approval and funding of these exploration projects present a sufficient public concern to outweigh the infringement, if any there be, arising from the rate increases ordered by the Commission.

Id. at 610, 611, 242 S.E.2d at 874. While this decision did not interpret the public purpose clause of the Constitution, it is nevertheless instructive as illustrating judicial acceptance of the promotion of economic development as a valid public purpose.

Further, the activities N.C.G.S. § 158-7.1 authorizes invoke traditional governmental powers and authorities in the service of eco-

nomic development. For example, subsections 158-7.1(b)(5) and (6) authorize economic development expenditures in connection with local government operation of water, sewer, and other utility systems, matters long considered a proper role of government. Likewise, the power under (b)(1) to acquire land for an industrial park, develop it for its intended use, and then convey it is analogous to the powers granted by the Urban Redevelopment Law (chapter 160A, article 22), which this Court has consistently upheld as meeting the public purpose test. *See Redevelopment Comm'n of Greensboro v. Security Nat'l Bank of Greensboro*, 252 N.C. 595, 114 S.E.2d 688. Urban redevelopment commissions have power to acquire property, clear slums, and sell the property to private developers. In that instance, as here, a private party ultimately acquires the property and conducts activities which, while providing incidental private benefit, serve a primary public goal.

As to the second prong of the *Madison Cablevision* inquiry, under the expanded understanding of public purpose, even the most innovative activities N.C.G.S. § 158-7.1 permits are constitutional so long as they primarily benefit the public and not a private party. "It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community." *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, 599-600. Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.

Viewed in this light, section 158-7.1 clearly serves a public purpose. Its self-proclaimed end is to "increase the population, taxable property, agricultural industries and business prospects of any city or county." N.C.G.S. § 158-7.1(a). However, it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy. Careful planning pursuant to the statute should enable optimization of natural resources while concurrently preserving the local infrastructure. The strict procedural requirements the statute imposes provide safeguards that should suffice to prevent abuse.

The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government's efforts to better serve the interests of its people. Each community has a distinct ambience, unique assets, and special needs best ascertained at the local level. Section 158-7.1 enables each to formulate its own definition of economic success and to draft a developmental plan leading to that goal. This aim is no less legitimate and no less for a public purpose than projects this Court has approved in the past.

Finally, while this Court does not pass upon the wisdom or propriety of legislation in determining the primary motivation behind a statute, it may consider the circumstances surrounding its enactment. In that regard, a Legislative Research Commission committee made a report to the 1989 General Assembly, warning that:

> The traditional foundations of North Carolina's economy—agriculture and manufacturing—are in decline. And, the traditional economic development tool—industrial recruitment—has proven inadequate for many of North Carolina's communities. Low wages and low taxes are no longer sufficient incentives to entice new industry to our State, especially to our most remote, most distressed areas.

N.C. Legislative Research Commission, Committee on Economic Development and Recruiting, Report to the 1989 N.C. General Assembly, at 15. In the economic climate thus depicted, the pressure to induce responsible corporate citizens to relocate to or expand in North Carolina is not internal only, but results from the actions of other states as well. To date, courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives.[1] Only California and

1. *See, e.g., Smith v. Industrial Dev. Bd. of Andalusia*, 455 So. 2d 839 (Ala. 1984); *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970); *Industrial Dev. Auth. of Pinal Co. v. Nelson*, 109 Ariz. 368, 509 P.2d 705 (1973); *Andres v. First Ark. Dev. Fin. Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959); *In Re Interrogatory Propounded by Governor*, 814 P.2d 875 (Colo. 1991); *Wilson v. Connecticut Prod. Dev. Corp.*, 167 Conn. 111, 355 A.2d 72 (1974); *Roan v. Connecticut Indus. Bldg. Comm'n*, 150 Conn. 333, 189 A.2d 399 (1963); *In re Opinion of Justices*, 54 Del. 366, 177 A.2d 205 (1962); *Linscott v. Orange Co. Indus. Dev. Auth.*, 443 So. 2d 97 (Fla. 1983); *Nations v. Downtown Dev. Auth. of Atlanta*, 255 Ga. 324, 338 S.E.2d 240 (1985); *State ex rel. Amemiya v. Anderson*, 56 Haw. 566, 545 P.2d 1175 (1976); *Potter v. Judge*, 112 Ill. App. 3d 81, 444 N.E.2d 821

Idaho lack reported decisions on this issue, though they too have statutes authorizing such expenditures. The Supreme Court of Washington has struck a pollution control facility financing plan as providing for loans in violation of a state constitutional prohibition against municipal loans to private corporations, regardless of whether the loans served a public purpose. *Port of Longview v. Taxpayers of Port of Longview*, 84 Wash. 2d 475, 527 P.2d 263 (1974), *modified*, 85 Wash. 2d 216, 533 P.2d 128 (1975). That court has not held governmental expenditures for economic incentives unconstitutional as not for a public purpose, however. Thus, by virtue of the trial court's ruling, North Carolina currently stands alone in so holding. Considered in this light, it would be unrealistic to assume that the State will not suffer economically in the future if the incentive pro-

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(1983); *Hawkins v. City of Greenfield*, 248 Ind. 593, 230 N.E.2d 396 (1967); *Brady v. City of Dubuque*, 495 N.W.2d 701 (Iowa 1993); *Duckworth v. City of Kansas City*, 243 Kan. 386, 758 P.2d 201 (1988); *Hayes v. State Property & Bldgs. Comm'n*, 731 S.W.2d 797 (Ky. 1987); *Farlouis v. LaRock*, 315 So. 2d 50 (La. Ct. App. 1975); *Common Cause v. State*, 455 A.2d 1 (Me. 1983); *Williams v. Anne Arundel Co.*, 334 Md. 109, 638 A.2d 74 (1994); *Reyes v. Prince George's Co.*, 281 Md. 279, 380 A.2d 12 (1977); *Opinion of the Justices to the House of Representatives*, 368 Mass. 880, 335 N.E.2d 362 (1975); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); *City of Gaylord v. Beckett*, 378 Mich. 273, 144 N.W.2d 460 (1966); *Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984); *Board of Supervisors of Lamar Co. v. Hattiesburg Coca-Cola Bottling Co.*, 448 So. 2d 917 (Miss. 1984); *State ex rel. Wagner v. St. Louis Co. Port Auth.*, 604 S.W.2d 592 (Mo. 1980); *Fickes v. Missoula Co.*, 155 Mont. 258, 470 P.2d 287 (1970); *Chase v. Douglas Co.*, 195 Neb. 838, 241 N.W.2d 334 (1976); *State ex rel. Brennan v. Bowman*, 89 Nev. 330, 512 P.2d 1321 (1973); *Opinion of the Justices*, 112 N.H. 42, 288 A.2d 697 (1972); *Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964); *Kennecott Copper Corp. v. Town of Hurley*, 84 N.M. 743, 507 P.2d 1074 (1973); *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 303 P.2d 920 (1956); *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112, *appeal dismissed*, 423 U.S. 1010, 46 L. Ed. 2d 381 (1975); *Gripentrog v. City of Wahpeton*, 126 N.W.2d 230 (N.D. 1964); *Stark Co. v. Ferguson*, 2 Ohio App. 3d 72, 440 N.E.2d 816 (1981); *Burkhardt v. City of Enid*, 771 P.2d 608 (Okla. 1989); *Carruthers v. Port of Astoria*, 249 Or. 329, 438 P.2d 725 (1968); *Basehore v. Hampden Indus. Dev. Auth.*, 433 Pa. 40, 248 A.2d 212 (1968); *In Re Advisory Opinion to Governor*, 113 R.I. 586, 324 A.2d 641 (1974); *Nichols v. South Carolina Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986); *Clem v. City of Yankton*, 83 S.D. 386, 160 N.W.2d 125 (1968); *West v. Industrial Dev. Bd. of Nashville*, 206 Tenn. 154, 332 S.W.2d 201 (1960); *Atwood v. Willacy Co. Navigation Dist.*, 271 S.W.2d 137 (Tex. Ct. App. 1954), *appeal dismissed*, 350 U.S. 804, 100 L. Ed. 723 (1955); *Utah Technology Fin. Corp. v. Wilkinson*, 723 P.2d 406 (Utah 1986); *Vermont Home Mortgage Credit Agency v. Montpelier Nat'l Bank*, 128 Vt. 272, 262 A.2d 445 (1970); *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984); *Mayor of Lexington v. Industrial Dev. Auth. of Rockbridge Co.*, 221 Va. 865, 275 S.E.2d 888 (1981); *State ex rel. Ohio Co. Comm'n v. Samol*, 165 W. Va. 714, 275 S.E.2d 2 (1980); *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973); *Powers v. City of Cheyenne*, 435 P.2d 448 (Wyo. 1967).

grams created pursuant to N.C.G.S. § 158-7.1 are discontinued. As Chief Justice Parker noted in his dissent in *Mitchell*:

> North Carolina is no longer a predominantly agricultural community. We are developing from an agrarian economy to an agrarian and industrial economy. North Carolina is having to compete with the complex industrial, technical, and scientific communities that are more and more representative of a nation-wide trend. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act. It is manifest that the establishment of new industry in North Carolina will enrich a whole class of citizens who work for it, will increase the per capita income of our citizens, will mean more money for the public treasury, more money for our schools and for payment of our school teachers, more money for the operation of our hospitals like the John Umstead Hospital at Butner, and for other necessary expenses of government. This to my mind is clearly the business of government in the jet age in which we are living. Among factors to be considered in determining the effect of the challenged legislation here is the aggregate income it will make available for community distribution, the resulting security of their [sic] income, and the opportunities for more lucrative employment for those who desire to work for it.

Mitchell, 273 N.C. at 164, 159 S.E.2d at 764 (Parker, C.J., dissenting).

The General Assembly thus could determine that legislation such as N.C.G.S. § 158-7.1, which is intended to alleviate conditions of unemployment and fiscal distress and to increase the local tax base, serves the public interest. New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens. The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest. We therefore hold that N.C.G.S. § 158-7.1, which permits the expenditure of public moneys for economic development incentive programs, does not violate the public purpose clause of the North Carolina Constitution. Accordingly, the decision of the trial court on this issue is reversed.

[2] Plaintiff further contends that even if N.C.G.S. § 158-7.1 meets the public purpose test, it is nevertheless unconstitutional as impermissibly vague and ambiguous, without reasonably objective standards, and incapable of reasonably certain interpretation. Specifically, plaintiff argues that the statute delegates legislative power to local governments both as to the making of the law—deciding who will receive appropriations and on what terms—and as to its execution. He contends that an act that allows local elected governing bodies to exercise discretion regarding the extent to or manner in which they will use the statutory authority is unconstitutional.

This view is inconsistent with prior decisions of this Court. In *Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E.2d 204 (1972), for example, the Court rejected contentions that an annexation statute unconstitutionally delegated legislative authority without sufficient guidelines. It stated: " 'The decisions of this Court support the view that ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties.' " *Id.* at 726, 190 S.E.2d at 207 (quoting *In re Annexation Ordinances*, 253 N.C. 637, 649, 117 S.E.2d 795, 803-04 (1961)). This Court has explicitly recognized that cities and counties have authority to exercise broad discretion within statutory limits. In *Riddle v. Ledbetter*, 216 N.C. 491, 5 S.E.2d 542 (1939), it stated:

> A municipal corporation has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations . . . .
>
> . . . [I]t is also true that a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to the powers expressly granted, and in doing this it may exercise discretion as to the means to the end.

Id. at 492-93, 5 S.E.2d at 543 (citations omitted); *see also Keeter v. Town of Lake Lure*, 264 N.C. 252, 263, 141 S.E.2d 634, 643.

Chapters 160A (Cities and Towns) and 153A (Counties) of the General Statutes also clarify that the General Assembly intended that local elected officials have considerable discretion in performing their duties. N.C.G.S. § 160A-4 provides:

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

N.C.G.S. § 160A-4 (1994). N.C.G.S. § 153A-4 contains similar language applicable to counties. In *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 45, 442 S.E.2d 45, 50 (1994), this Court applied the broad rule of construction in N.C.G.S. § 160A-4 in holding that the City of Charlotte possessed the authority and discretion to charge user fees for regulatory services even though there was no express statutory authority therefor.

In this case, the General Assembly has given discretion to the elected governing bodies of cities and counties pursuant to N.C.G.S. § 158-7.1(a) to determine when economic development incentives will aid and encourage the location of manufacturing enterprises and increase the population, taxable property, agricultural industries, and business prospects of the city or county. Having made such determinations, they may then exercise discretion about whether to make an economic development expenditure and the nature and amount thereof. Subsections (b) through (f) state in greater detail the authority for local governments to make specific types of economic development expenditures. The statute leaves it to the duly elected governing bodies of the cities and counties to exercise discretion as to the manner and extent to which the authority will be used. The General Assembly specifically stated in subsection (b) that the enumerated specifics did not limit the broad authority granted in subsection (a).

These provisions evince an evident legislative purpose to give local governments considerable flexibility and discretion to execute the perceived public purpose of economic development in communities within their jurisdictions. As the foregoing cases indicate, the General Assembly could do this without running afoul of constitutional limitations. We conclude that the meaning and intent of

N.C.G.S. § 158-7.1 are sufficiently clear to pass constitutional muster; accordingly, this assignment of error is overruled.

[3] Plaintiff finally contends that the trial court erred in failing to find that defendants violated the North Carolina Open Meetings Law. He argues that the undisputed evidence shows that the County Commissioners and City Board of Aldermen met in closed sessions to discuss the amount of economic development incentives to offer private corporations and came to a group decision in private. Following the closed meetings, the boards either communicated directly with the corporations or had defendant WSBI act as the information conduit. In almost every instance, the boards expressly indicated to the private corporations that they would keep their decisions confidential until the corporation was ready to "go public" with the information.

N.C.G.S. § 143-318.10(a) provides that "each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." An "official meeting" is defined as

> a meeting, assembly, or gathering together at any time or place . . . of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.

N.C.G.S. § 143-318.10(d) (1993). Those seeking exemption have the burden of establishing that an exception embraces their action. *See News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake Co.*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586-87 (1976). Such exceptions should be strictly construed. *Id.*

Section 143-318.11 sets forth specific exceptions to the general rule that the public must be allowed access to government meetings. Defendants contend that they were entitled to take the actions at issue because N.C.G.S. § 143-318.11(a)(4) allows closed meetings "[t]o discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body."

The 1993 General Assembly considered repealing the economic development exception as part of its extensive revision of the Open Meetings Law. H.B. 120, 1993 N.C. General Assembly, at 3 (proposed deletion of former N.C.G.S. § 143-318.11(a)(6)). The 1993 amendment, however, left the exception permitting closed sessions for economic

development discussions substantively unchanged. *See* N.C.G.S. § 143-318.11(a)(4) (Supp. 1995).

As a further requirement to any open meetings exception, North Carolina law provides that a "public body may hold a closed session only upon a motion duly made and adopted at an open meeting" and that the motion to meet in closed session must cite one of the permissible purposes listed in N.C.G.S. § 143-318.11(a). N.C.G.S. § 143-318.11(c). The trial court found that each closed session held to discuss economic development expenditures was preceded by a "motion and approving vote to go into closed session at an open and regularly scheduled public meeting. The motion stated that the closed session would be for the discussion of matters relating to the location or expansion of business or industry."

The trial court further found that during the closed sessions to discuss matters relating to the location or expansion of industries or businesses, no action was taken which would authorize any city or county official to sign a contract or to make any expenditure of funds:

> All actions taken by the Boards authorizing or approving the signing of an economic development contract or commitment and the payment of economic development expenditures on behalf of the Boards were taken in regularly scheduled public meetings. The agenda materials for those meetings contained the terms of the proposed economic development expenditure contract and were available to the media and to the general public at least four (4) days prior to said public meetings. Those economic development expenditures made pursuant to the provisions of N.C.G.S. § 158-7.1(b) through (f) were approved at regularly scheduled public meetings following publication of a notice of a public hearing with respect to the proposed economic development expenditure as provided in said statute.

After careful review of the transcripts and record, we conclude that there was competent evidence to support the trial court's findings of fact.

Plaintiff argues that the economic development exception, when strictly construed, does not permit the conduct that occurred during the closed sessions. He contends that the discussions and actions the boards undertook deviated substantially from the plain meaning of the terms used by the legislature and included details as to the nature and amount of subsidies to be paid to private corporations. The trial

court found that at the closed sessions in question, "[s]taff was given instructions as to further negotiations and the Board members did, in nine cases, indicate their *informal* approval regarding certain economic development incentives." (Emphasis added.) Any company receiving notice of a preliminary approval was also advised, however, that final approval at a public meeting would be required before any contract could be signed or any funds expended.

We first note that the statute contains no express limitation on a public body's discussion in closed meetings of matters relating to the location or expansion of industries or businesses. Further, it does not make preliminary or tentative approval during an authorized closed session unlawful. N.C.G.S. § 158-7.1(c) states that "[a]ny appropriation or expenditure pursuant to subsection (b) of this section must be approved by the county or city governing body after a public hearing." If the expenditure is for the acquisition of an interest in real property, the statute requires that the notice for the public hearing describe "the governing body's intention to approve the acquisition." *Id.* This language shows that the General Assembly intended for the governing body to reach a tentative conclusion before the public hearing. Because the Open Meetings Law authorizes a closed session to discuss the acquisition, and N.C.G.S. § 158-7.1(c) requires that notice of the public hearing thereon describe the intention to approve it, it logically follows that the intent to approve the acquisition which is the subject of the notice may be formed in a closed session.

[4] Plaintiff also contends that the County Board of Commissioners violated the Open Meetings Law by failing to keep "full and accurate minutes" of its closed meetings held after 1 October 1994. N.C.G.S. § 143-318.10(e) provides: "Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11." Plaintiff argues the evidence shows that on 8 December 1994 and 2 March 1995, the County Commissioners met in closed session to discuss matters allegedly exempted from open meetings requirements by N.C.G.S. § 143-318.11(a)(4), and the minutes of both sessions only state "discussion."

This appears to be a question of first impression for this Court. However, the United States Court of Appeals for the Fourth Circuit, in *Town of Graham v. Karpark Corp.*, 194 F.2d 616 (4th Cir. 1952), has interpreted a North Carolina statute requiring "full and accurate" minutes. The court stated:

> The statutes of North Carolina require that a contract by a municipality involving as much as two hundred dollars be in writing, signed by the officer authorized to execute it and approved by the governing body. G.S. § 160-279. And to be valid it must be authorized by ordinance or resolution adopted by the board of commissioners. G.S. § 160-332. It is not made a condition of validity, however, that it be entered in the minutes of the board. The requirement of G.S. § 160-269 that a full and accurate journal of the proceedings be kept would seem to be merely directory and not a condition precedent to the validity of a contract regularly entered into by the municipality.

Id. at 621-22. Further, an Institute of Government publication contains the following, which, while not authoritative, is instructive:

> **121. [D]oes [the statutory requirement that "full and accurate minutes" of closed sessions be kept] mean that the minutes must show what everyone said at the closed session?**
>
> No. The phrase "full and accurate minutes" is also used for the statutory requirement that *city councils* and *boards of county commissioners* keep minutes of all their meetings, and it has a settled meaning in that existing context. Presumably the General Assembly intended the same meaning for the phrase in the open-meetings law. Under the existing interpretation of the phrase, the purpose of minutes is to provide a record of the *actions taken* by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no record (other than the fact the meeting occurred) is necessary. Thus if the public body uses the closed session *only for discussion* and takes no action, *nothing* need appear in the minutes other than the fact that the meeting was held. If some action is taken, of course, the minutes should reflect that fact.

David M. Lawrence, *Open Meetings and Local Governments in North Carolina* 29 (4th ed. 1994) (emphasis added). This accords with the common understanding of the purpose of minutes. Generally, "they should contain mainly a record of what was *done* at the meeting, not what was *said* by the members." Henry M. Robert, *Robert's Rules of Order Newly Revised* § 47, at 458 (9th ed. 1990). Their purpose is to reflect matters such as motions made, the movant, points of order, and appeals—not to show discussion or absence of action. *See id.* at 459-60.

In this case, no action was taken at the closed meetings. Therefore, the cursory reference to "discussion" in the minutes sufficed, and we perceive no violation of the "full and accurate minutes" requirement of N.C.G.S. § 143-318.10(e).

In summary, we conclude that the trial court's findings of fact are supported by competent evidence and that these findings support its conclusion that defendants did not violate the Open Meetings Law. This assignment of error is therefore overruled.

For the foregoing reasons, we reverse the trial court's rulings that N.C.G.S. § 158-7.1 violates Article V, Section 2(1) of the North Carolina Constitution and is impermissibly vague and ambiguous. We affirm the trial court's ruling that defendants did not violate the Open Meetings Law.

AFFIRMED IN PART; REVERSED IN PART.

Justice ORR dissenting.

At issue in this case is the City of Winston-Salem and Forsyth County's authorization, pursuant to N.C.G.S. § 158-7.1, to expend public funds directly to, and for the benefit of, selected private businesses as an inducement to these businesses to either expand or locate in the community. The majority opinion sanctions this practice on the theory that since jobs were created and the tax base increased by virtue of the inducements, the expenditures, totalling $13.2 million for the twenty-four challenged projects, were for a public purpose as required by Article V, Section 2 of the North Carolina Constitution. As a result, it appears to me that little remains of the public purpose constitutional restraint on governmental power to spend tax revenues collected from the public. Because I believe that the majority's holding in this case is (1) based on a theory unsupported by the evidence, and (2) contrary to established precedent interpreting the intent of the North Carolina Constitution, I respectfully dissent.

The logic upon which the majority opinion rests its conclusion that the expenditure of these funds was for a public purpose can be stated as follows: The creation of new jobs and an increase in the tax base *ipso facto* benefits the general public. Therefore, local government expenditure of tax dollars to a private business for its private benefit in order to induce the business to either expand or locate in the community is for a public purpose if it creates new jobs and increases the tax base.

The fallacy of this reasoning begins with the assumption that new jobs and a higher tax base automatically result in significant benefit to the public. The trial court's finding of fact number 9 addresses the factual and evidentiary failings of this assumption:

> 9. No evidence was presented of economic distress in the City and County from 1990 to the present time. During this period of time, based on the evidence presented, the unemployment rate in Forsyth County was [as] follows:
>
> | | |
> |---|---|
> | January, 1993 | 4.9% |
> | June, 1993 | 5.0% |
> | December, 1993 | 3.1% |
> | January, 1994 | 4.1% |
> | June, 1994 | 4.0% |
> | December, 1994 | 2.5% |
> | January, 1995 | 3.7% |
> | June, 1995 | 4.1% |
>
> No evidence was presented that incentives paid or committed by the City and County improved the unemployment rate or that they otherwise resulted in meaningful economic enhancement. No evidence was presented that the incentive grants made by the City and County reduced the net cost of government or resulted in a reduction in the amount or rate of property taxes paid by, or the level of services rendered to, the citizens of Winston-Salem and/or Forsyth County.

The argument presented by the defendants relies on the evidence of a projected total from the twenty-four projects of 5,532 new jobs and a projected tax base increase of $238,593,000. As impressive as those numbers appear, they must be viewed in the proper context. Based on January 1995 estimates, the work force in Forsyth County totalled 152,030, with an estimated 145,840 employed. Therefore, even if all of the projected 5,532 new jobs came to fruition, it still represents less than four percent of the employed work force in the county. In addition, an estimated eighty-five percent of those new jobs went to individuals already in Forsyth County, many of whom were presumably employed with other businesses. With respect to the increased tax base, the County's 1995 property tax base was valued at $15,633,231,770. The increase in the property tax base projected by defendants from the projects is $238,593,000, or slightly more than one and one-half percent of the overall tax base. Therefore, the conclusion that there is anything more than limited benefit accruing to the public in this case cannot be supported by the existing evidence.

Although there is undoubtedly some benefit to the general public, as noted with approval in the majority opinion, "direct state aid to a private enterprise, with only limited benefit accruing to the public, contravenes fundamental constitutional precepts." As Justice Sharp (later Chief Justice) stated in *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968):

> It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. *Briggs v. Raleigh*, 195 N.C. 223, 141 S.E. 597 [(1928)].

Mitchell, 273 N.C. at 144, 159 S.E.2d at 750.

In applying the above test, and juxtaposing the alleged benefits to the public vis à vis the benefits to the private enterprises, it is useful to examine the following table that was included in the trial court's judgment:

RECIPIENT OF FUNDS OR BENEFITS/DATE	AMOUNT OF CITY INCENTIVE AUTHORIZED	AMOUNT OF COUNTY INCENTIVE AUTHORIZED	PROJECTED TAX BASE CREATED	PROJECTED NEW JOBS	STATED PURPOSE OF GRANT
Texwipe Co. 1990	$ 14,675	$ 60,000	$ 1,000,000	150	On-the-job training
Lee Company 8/1991	880,000	283,000	12,000,000	840	Construction of road; development of land at 311 Centre on property owned by Winston-Salem Business, Inc., on-the-job training
Cluett Corporation 9/1992	20,000	0	3,500,000	180	Utilities connections
Champion Products 4/1993	75,000	75,000	6,000,000	350	Site improvements; on-the-job training
Omni Tool 7/1991	0	45,000	651,000	32	On-the-job training
Somar Co. 10/1991	10,000	10,000	(leased sq. ft.)	196	On-the-job training
Tara Corp. 7/1992	36,462	0	850,000	10	Financing of land purchase
Central Air Conditioning Dist. 1/1992	170,000	50,000	1,100,000	20	Financing of land purchase; expansion; relocating utilities on site
Southern National Bank 11/1992	473,500	473,500	(leased 90,000 sq. ft.)	289	Rent of headquarters building; parking fees; spousal relocation assistance
Sara Lee Knitwear 2/1993	150,000	150,000	16,412,000	250	Construction of a road
Wake Forest University 3/1993 (Pepsi Cola)	500,000	500,000	11,000,000	1,000	Upfitting of rental property for tenant of Wake Forest; moving and other expenses to move one tenant out to make room for another
Siecor Corp. 3/1993	1,233,000	1,133,000	32,000,000	200	Site grading and preparation; donation of land developed by Winston-Salem Business, Inc.—Centre 311

RECIPIENT OF FUNDS OR BENEFITS/DATE	AMOUNT OF CITY INCENTIVE AUTHORIZED	AMOUNT OF COUNTY INCENTIVE AUTHORIZED	PROJECTED TAX BASE CREATED	PROJECTED NEW JOBS	STATED PURPOSE OF GRANT
R.J. Reynolds Tobacco Co. 5/1994	250,000	250,000	(leased 57,000 sq. ft.)	250	Demolition work and building of parking lot for use by tenant, Wachovia Credit Operations
Dize Company 1993	25,000	0	0	50	On-the-job training
Ilco-Unican Company 1994	20,000	0	4,000,000	35	On-the-job-training
Amp, Incorporated 10/1994	35,000	35,000	7,000,000	80	Widening of road
Wachovia Corporation 8/1994	4,976,000+	0	80,000,000	300	Construction of parking deck and related construction
HDM Partners, Ltd. 9/1993	94,000	25,000	3,480,000	100	Construction of road and site improvements
Chesapeake Display and Packaging 5/1993	0	200,000	6,000,000	150	Facility upfit and site improvements
Standard Commercial 2/1994	0	200,000	12,500,000	40	Road construction; utilities construction
Dudley Products 7/1994	0	120,000	2,500,000	100	Site improvements
Hayward Industries 1/1995	0	415,000	32,000,000	770	Site improvements
Pope Companies (Draper Company) 4/1995	0	20,000	2,100,000	75	Road construction
Adele Knits 7/1995	120,000	120,000	4,500,000	65	Facility upfit
TOTAL	$9,082,637	$4,164,5000 [sic]	$238,593,000	5,532	

In examining the stated purposes of the grants, it is obvious that the $13.2 million was authorized for the specific benefit of the companies in question. The money expended was directly for the use of these private companies to pay for such activities as on-the-job training for employees, road construction, site improvements, financing of land purchases, upfitting of the facilities, and even spousal relocation assistance. In weighing these direct "private benefits" paid for by the taxpayers against the limited "public benefits," only one conclusion can be reached—that the trial court correctly held that the expenditures in question were not for a public purpose. The opposite conclusion reached by the majority can be reached only by ignoring the weight of the private benefits and relying instead on the assumption that simply creating new jobs and increasing the tax base is a public purpose that justifies the payment of tax dollars to the private sector. As previously noted, there is simply no evidence to support such a conclusion, and the majority's position must fail.

The second aspect of the majority's opinion with which I disagree is its assertion that *Mitchell* and *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973), do not control this decision and are distinguishable. In reaching its conclusion, the majority distinguishes one aspect of *Mitchell* from the instant case by observing that the General Assembly unenthusiastically passed the legislation in question in *Mitchell*, declaring it to be "bad policy." Granted, our legislature has not expressly stated that the practice of granting economic incentives as authorized by N.C.G.S. § 158-7.1 is "bad policy," but it is evident from a wide range of sources included in the record that the primary argument for such assistance to private industry is that "all the states are doing it" and, thus, that North Carolina must do it too in order to be competitive. The necessity of forcing communities and states to bid against each other with promises of government subsidies in an effort to induce industries to expand or locate in the community is a practice just as distasteful as the practice objected to in *Mitchell*. Therefore, the fact that the General Assembly was unenthusiastic in passing the legislation in question in *Mitchell* in no way lessens the impact of *Mitchell*.

Two other rationales espoused by the majority for distinguishing *Mitchell* (and also *Stanley*) from the case *sub judice* arise out of the passage of two 1973 amendments to the North Carolina Constitution. The first amendment, Article V, Section 9, allows counties to create authorities to issue revenue bonds for industrial and pollution control facilities. N.C. Const. art. V, § 9. As acknowledged by the majority, the first amendment was narrowly tailored to address a specific situation, but the majority claims that it nonetheless diminishes the significance of *Mitchell* and *Stanley*. For whatever diminishment there may be, nothing appears to indicate nor does the majority contend that *Mitchell* and *Stanley* were not correctly decided as a matter of law, nor does the majority contend that the principles of law dealing with the public purpose doctrine are no longer valid.

The second amendment, Article V, Section 2(7), allows the government to "contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." N.C. Const. art V, § 2(7). I find the majority's reliance on Article V, Section 2(7) to be of no significance in that a straightforward reading of the amendment simply permits the payment of tax dollars to private enterprise "for the accomplishment of [a] public purpose[]." As previously noted, unless one is willing to conclude that any expenditure that creates jobs and increases the tax base is "a

public purpose," that amendment has no substantive effect on the holdings in *Mitchell* and *Stanley*, and thus not on this case. In fact, the amendment merely allows government to perform a public purpose by contracting with the private sector to actually accomplish the public purpose.

The majority also relies on a "changing times" theory to ignore the law as set forth in *Mitchell* and *Stanley*. While economic times have changed and will continue to change, the philosophy that constitutional interpretation and application are subject to the whims of "everybody's doing it" cannot be sustained.

Finally, the majority chooses to ignore the principles set forth in the *Stanley* case for determining what is a public purpose. Justice Sharp, writing for a unanimous Court, stated:

> Because the concept of public purpose must expand to meet the necessities of changed times and conditions, this Court has not attempted to confine public purpose by judicial definition but has "left each case to be determined by its own peculiar circumstances as from time to time it arises." *Keeter v. Lake Lure*, [264 N.C. 252, 264, 141 S.E.2d 634, 643 (1965)]. Our reports contain extensive philosophizing and many decisions on the subject. Most recently we have considered the question whether a purpose was public or private in *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E.2d 517 (1973); *Martin v. Housing Corp.*, [277 N.C. 29, 175 S.E.2d 655 (1970)]; *Redevelopment Comm. v. Guilford County*, [274 N.C. 585, 164 S.E.2d 476 (1968)]; *Mitchell v. Financing Authority*, [273 N.C. 137, 159 S.E.2d 745]. These decisions, and the cases on which they are based, establish the following principles:
>
> (1) An activity cannot be for a public purpose unless it is properly the "business of government," and it is not a function of government either to engage in private business itself or to aid particular business ventures. *See* Note, 49 N.C. L. Rev. 830, 833 (1971). It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector. In *Martin v. Housing Corp.*, [277 N.C. 29, 175 S.E.2d 655], and *Wells v. Housing Authority*, [213 N.C. 744, 197 S.E. 693 (1938)], revenue bonds issued by two public housing agencies for the purpose of providing housing for low-income tenants were held to be for a public purpose. Governmental activity in that field was not an

intrusion upon private enterprise, which had eschewed the field. Further, the primary benefits passed directly from the public agency to the public and not to a private intermediary.

(2) Aid to a private concern by the use of public money or by tax-exempt revenue-bond financing is not justified by the incidental advantage to the public which results from the promotion and prosperity of private enterprises.

(3) In determining what is a public purpose the courts look not only to the end sought to be attained but also "to the means to be used." *Turner v. Reidsville*, 224 N.C. 42, 44, 29 S.E.2d 211, 213 (1944). *See Wells v. Housing Authority*, [213 N.C. at 750, 197 S.E. at 697]. Direct assistance to a private entity may not be the means used to effect a public purpose. "It is the essential character of the direct object of the expenditure which must determine its validity, and not the . . . degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." 63 Am. Jur. 2d *Public Funds* § 59 (1972).

Stanley, 284 N.C. at 33-34, 199 S.E.2d at 653-54 (alteration in original).

I acknowledge that in *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), this Court disavowed a portion of the language in the first prong of the *Stanley* test above: "It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector." *Id.* at 647, 386 S.E.2d at 207. However, the *Madison* Court did not disavow any other portion of the quote from *Stanley*. In fact, *Madison* relied on an abbreviated statement of the principles set out in *Stanley* for determining whether a particular undertaking by a local government is for a public purpose: "(1) it involves a reasonable connection with the convenience and necessity of the particular municipality, *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); and (2) *the activity benefits the public generally, as opposed to special interests or persons*, *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665." *Madison*, 325 N.C. at 646, 386 S.E.2d at 207 (emphasis added).

I further acknowledge that the sentence in the third prong of the *Stanley* test—"Direct assistance to a private entity may not be the means used to effect a public purpose," *Stanley*, 284 N.C. at 34, 199

S.E.2d at 653—is no longer accurate in light of the passage of Article V, Section 2(7) permitting such assistance. However, the ultimate test for determining public purpose as set forth in *Mitchell* and *Stanley* and even in *Madison* remains basically the same and applicable to this case: Does the expenditure benefit the public generally as opposed to special interests or persons? As stated in the second prong of the *Stanley* test, "[a]id to a private concern by the use of public money . . . is not justified by the incidental advantage to the public which results from the promotion and prosperity of private enterprise." *Id.* at 33, 199 S.E.2d at 653. The facts of this case fit squarely into this principle and thus, compel a finding that the trial court was correct.

Finally, many of the arguments presented to this Court rest on public policy. Advocates for these business incentives contend that without them, North Carolina will be at a significant competitive disadvantage in keeping and recruiting private industry. They further contend that the economic well-being of our state and its citizens is dependent on the continued utilization of this practice. These arguments are compelling, and even plaintiff admits that a public purpose is served by general economic development and recruitment of industry. However, plaintiff and those supporting his point of view argue that direct grants to specific, selected businesses go beyond the acceptable bounds of public purpose expenditures for economic development. Instead, they say that this is selected corporate welfare to some of the largest and most prosperous companies in our State and in the country. Moreover, these opponents contend that the grants are not equitably applied because they generally favor the larger companies and projects and, in this case, under the County's Economic Incentives Program Guidelines, completely eliminate retail operations from being considered. In challenging the actual public benefit, a question also is raised about the economic loss and devastation to smaller North Carolina communities that lose valued industry to larger, wealthier areas. For example, the move of Southern National Bank headquarters from Lumberton to Winston-Salem undoubtedly adversely affected Lumberton.

Also troubling is the question of limits under the majority's theory. If it is an acceptable public purpose to spend tax dollars specifically for relocation expenses to benefit the spouses of corporate executives moving to the community in finding new jobs or for parking decks that benefit only the employees of the favored company,

then what can a government not do if the end result will entice a company to produce new jobs and raise the tax base? If a potential corporate entity is considering a move to Winston-Salem but will only come if country club memberships are provided for its executives, do we sanction the use of tax revenue to facilitate the move? I would hope not, but under the holding of the majority opinion, I see no grounds for challenging such an expenditure provided that, as a result of such a grant, the company promises to create new jobs, and an increased tax base is projected.

In conclusion, for the foregoing reasons and for the reasons stated by the trial court, N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional on its face and as applied because it is impermissibly vague, ambiguous, and without reasonably objective standards and because it violates the public purpose clause of the North Carolina Constitution. Therefore, I would affirm the decision of the trial court.

In addition, even though I concur with the majority on the issue of the open meetings law violation, I am compelled to observe that although the open meetings law statutory exemptions may technically cover the practice complained of, what transpired appears to violate the spirit of the law and result in the abuses the law is intended to prevent.

JUSTICE LAKE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. FRANK RAY CHANDLER

No. 343A93

(Filed 8 March 1996)

1. Jury § 141 (NCI4th)— capital trial—jury selection—parole eligibility questions not permitted

The trial court did not err by denying defendant's pretrial motion in a capital trial to conduct *voir dire* regarding prospective jurors' beliefs about parole eligibility. The decision of *Simmons v. South Carolina*, — U.S.—, 129 L. Ed. 2d 133 is inapplicable when, as here, the defendant remains eligible for parole if given a life sentence.

Am Jur 2d, Jury §§ 189, 205 et seq.

2. Burglary and Unlawful Breakings § 151 (NCI4th)— burglary—instructions—intent to commit attempted larceny—correction in supplemental instructions—no plain error

The trial court did not commit plain error by originally instructing the jury that defendant could be found guilty of burglary if it found he entered the occupied dwelling with the intent to commit the offense of attempted larceny, a misdemeanor, rather than with the intent to commit larceny, a felony, where the court thereafter gave the jury supplemental instructions in which it replaced "attempted larceny" with "larceny" in describing the intent element of burglary; the verdict sheet stated that defendant must have intended to commit larceny in order for the jury to return a verdict of guilty; the trial court correctly defined the intent required for both larceny and attempted larceny in the original instructions, and the instructions made it clear that the intent required is the same; the jurors convicted defendant of the separate charge of attempted larceny, which means they concluded beyond a reasonable doubt that defendant intended to commit a larceny; and there was direct evidence presented at trial of defendant's intent sufficient to support a burglary conviction and no evidence to the contrary.

Am Jur 2d, Burglary § 69.

3. Larceny § 52 (NCI4th)— attempted larceny—indictment—allegation of particular goods not required

It is not necessary in an attempted larceny indictment to specify the particular goods and chattels the defendant intended to steal.

Am Jur 2d, Larceny §§ 128 et seq.

4. Criminal Law § 1341 (NCI4th)— pecuniary gain aggravating circumstance—constitutionality of pattern instruction

The pattern jury instruction on pecuniary gain is not unconstitutionally vague and overbroad.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

5. Criminal Law § 1341 (NCI4th)— conviction under felony murder rule—submission of pecuniary gain aggravating circumstance

The trial court did not err in submitting the pecuniary gain aggravating circumstance after the jury failed to find defendant guilty of first-degree murder based on premeditation and deliberation but found him guilty under the felony murder rule where the State's evidence was that defendant's motive for breaking and entering the victim's home was to steal, and although the jury could find from the evidence that defendant did not intend to kill the victim when he struck her, it could also find that defendant's motive in striking her was pecuniary gain.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

6. Criminal Law § 1341 (NCI4th)— pecuniary gain aggravating circumstance—intent to steal—instructions—value in money not required

The trial court did not err by failing to instruct the jury in a capital sentencing proceeding that it could find the pecuniary gain aggravating circumstance only if it found that defendant intended or expected to obtain money or some other thing which the defendant valued in money where defendant testified that he went to the victim's house to steal marijuana and a fellow inmate testified that defendant told him he intended to steal the victim's purse. The State's evidence showed that defendant broke into and entered the victim's house with the intent to steal, and whether defendant was looking for marijuana to satisfy his drug dependency or for the victim's purse was not relevant.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

7. Criminal Law § 1341 (NCI4th)— felony murder—burglary as underlying felony—pecuniary gain aggravating circumstance

The trial court did not err in submitting the pecuniary gain circumstance to aggravate a felony murder for which burglary is the underlying felony since the circumstance that the capital felony was committed for pecuniary gain does not constitute an element of the offense.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

8. Criminal Law § 1358 (NCI4th)— capital sentencing—mental or emotional disturbance mitigating circumstance—voluntary alcohol use

Defendant's alleged voluntary alcohol use on the night of a murder does not qualify as a mental or emotional disturbance for purposes of the mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Criminal Law §§ 598, 599.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 73 ALR3d 195.

9. Criminal Law § 455 (NCI4th)— capital sentencing—death penalty as deterrence—prosecutor's argument not improper

The prosecutor did not improperly urge the jury in a capital sentencing proceeding to vote for the death penalty to deter the violence and crime that plagues our society by comments about the rights of the victim and the responsibilities of jurors. Furthermore, the prosecutor could properly argue for the death penalty because of its deterrent effect on the defendant personally.

Am Jur 2d, Trial §§ 554, 572.

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

10. Criminal Law § 436 (NCI4th)— capital sentencing—prosecutor's closing argument—failure to tell what occurred—lack of remorse

The prosecutor's comments in his jury argument in a capital sentencing proceeding regarding defendant's insincerity and lack of remorse shown by his failure to tell his version of what happened on the night of the crime until he testified were permissible inferences from the evidence and not improper.

Am Jur 2d, Trial §§ 554, 572, 573.

11. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's closing argument—comment on aggravating circumstance—no gross impropriety

The prosecutor's closing argument in a capital sentencing proceeding about the legislature's provision of only one aggravating circumstance applicable to the facts of this case was not so grossly improper that the trial court should have intervened *ex mero motu*.

Am Jur 2d, Trial §§ 554, 572, 573.

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

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant was convicted under the felony murder rule, with first-degree burglary as the underlying felony; the jury found as the sole aggravating circumstance that the murder was committed for pecuniary gain; the jury rejected the three statutory mitigating circumstances submitted and found three nonstatutory mitigating circumstances; defendant admitted at trial that he killed the ninety-year-old victim; defendant broke into and entered the victim's home at night, seeking either marijuana or money; as defendant walked through the victim's house he heard the victim scream, turned, and struck the victim in the head with such force as to break her skull in two; defendant thereafter carried her to her bed, wiped his bloody hands on her stomach, removed her pajama bottoms and underpants, and then covered her up and searched the house for her purse; unable to find it, he returned to his aunt's house and went to sleep; after the murder defendant immediately began a failed attempt to establish an alibi, lied to the police, tried to convince his cousin to lie to the police, and tried to destroy his fingerprint

cards after the police obtained them; and defendant told a fellow inmate he would "play crazy" to try to avoid conviction.

Am Jur 2d, Criminal Law § 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

Justice ORR dissenting.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Freeman, J. on 20 July 1993 in Superior Court, Surry County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal of his convictions of first-degree burglary and attempted larceny was allowed on 5 April 1994. Heard in the Supreme Court 10 January 1995.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda M. Fox, Assistant Attorney General, for the State.

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

MITCHELL, Chief Justice.

This case arises out of the death of Doris Poore, a ninety-year-old widow who was killed during a burglary of her home on 11 December 1992.

Defendant was indicted for first-degree murder, first-degree burglary, attempted larceny, attempted first-degree rape, and attempted first-degree sexual offense. He was tried before a jury, which found him guilty of the first-degree murder of Doris Poore under the felony murder rule, with first-degree burglary as the underlying felony. The jury also found him guilty of attempted larceny, but not guilty of attempted first-degree rape or first-degree sexual offense. After a separate capital sentencing proceeding, the jury recommended and the trial court imposed a sentence of death for the first-degree murder conviction and a three-year prison sentence for the attempted larceny conviction.

The State presented evidence at trial tending to show that on 10 December 1992, Mrs. Poore talked by telephone with Grace Vaughn, a friend, until approximately 10:30 p.m. The next day at 8:00 a.m., Lea Quiros, the victim's housekeeper, arrived at Mrs. Poore's house and knocked on the front door. When Mrs. Poore did not answer the door, Mrs. Quiros attempted to call her on the telephone. Again, no one answered. Mrs. Quiros contacted Mr. Jack Leach, Mrs. Poore's son-in-law, who, on arrival, entered the house by the back door. Mr. Leach let Mrs. Quiros in the house. Mr. Leach found Mrs. Poore dead in her bed in a pool of blood.

Special Agent R.D. Melton of the SBI testified that during the investigation of Mrs. Poore's death, he observed that the screen door at the back of her house had been cut with two "L"-shaped cuts above the center support strut on the right side of the door where a latch was located. The screen was slightly pushed in. The wooden door was open, and the screws from the chain lock were pulled from the wall and left hanging on the door.

After entering Mrs. Poore's house, Melton found Mrs. Poore's glasses and hearing aids on the dining room table. Upon entering Mrs. Poore's bedroom, he found bed clothing on the bed, a sheet pulled up over the victim, and an area of pooled blood underneath her head. The victim was lying on the bed with her pajama top open and her body was nude from the waist down; smeared bloody fingerprints were on her abdomen. A pair of pajama bottoms and a pair of panties were wadded together at the foot of the bed between the victim's legs, but slightly beneath her right foot. He also noted that an electric heating pad was on the bed.

Dr. Gregory James Davis, a forensic pathologist, testified that Mrs. Poore died from a single "massive blow" to the head. The blow resulted in a hinge fracture to the scalp, which effectively caused the skull to snap in two resulting in extensive swelling and hemorrhaging of the brain. Mrs. Poore had numerous abrasions, lacerations, and bruises.

Special Agent Ricky Navarro, a latent evidence specialist with the SBI, testified that palm and fingerprints matching the defendant's were found on the wooden door leading into the kitchen.

Special Agent J.L. Eddins testified that after he took defendant's fingerprints, he asked defendant to sign a consent to search form. Defendant signed the fingerprint card, but refused to sign the other

related documents. After defendant asked to make a phone call, he proceeded to destroy all of the documents and the card.

Jeffrey Kyle Wilson, defendant's cellmate from January 1993 until April 1993, testified that while defendant was in jail, defendant asked him what he should do. Wilson told him to tell the truth so that he would not get the electric chair. Wilson said that defendant replied that "they" did not have the evidence to convict him. Then, defendant described how he had committed the murder and that as a defense, he planned to "play crazy."

Defendant took the stand as the only defense witness and testified that he left his aunt's house between midnight and 12:30 a.m. on 11 December 1992 and walked to the victim's house. After knocking on the window, back door, and garage door, and not getting an answer, he entered the house through the unlocked basement door. He proceeded up the stairs, cut the screen door with a pocketknife, and opened the back door leading to the kitchen. He testified that as he started to walk through the house, he saw something out of the corner of his eye. When he started to leave, somebody behind him screamed. He then turned and swung, making the victim fall against him. He testified that as Mrs. Poore was falling, he caught her; he then carried her to her bed, put her in the bed, and went to the bathroom to wash the blood off his hand. He saw Mrs. Poore's clothes at the front of the toilet, picked them up, put them next to her in her bed, and covered her up.

Defendant testified that he had not known who lived in the house, but thought that a man lived there because he had seen a blue pickup truck parked in front of the house before and had seen a man smoking "reefer" or marijuana there. Defendant testified that after he left the house, he washed his clothes and that he still had them. On cross-examination, defendant testified that after he killed Mrs. Poore, he did not look for the marijuana as he had originally planned.

[1] By his first assignment of error, defendant contends that the trial court erred by denying his pretrial motion to conduct *voir dire* regarding prospective jurors' beliefs about parole eligibility. This Court has consistently decided this issue against defendant. *State v. Powell*, 340 N.C. 674, 687-88, 459 S.E.2d 219, 225 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3467 (1996); *State v. Price*, 337 N.C. 756, 762-63, 448 S.E.2d 827, 831 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 224 (1995); *State v. Payne*, 337 N.C. 505, 516, 448

S.E.2d 93, 99 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). As we explained in *Payne*, the recent decision in *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), does not affect our position on this issue when, as here, the defendant remains eligible for parole if given a life sentence. *Payne*, 337 N.C. at 516-17, 448 S.E.2d at 99-100. We continue to adhere to our prior rulings on this issue. This assignment of error is overruled.

[2] By his next assignment of error, defendant contends that the trial court erred by instructing the jury that defendant could be found guilty of burglary if it found he entered the occupied dwelling with the intent to commit the offense of attempted larceny, a misdemeanor, rather than with the intent to commit larceny, a felony. The trial court instructed the jury as to the first-degree burglary charge as follows:

> Now, the defendant has also been accused in another case of burglary in the first degree, which is the breaking and entering of an occupied dwelling house of another without his or her consent, in the nighttime, with the intent to commit either the felony of attempted first degree rape, felony of attempted sexual—first degree sexual offense, or the *felony of attempted larceny*, or the felony of attempted robbery with a dangerous weapon.

(Emphasis added.)

The trial court repeated this instruction when it listed the sixth element of the offense of first-degree burglary:

> and sixth, that at the time of the breaking and entering the defendant intended to commit either the felony of first degree—attempted first degree rape, attempted first degree sexual offense, *attempted larceny* or attempted robbery with a dangerous weapon.

(Emphasis added.)

The trial court then, for the third time, told the jury that defendant could be found guilty of first-degree burglary if he acted with the intent to commit attempted larceny.

> So I charge that if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant broke and entered an occupied dwelling house without the owner's consent, during the nighttime, and that at that time the

> defendant intended to commit either attempted first degree rape, attempted first degree sexual offense, *attempted larceny* or attempted robbery with a dangerous weapon, it would be your duty to return a verdict of guilty of first degree burglary.

(Emphasis added.)

In this case, defendant was charged with attempted larceny, attempted first-degree rape, and attempted first-degree sexual offense, in addition to the first-degree burglary and murder charges. As to the burglary charge, the trial court should have instructed that if defendant had the intent to commit a rape, sexual offense, or *larceny* at the time of the breaking and entering, then he should be convicted of first-degree burglary. The crime of first-degree burglary is "complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein, whether or not anything was actually stolen from the house." *State v. Coffey*, 289 N.C. 431, 437-38, 222 S.E.2d 217, 221 (1976).

At the conclusion of the trial court's instructions, the prosecutor suggested that they might have been erroneous. The trial court then told the jury that it was going to correct that error and gave the jury supplemental instructions, *inter alia*, on the elements of first-degree burglary. During the supplemental instructions, the trial court replaced the phrase "attempted larceny" with the word "larceny" in describing the intent element of first-degree burglary. Defendant argues, nevertheless, that the effect of the supplemental instructions was to leave the jury with the impression that attempted larceny and larceny had the same definition. Therefore, defendant contends the jury convicted him of attempted larceny and first-degree burglary "with intent to commit larceny."

Defendant did not object to the trial court's instructions on first-degree burglary at trial. Therefore, our review is limited to a review for plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). To constitute plain error, an error in the trial court's instruction must be "so fundamental as to amount to a miscarriage of justice or . . . 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).

> A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is cor-

> rect. *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964); *State v. Taft*, 256 N.C. 441, 124 S.E.2d 169 (1962). If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. Hall*, 267 N.C. 90, 147 S.E.2d 548 (1966). Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. Norris*, 242 N.C. 47, 86 S.E.2d 916 (1955). The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.

State v. McWilliams, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971).

In viewing the charge as a whole, we conclude that the erroneous inclusion of the word "attempted" in the original burglary instruction was not plain error. First, the trial court's supplemental instructions and the verdict sheet state that for the jury to return a verdict of "guilty," defendant must have intended to commit larceny, a correct statement of the law. Second, the crucial element in burglary is the intent to commit a larceny, which is the identical intent necessary to commit an attempted larceny. In the original instruction, the trial court correctly defined the intent required for both larceny and attempted larceny, and the instructions make it clear that the intent required is the same. Third, the jurors convicted defendant of the separate charge of attempted larceny, which means they concluded beyond a reasonable doubt that defendant intended to commit a larceny. The fact that defendant left the house without taking anything is irrelevant because the actual commission of the intended felony is not essential to the crime of burglary. *See State v. Worsley*, 336 N.C. 268, 279-81, 443 S.E.2d 68, 73 (1994).

Finally, based on the evidence submitted at trial, there could be no plain error by the inclusion of the word "attempted" in the original burglary instruction. The State presented evidence that there was a breaking and entering of an occupied dwelling at nighttime. In the absence of evidence of another intent or explanation for breaking and entering, the usual object or purpose of burglarizing a dwelling house at night is theft. *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976). In this case, defendant testified that he intended to steal marijuana when he broke into and entered the victim's home. Thus,

there was direct evidence presented at trial of defendant's intent to commit larceny sufficient to support the burglary conviction and no evidence to the contrary. Accordingly, this assignment of error is overruled.

Defendant next contends that because the original jury instruction on burglary erroneously contained the phrase "attempted larceny," the subsequent conviction for felony murder based on the burglary must be vacated. The instruction given to the jury on felony murder was correct, and as we have previously explained, the inclusion of the word "attempted" in the original burglary instruction neither factually nor legally changed the elements of burglary. In any event, any error was corrected by the supplemental instructions. Defendant's conviction for first-degree murder based on the underlying felony of burglary was without error, and this assignment of error is overruled.

[3] By another assignment of error, defendant contends that his conviction for attempted larceny must be vacated because the indictment for attempted larceny did not specify the property defendant attempted to steal. Defendant mistakenly relies upon the case of *State v. Ingram*, 271 N.C. 538, 157 S.E.2d 119 (1967), which held that an indictment for felonious larceny was fatally defective because the description of the stolen property "by generally and broadly comprehensive words" was not sufficient to enable the jury to say that the specific article proved to be stolen was the same as that alleged in the indictment. It is not necessary in an *attempted* larceny indictment, however, to specify the particular goods and chattels the defendant intended to steal. *State v. Utley*, 82 N.C. 556 (1880). The offense of *attempted* larceny is complete where there is a general intent to steal and an act in furtherance thereof, and it is "equally a public injury, whether the attempt was with a general intent to steal, or upon a particular intent." *Id.* at 558. In *Utley*, the defendant was indicted for "an attempt to steal, take and carry away from the dwelling house of John J. Norris the goods and chattels and moneys of the said Norris in said house contained," and this Court held that the indictment was legally sufficient. *Id.* at 558-59. In doing so, we concluded that it is not necessary in a bill of indictment for attempted larceny "to aver the specific articles intended to be taken, as such fact is extrinsic and not essential to constitute a criminal attempt." *Id.* at 560.

[4] Defendant raises several assignments of error relating to the submission of the pecuniary gain aggravating circumstance to the jury

during his capital sentencing proceeding. N.C.G.S. § 15A-2000(e)(6) (Supp. 1995). By one such assignment, defendant contends that the pattern jury instruction on pecuniary gain is vague and overly broad. This Court has previously concluded that submitting the aggravating circumstance of pecuniary gain is constitutional where the pattern instruction was used. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) ("*Oliver II*"). This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred in submitting the pecuniary gain aggravating circumstance after the jury had failed to find defendant guilty of first-degree murder on the theory that he killed after premeditation and deliberation. Defendant argues that if he did not possess the *mens rea* to commit premeditated and deliberated murder, then he also could not have had the requisite state of mind to kill for pecuniary gain. We disagree.

"The gravamen of the pecuniary gain aggravating circumstance is that 'the killing was for the purpose of getting money or something of value.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 (quoting *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)), *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993). Pecuniary gain should be found where "the hope of pecuniary gain provided the impetus for the murder." *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981) ("*Oliver I*").

In *Oliver I*, the defendants, who were convicted on the felony murder theory with armed robbery as the underlying felony, contended that the trial court erred in submitting pecuniary gain as an aggravating circumstance. This Court stated that the pecuniary gain circumstance examines the motive of the defendant. "While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence." *Id.*

The State's evidence in this case was that defendant's motive for breaking and entering Mrs. Poore's house was to steal. Defendant testified that he went to Mrs. Poore's house to steal marijuana. Jeffrey Kyle Wilson, a fellow inmate, testified that defendant told him he was going to steal Mrs. Poore's purse, but after he killed her, he could not find it. Although a jury could find from such evidence that defendant did not intend to kill the victim when he struck her, it also could find that defendant's motive in striking her was pecuniary gain. This assignment of error is overruled.

[6] By another assignment of error, defendant contends that the trial court erred in instructing the jury that it could find the pecuniary gain aggravating circumstance without finding that defendant acted with the motive of pecuniary gain. Defendant argues that this is so because the evidence showed that defendant's motive for breaking and entering Mrs. Poore's house was for drugs that he could use to satisfy his drug dependency, not for money or property that he could convert to money. Consequently, he says the jury should have been instructed that it could find the pecuniary gain circumstance if it found that he intended or expected to obtain money or some other thing which *the defendant* valued in money. We find defendant's argument unpersuasive.

The State's evidence showed that defendant broke into and entered Mrs. Poore's house with the intent to steal. Absent evidence to the contrary, a usual object or purpose of burglarizing a dwelling house at night is presumed to be theft. *Hedrick*, 289 N.C. at 236, 221 S.E.2d at 353. Whether defendant was looking for marijuana or for Mrs. Poore's purse is not relevant. As there was no evidence that the burglary was motivated by some impulse other than pecuniary gain, the evidence in this case was sufficient to support a finding of the pecuniary gain aggravating circumstance. This assignment of error is overruled.

[7] Finally, defendant contends that the trial court erred in submitting the pecuniary gain circumstance to aggravate a felony murder conviction where burglary is the underlying felony. Defendant argues that he was convicted of first-degree burglary on the basis of his intent to commit larceny. He says that because larceny is an element of burglary, pecuniary gain is also an element of burglary, and this Court has held that an element of the felony used to support a felony murder conviction cannot also be used as an aggravator.

We have consistently upheld the submission of the pecuniary gain aggravating circumstance for purposes of sentencing a defendant convicted of felony murder with robbery as the underlying felony. *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983); *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981); *Oliver I*, 302 N.C. 28, 274 S.E.2d 183. We find these cases dispositive of the issue of whether submission of the pecuniary gain aggravating circumstance is proper in a burglary-felony murder case.

In *Oliver I* and its progeny, we stated that

> robbery constitutes an essential element of felony murder. In a capital case tried solely on a felony murder theory[,] a jury, in the absence of this element, could not find defendant guilty of the capital offense. The circumstance that the capital felony was committed for pecuniary gain, however, is not such an essential element. This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence.

302 N.C. at 62, 274 S.E.2d at 204 (footnote omitted). This same reasoning applies to felony murder where burglary is the underlying felony. Burglary is an essential element of felony murder. Pecuniary gain is not such an essential element. Thus, the pecuniary gain aggravating circumstance was properly submitted to the jury. This assignment of error is overruled.

[8] By another assignment of error, defendant contends that the trial court erred by failing to submit the statutory mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance when he committed the crime. N.C.G.S. § 15A-2000(f)(2). Defendant argues that there was substantial evidence from which a reasonable juror could have found this circumstance to exist. Defendant's evidence tended to show that he was in a panicked state when he struck Mrs. Poore and that he was suffering from mixed personality disorder and substance abuse disorder.

A trial court is not required to submit a mitigating circumstance to the jury unless it is supported by substantial evidence. *State v. Miller*, 339 N.C. 663, 455 S.E.2d 137, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995). Here, the evidence did not support defendant's contention that he was under a mental or emotional disturbance at the time of the murder. The only witness called to testify in support of any claim of mental or emotional impairment was Dr. John Warren, a clinical psychologist. Dr. Warren testified that defendant suffers from substance abuse disorder including the substances of alcohol and marijuana primarily, and LSD occasionally. He opined that in such individuals alcohol abuse blocks out controls or inhibitions. He testified that defendant told him that he had been drinking fortified wine on the night in question. Dr. Warren also testified that defendant suffered from mixed personality disorder with immature, impulsive,

antisocial, and emotionally unstable features that, among other things, made the defendant more impulsive than a normal person.

However, on cross-examination, Dr. Warren testified that defendant has an average-range IQ and that he was competent to stand trial. He also testified that he did not have any independent corroboration to the effects of any alcohol that defendant allegedly consumed on the night in question other than what he had been told by the defendant—a defendant who had also denied having any involvement in the murder during Dr. Warren's examination of him six months prior to trial. Moreover, Dr. Warren did not testify about the specific effects, if any, that alcohol may have on a person diagnosed with mixed personality disorder.

Assuming *arguendo* that defendant was under the influence of fortified wine at the time he committed the murder, in *State v. Irwin*, 304 N.C. at 105-06, 282 S.E.2d at 447-48, we held that voluntary intoxication by alcohol or drugs at the time of the commission of a murder does not qualify as a mental or emotional disturbance under the statute. *See also State v. Greene*, 329 N.C. 771, 775, 408 S.E.2d 185, 186 (1991). Thus, defendant's alleged voluntary alcohol use on the night in question does not qualify as a mental or emotional disturbance for purposes of N.C.G.S. § 15A-2000(f)(2). This assignment of error is overruled.

Defendant next contends that the trial court erred by not intervening during the prosecutors' closing arguments to the jury. He brings forward numerous assignments of error in which he argues that (1) the prosecutors improperly urged the jury to vote for the death penalty to deter the violence and crime that plague our society; (2) the prosecutors improperly encouraged the jury to draw negative inferences from defendant's decision not to incriminate himself or to give a statement to the police prior to testifying on his own behalf; and (3) the prosecutors improperly criticized the capital punishment statute, thereby discouraging the jury from following the law as it is obligated to do. Further, defendant argues that the prosecutors' arguments did not rely upon matters contained within the record; instead, they relied upon an appeal to the jury's sense of civic commitment to protect all of society.

As a general rule, prosecutors are granted wide latitude in the scope of their closing argument to the jury at sentencing and may argue the law and facts in evidence and all reasonable inferences drawn therefrom. *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718

(1995). 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.*

[9] First, defendant contends that one of the prosecutors blatantly and unconstitutionally urged the jury to vote for the death penalty to deter crime. Despite failing to object during the prosecutor's argument, defendant now challenges the following comments:

> When are we going to care about the rights of the victim? We all care about the rights of the accused. That's what this whole system is about in this room is the right of the accused, a human being, before we deprive him of that sweet air.
>
> . . . .
>
> . . . By inaction the fire has gone out. It's cold. Don't let that happen in this country. Don't let the fire go out. Don't let the moral fiber and conscience of this country go out. Don't let that be the fate of this country, the fate of people like Mrs. Poore that live in the City of Mount Airy, as you've seen in that aerial photograph. Don't let it go. Make the choice.

"[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. at 482, 346 S.E.2d at 410. A prosecutor is permitted to emphasize the responsibility of the jurors and even describe them as the voice of the community. *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994). Defendant has failed to show how the prosecutor's argument was improper. Certainly it did not amount to "gross impropriety."

[10] Defendant also challenges the following comments by one of the prosecutors, to which his objection was overruled, which he argues improperly appealed to the jury's sense of civic commitment to protect all of society and did not rely upon matters contained within the record:

> Because if we don't have law you may be sitting over with that family one day or sitting where there's family, and you may be sit-

> ting and looking at 12 jurors and hoping that those jurors know that they are the last hope that our society has. If we can't stop the Frank Chandlers of the world, if we can't stop the men of the night—

This Court has previously held that a prosecutor may argue for the death penalty because of its deterrent effect on the defendant personally. *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Defendant's argument is without merit.

Defendant also challenges comments by another prosecutor which he argues sought to convince the jury that by failing to tell his version of what happened on the night of the crime until he testified, defendant was seeking an unfair tactical advantage and, therefore, should not be viewed as remorseful. A prosecutor is permitted to argue the law and the facts in evidence and all reasonable inferences that may be drawn therefrom. *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). Based on the evidence in this case, we find the prosecutor's comments regarding defendant's insincerity to be permissible inferences from the evidence.

[11] Finally, defendant contends that the prosecutors at several points criticized the whole basis of our capital punishment statute. For example, defendant argues that a prosecutor criticized the legislature for providing only one aggravating circumstance.

> One aggravating circumstance. That's a choice right there. Out of the 11 aggravating circumstances that North Carolina provides for when a man goes into a woman's house such as this woman and kills a 90-year-old woman the North Carolina Legislature decided that you would have just one choice, one aggravating factor under the law. I find that interesting.

Because defendant did not object to any of the statements, we review them to determine whether the arguments complained of were "so prejudicial and grossly improper as to require corrective action by the trial [court] *ex mero motu*." *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988). Read in context, we hold that none of the prosecutors' statements complained of by defendant were so grossly improper that the trial court should have intervened *ex mero motu*. These assignments of error are overruled.

Defendant raises four additional issues that have been decided contrary to his position by this Court. He raises these issues for the

purpose of preserving them for any possible further judicial review of this case. We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

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. 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 defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

[12] In the present case, defendant was convicted of first-degree murder under the felony murder rule, with first-degree burglary as the underlying felony. The jury found as the sole aggravating circumstance that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The jury found as mitigating circumstances that (1) defendant's parents did not provide proper role models for him during his formative years, (2) defendant had a history of alcohol and drug abuse which has led him to make poor choices in his life, and (3) defendant acknowledged his guilt in open court to the charges of murder and burglary.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). We do not find this case 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 (1988), the defendant was convicted of first-degree murder based on the theory of felony murder, with pecuniary gain as the only aggravating circumstance. The jury found several mitigating circumstances, including that defendant was under the influence of mental or emotional disturbance at the time of the crime. By contrast, in this case the mental or emotional disturbance mitigator was not even submitted for the jury's consideration. Further, the brutality of this crime substantially outweighs that of the crime in *Benson*. The defendant there shot the victim's legs; defendant here struck the victim in the head with such force as to break her skull in two.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was one of four individuals who was involved in the beating death of a robbery victim. Again, the defendant was found guilty of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. The Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." *Id.* at 27, 352 S.E.2d at 664. In addition, the Court deemed it important that the defendant was only seventeen. The jury found, in contrast to the present case, that defendant suffered from impaired capacity to appreciate the criminality of his conduct, that he was under the influence of a mental or emotional disturbance at the time of the murder, and that his age at the time of the crime had mitigating value.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the defendant was convicted of first-degree murder for mistakenly shooting the victim in a parking lot during an argument with the victim's friend. The only aggravating circumstance found was that the murder was part of a course of conduct which included the commission by the defendant of other crimes of violence against another person or persons. The Court found that the "seemingly senseless shooting simply did not contain the viciousness and the cruelty present" in other death cases that involved only the "course of conduct" aggravating circumstance. *Id.* at 234, 341 S.E.2d at 731.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant, after drinking all day, stabbed and robbed a man. This Court concentrated on the fact that the defendant had been drinking heavily all day and wanted to kill the victim to buy more liquor.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the evidence was speculative as to how the murder occurred or how defendant acted when he encountered the victim, who was a law enforcement officer. This Court emphasized the "unqualified cooperation" of the defendant during the investigation.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant shot his victim after the defendant had spent the night drinking. There was no motive for the killing, and immediately after the victim was shot, the defendant sought medical help for the victim.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703, the victim was shot twice in the head. The defendant had flagged down the victim's car earlier, telling his companions that he intended to rob the victim. This Court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with the victim." *Id.* at 46, 305 S.E.2d at 717. Here, the defendant admitted at trial that he killed Mrs. Poore.

We conclude that this case is not similar to any of the above cases where the death sentence was found to be disproportionate. In this case, defendant admitted at trial that he killed Mrs. Poore, and the jury specifically rejected the three statutory mitigating circumstances submitted: that defendant suffered from impaired capacity to appreciate the criminality of his conduct, that his age at the time of the crime had mitigating value, and that defendant had no significant history of prior criminal activity.

Defendant, in this case, broke into and entered the home of an elderly woman who lived alone, seeking either marijuana or money. Based on defendant's testimony, if believed, as he walked through the house, he heard Mrs. Poore. Upon hearing her, he struck her in the head with such force as to break her skull in two. Thereafter, he carried her to her bed and wiped his bloody hands on her stomach. He then removed her pajama bottoms and underpants. He told his cellmate Jeffrey Kyle Wilson that he did this because he wanted to see what an old woman's "pussy" looked like. He then covered her up and proceeded to search the house for her purse. Unable to find it, he left the house and returned to his aunt's house and went to sleep. Defendant never attempted to seek medical attention for Mrs. Poore after he struck her, but instead left her in her bed in a pool of blood to die.

After the murder, defendant immediately began a failed attempt to establish an alibi. He lied to the police. He tried to convince his cousin to lie to the police and to say that he never left the house on the morning of the murder. He also tried to destroy his fingerprint cards after the police obtained them. He told Wilson that he would try to avoid conviction and would "play crazy." Defendant's lack of remorse is evident.

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 have repeatedly stated that we review all of the cases in the pool when engaging in this statutory duty, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude 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.

The fact that Mrs. Poore was killed in her home at night is also significant. As this Court has consistently stated,

> [t]he sanctity of the home is a revered tenet of Anglo-American jurisprudence. *See, e.g., Segura v. United States*, 468 U.S 796, 810, 82 L. Ed. 2d 599, 612 (1984) ("The sanctity of the home is not to be disputed."). The law recognizes the special status of the home, giving one the right to defend it. "A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion . . . ." *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913), quoting I Wharton's Criminal Law, sec. 503 (9th ed.), and citing 1 J. Bishop, *New Criminal Law*, sec. 858 and 1 Hale, *Pleas of the Crown*, sec. 458. And the law has consistently acknowledged the expectation of and right to privacy within the home. *See, e.g., Segura v. United States*, 468 U.S. at 820, 82 L. Ed. 2d at 619 (Stevens, J., dissenting) ("Nowhere are expectations of privacy greater than in the home."). This crime shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure.

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).

Under North Carolina's system for administering capital punishment as mandated by our legislature, the appropriateness of the sentence of death is for the jury to decide. N.C.G.S. § 15A-2000 (1988). Although this Court is required to conduct the function of proportionality review, we are not authorized to substitute our own notions as to the appropriateness of the penalty of death in a given case for those of the jury. Therefore, only in the most clear and extraordinary situations may we properly declare a sentence of death which has been recommended by the jury and ordered by the trial court to be disproportionate. *See generally State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). This is not such a case. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we hold that the defendant received a fair trial, free of prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO ERROR.

Justice ORR dissenting.

I respectfully dissent from the majority opinion on two grounds. First, the trial court erred in submitting the (e)(6) aggravating circumstance—that the capital felony was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (Supp. 1995)—and second, the death sentence is disproportionate.

In 1977, the North Carolina General Assembly passed a new capital punishment statute, N.C.G.S. § 15A-2000, modeled in large part on the American Law Institute's Model Penal Code § 210.6. *See State v. Johnson*, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-10 (1979) (reviewing the history leading to the enactment of N.C.G.S. § 15A-2000). Under this new legislation, a defendant convicted of a capital felony is subjected to a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. N.C.G.S. § 15A-2000(a)(1). The heart of the death penalty statute is the requirement that a death sentence cannot be imposed absent a finding of at least one aggravating circumstance of the eleven possible aggravating circumstances set out in the statute. N.C.G.S. § 15A-2000(d)(2); *see* Geoffrey Carlyle Mangum, Comment, *Vague*

and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute, 16 Wake Forest L. Rev. 765, 777 (1980).

Generally, the critical function of aggravating circumstances in any capital punishment scheme is to identify those circumstances that distinguish killings resulting in first-degree murder convictions warranting the punishment of death from those that do not. *See Lowenfield v. Phelps*, 484 U.S. 231, 244, 98 L. Ed. 2d 568, 581-82 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."); *Gregg v. Georgia*, 428 U.S. 153, 197-98, 49 L. Ed. 2d 859, 888 (1976) (The aggravating circumstances require the jury to consider "the circumstances of the crime or the character of the defendant" before it recommends sentence.). Thus, an "aggravating circumstance" is just that—"a fact or group of facts which tend to make a specific murder particularly deserving of the death penalty." N.C.P.I.—Crim. 150.10 (1995); *see State v. Hutchins*, 303 N.C. 321, 351, 279 S.E.2d 788, 806 (1981); *Black's Law Dictionary* 60 (rev. 5th ed. 1979) (defining "aggravation" as "[a]ny circumstance attending the commission of a crime . . . which increases its guilt or enormity . . . , but which is above and beyond the essential constituents of the crime"). The eleven aggravating circumstances listed in N.C.G.S. § 15A-2000(e) fit neatly within that concept:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

N.C.G.S. § 15A-2000(e).

In the interpretation and construction of statutes, it is the responsibility of the reviewing court to attempt to determine the legislative intent. *See State v. Lucas*, 302 N.C. 342, 345, 275 S.E.2d 433, 435 (1981). The Fair Sentencing Act, enacted in 1979, was amended in 1981 and contained an aggravating factor that "[t]he offense was committed for hire or pecuniary gain." N.C.G.S. § 15A-1340.4(1)(c) (Supp. 1981). In 1983, the legislature again amended N.C.G.S. § 15A-1340.4(a)(1)(c), Act of Oct. 1, 1983, ch. 70, secs. 1-2, 1983 N.C.

Sess. Laws 43 (entitled "An Act To *Clarify* The Aggravating Factor Regarding Pecuniary Gain Under The Fair Sentencing Act") (emphasis added), "clarifying" the aggravating factor "that the offense was committed for hire or *pecuniary gain*" and stated that it meant "defendant was hired or *paid to commit the crime*." N.C.G.S. § 15A-1340.4(a)(1)(c) (emphasis added); *see State v. Abdullah*, 309 N.C. 63, 76, 306 S.E.2d 100, 108 (1983); *State v. Thompson*, 64 N.C. App. 354, 355, 307 S.E.2d 397, 398 (1983); *State v. Thompson*, 62 N.C. App. 585, 586, 303 S.E.2d 85, 86 (1983); *see also State v. Thompson*, 60 N.C. App. 679, 684, 300 S.E.2d 29, 32 (held error to submit (a)(1)(c) aggravating factor when only evidence of pecuniary gain was that the defendant broke into the building with the intention of taking copper), *modified and aff'd*, 309 N.C. 421, 307 S.E.2d 156 (1983). Thus, in my opinion, the 1983 amendment to paragraph (a)(1)(c) of the Fair Sentencing Act clarifying the scope of "pecuniary gain" evinces the legislature's intent to avoid enhancement of a sentence simply because money or other valuable items are involved in the crime. However, this Court in *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), relying on an earlier interpretation in *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), of the (e)(6) aggravating circumstance rejected the argument that, in the capital punishment statute, "for pecuniary gain" meant that a defendant had to be hired or paid to commit the murder. The Court based its decision in part on the fact that the legislature had failed to "clarify" the capital punishment statute and had only done so on the "pecuniary gain" aggravating factor under the Fair Sentencing Act.

Having rejected in *Gardner* what would appear to be a logical limitation of the (e)(6) aggravating circumstance, this Court has over the years broadened the circumstances under which the (e)(6) aggravating circumstance is deemed correctly applied. In *State v. Jennings*, this Court said:

> The gravamen of the pecuniary gain aggravating circumstance is that "the killing was for the purpose of getting money or something of value." [*Gardner*, 311 N.C. at 513, 319 S.E.2d at 606]; *see also* [*Oliver*, 302 N.C. at 62, 274 S.E.2d at 204]("[t]he hope of pecuniary gain provided the impetus for the murder"). This financial motivation or impetus "aggravates" the murder, distinguishing the murder from other murders as being more egregious and therefore more worthy of the extreme sanction of death.

State v. Jennings, 333 N.C. 579, 621-22, 430 S.E.2d 188, 210, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993). As noted in *Oliver*, the pecuniary gain aggravating circumstance "examines the *motive* of the defendant rather than his acts." *Oliver*, 302 N.C. at 62, 274 S.E.2d at 204 (emphasis added).

Although well aware of the necessity to follow precedent even when disagreeing with the earlier reasoning of the Court, the majority opinion now broadens even further the interpretation and application of the (e)(6) "pecuniary gain" aggravating circumstance. As such, I find the application is neither supported by case law nor a sound extension of the purpose of aggravating circumstances.

In reviewing the evidence in this case, the sum total of all the evidence relating to pecuniary gain is (1) that defendant broke into Mrs. Poore's house seeking to steal marijuana, and (2) that a fellow inmate and one of the investigating officers testified that defendant told them that before leaving the house after the murder, defendant "looked for" Mrs. Poore's pocketbook but never saw it. I note that the statement in the majority opinion that defendant "was going to steal Mrs. Poore's purse, but after he killed her, he could not find it" is not supported by the record. It is uncontradicted, however, that nothing was stolen by the defendant either before the murder or afterwards. With respect to the killing itself, the evidence is also uncontradicted that there was a surprise encounter between defendant and Mrs. Poore in the darkened house and that defendant turned in surprise and struck Mrs. Poore with one fatal blow of his hand to her head. It is particularly noteworthy that the jury did *not* convict defendant of premeditated and deliberate first-degree murder, indicating that the jury believed defendant's testimony that he did not intend to kill Mrs. Poore. The jury instead convicted him under the felony murder theory, the underlying felony being the burglary of Mrs. Poore's house.

If we are to rely on the test established in *Oliver*, then there must be *some* evidence that the *motive* for the killing was pecuniary gain. There simply is no such evidence in this case. While defendant clearly had a pecuniary gain motive for breaking into Mrs. Poore's house, it is only unsupported speculation that the actual killing had anything to do with seeking pecuniary gain. The facts here are totally opposite from circumstances where, for example, a defendant is paid to commit murder, commits murder in order to collect insurance proceeds, or shoots a store clerk who refuses to open a cash register. Under

those types of circumstances, evidence clearly exists that the defendant's motive for the killing was pecuniary gain.

Where the majority opinion now leaves the state of the law is that as long as there is some pecuniary gain motive present in the attendant circumstances surrounding a capital felony, a defendant, even one convicted of felony murder but not first-degree murder based on premeditation and deliberation, will be subject to the imposition of the death penalty. This extension of the application of the (e)(6) aggravating circumstance also directly relates to my disagreement with the majority's finding of proportionality in this case. The following capital felony decisions rendered by this Court in 1995 alone include defendants who were found guilty of first-degree murder based on premeditation and deliberation—many based on premeditation and deliberation *and* felony murder or involving murderous acts far more egregious than those found in the instant case—and yet were either:

(1) not tried capitally, *State v. Holt*, 342 N.C. 395, 464 S.E.2d 672 (1995) (victim shot as he fled); *State v. Pleasant*, 342 N.C. 366, 464 S.E.2d 284 (1995) (father dies from multiple gunshot wounds); *State v. King*, 342 N.C. 357, 464 S.E.2d 288 (1995) (victim shot in the head for stealing drug money); *State v. Gibson*, 342 N.C. 142, 463 S.E.2d 193 (1995) (victim died from multiple gunshot wounds during fight over his girlfriend); *State v. Burke*, 342 N.C. 113, 463 S.E.2d 212 (1995) (victim died from multiple gunshot wounds); *State v. Butler*, 341 N.C. 686, 462 S.E.2d 485 (1995) (victim stabbed to death in his home); *State v. Goodson*, 341 N.C. 619, 461 S.E.2d 740 (1995) (wife killed by gunshot wound to the head); *State v. Cannon*, 341 N.C. 79, 459 S.E.2d 238 (1995) (wife shot and killed during domestic dispute); *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995) (teenage boy stabbed while sitting in his car); *State v. Riddick*, 340 N.C. 338, 457 S.E.2d 728 (1995) (victim died from single gunshot wound to the neck); *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (mother kills four-year-old child by stuffing plastic bag down her throat), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995); *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995) (victim died from multiple gunshot wounds from behind); *State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778 (victim died from multiple gunshot wounds), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 438 (1995); *State v. Alford*, 339 N.C. 562, 453 S.E.2d 512 (1995) (victim shot in the head while sitting in his cousin's car); *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995) (victim shot during argument); or

(2) a jury declined to impose the death penalty, *State v. Jahn*, 342 N.C. 176, 463 S.E.2d 204 (1995) (victim "pistol whipped" and then shot at point-blank range in the back of the neck); *State v. McCray*, 342 N.C. 123, 463 S.E.2d 176 (1995) (victim died from multiple gunshot wounds); *State v. Ratliff*, 341 N.C. 610, 461 S.E.2d 325 (1995) (victim died from three stab wounds in the chest); *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655 (1995) (two victims killed in their home by gunshots to the head); *State v. Johnson*, 341 N.C. 104, 459 S.E.2d 246 (1995) (wife died from gunshot wounds inflicted while mother held victim in her arms); *State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995) (victim died from being shot with a crossbow in retaliation for defendant being cheated in a drug deal with a third party); *State v. Hightower*, 340 N.C. 735, 459 S.E.2d 739 (1995) (pregnant girlfriend stabbed thirteen times); *State v. Porter*, 340 N.C. 320, 457 S.E.2d 716 (1995) (defendant killed mother and two other victims by torching mother's mobile home); *State v. Jackson*, 340 N.C. 301, 457 S.E.2d 862 (1995) (victim shot during fight); *State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995) (victim shot in the head while sitting in his car); *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995) (victim killed by being dragged behind his truck and then dumped in a creek); *State v. Baity*, 340 N.C. 65, 455 S.E.2d 621 (1995) (victim killed from two gunshot wounds to the chest); *State v. Johnson*, 340 N.C. 32, 455 S.E.2d 644 (1995) (grandparents killed by arson in conspiracy between granddaughter and her boyfriend); *State v. Lovin*, 339 N.C. 695, 454 S.E.2d 229 (1995) (victim shot and stabbed to death in his home by acquaintance); or

(3) a jury was unable to decide on the death penalty, thus requiring the imposition of a mandatory life sentence by the trial court, *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995) (police officer shot in the head while executing a search warrant for defendant's apartment); *State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995) (victim stabbed twenty-seven times and then castrated); *State v. Larrimore*, 340 N.C. 119, 456 S.E.2d 789 (1995) (victim shot by hit man hired by the defendant when he opened his front door).

I also note that of the seven other cases decided in 1995 in which the defendants were convicted of felony murder but not first-degree murder based on premeditation and deliberation, six of the defendants were sentenced to a life sentence despite findings of several aggravating circumstances. *E.g.*, *State v. McNatt*, 342 N.C. 173, 463 S.E.2d 76 (1995) (victim killed by blunt trauma as a result of being hit with the butt of a rifle and then kicked and beaten for five minutes

during robbery); *State v. Lamb*, 342 N.C. 151, 463 S.E.2d 189 (1995) (victim killed by a single gunshot wound to the chest during robbery); *State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995) (ex-girlfriend's new boyfriend killed by gunshot while sitting in his car); *State v. Grace*, 341 N.C. 640, 461 S.E.2d 330 (1995) (victim died of three gunshot wounds during robbery); *State v. Thibodeaux*, 341 N.C. 53, 459 S.E.2d 501 (1995) (victim died from numerous gunshot wounds during robbery); *State v. McCullers*, 341 N.C. 19, 460 S.E.2d 163 (1995) (victim killed with baseball bat during robbery). In *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 688 (1996), the only robbery-felony murder case in which pecuniary gain was the sole aggravating circumstance found, the defendant was sentenced to death. However, the facts in *Powell* support a conclusion that the defendant's motive for killing the victim was because he "wanted the money from the cash register." *Id.* at 684, 459 S.E.2d at 223.

With the exception of the last six cases involving felony murder, all of the cases noted involve defendants who were convicted of first-degree murder based, at least in part, on premeditation and deliberation. As indicated, none of these defendants will suffer the death penalty. Defendant, in this case, now faces execution as opposed to a life sentence solely because of the tenuous evidence involving "pecuniary gain."

Mrs. Poore's death is a tragedy, and the circumstances surrounding it are egregious and disturbing. However, in a capital punishment system that is supposed to be proportional and designed to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty, *Gregg*, 428 U.S. at 189, 49 L. Ed. 2d at 883, *quoted in Johnson*, 298 N.C. at 59, 257 S.E.2d at 607, I believe that the majority's decision in this case moves us perilously close to a constitutionally infirm application of the (e)(6) aggravating circumstance, and is also in error as to proportionality.

Because I believe that, in this case, the sole aggravating circumstance was improperly submitted and that the sentence imposed is disproportionate, the defendant should be resentenced and a life sentence imposed.

STATE OF NORTH CAROLINA v. MARTIN ALEXANDER RICHARDSON

No. 11A94

(Filed 8 March 1996)

1. **Indigent Persons § 5 (NCI4th)— appointment of counsel—motion by privately retained counsel to be appointed—no withdrawal**

The trial court correctly ruled that defendant was not indigent and refused to change the status of defendant's privately retained counsel to appointed counsel in a prosecution for first-degree murder, first-degree kidnapping, first-degree rape, first-degree sexual offense, and armed robbery where the court provided funds for an investigator and experts. Under N.C.G.S. § 15A-143, a defendant who has retained counsel who has made a general appearance on his behalf is no longer considered indigent within the meaning of the statutory framework; unless retained counsel is allowed to withdraw from the case, there is no requirement to redetermine defendant's status. Here defendant's retained counsels' general notice of appearance meant that they were required to represent defendant through the entry of final judgment, defense counsel acknowledged that they were in the case whether compensated or not and never moved to withdraw, and defense counsel continued their zealous representation of defendant throughout the case. N.C.G.S. § 7A-450(c); N.C.G.S. § 7A-455.

Am Jur 2d, Criminal Law §§ 976, 989; Trial § 228.

Comment Note.—Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

2. **Jury § 256 (NCI4th)— capital murder—jury selection—Batson challenge—first African-American peremptorily challenged**

The trial court did not err in a prosecution for first-degree murder, first-degree kidnapping, first-degree rape, first-degree sexual offense, and armed robbery by allowing the prosecution to exercise a peremptory strike against an African-American prospective juror. Although defendant argued that a pattern of strikes against African-American jurors could not be shown the first time the State struck such a juror, the trial court's question-

ing of defense counsel with respect to the "pattern" was in response to counsel's use of the term; the court did not limit defense counsel to showing a pattern of discriminatory challenges in establishing a prima facie case of purposeful discrimination and defendant failed to show that racial discrimination was the basis of the prosecution's dismissal of this juror.

Am Jur 2d, Jury §§ 234, 244.

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

3. Robbery § 76 (NCI4th)— armed robbery and murder—taking of property as afterthought—evidence sufficient

The trial court did not err in a prosecution for first-degree murder, first-degree kidnapping, first-degree rape, first-degree sexual offense, and armed robbery by refusing to dismiss the armed robbery charge because defendant had stated that he did not notice the credit cards on which the charge was based until after he had killed the victim and was driving her car back to the mall, so that he possessed the credit cards for some time before he intended to steal them. There is sufficient evidence that defendant kidnapped the victim to rape and rob her and possessed the intent to permanently deprive her of her property from the moment he entered her car. The State is not bound by the statements of defendant which it has introduced where they are contradicted by other evidence; when viewed in the light most favorable to the State and giving the State every reasonable inference that may be drawn from the evidence, the evidence introduced at trial was sufficient. N.C.G.S. § 14-87(a).

Am Jur 2d, Homicide § 46; Robbery §§ 17, 65.

4. Kidnapping and Felonious Restraint § 21 (NCI4th)— intent to inflict serious bodily harm—sufficiency of evidence

The trial court did not err in a prosecution for first-degree murder, first-degree kidnapping, first-degree rape, first-degree sexual offense, and armed robbery by not dismissing the first-degree kidnapping charge on the grounds that there was insufficient evidence that defendant intended to inflict serious bodily harm on the victim at the time of the kidnapping. Although the victim agreed to take defendant where he wanted to go if he did not harm her, defendant locked the door after he got in the car, directed the victim to drive into the country and ordered her to

drive down a dead-end road, made sexual advances toward her, she agreed to have sexual intercourse only if defendant did not hurt her, and defendant shortly thereafter stabbed her several times.

Am Jur 2d, Abduction and Kidnapping §§ 27, 48-50.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

5. Criminal Law § 427 (NCI4th)— capital murder—guilt phase—prosecutor's arguments—not a comment on defendant's failure to testify

The trial court did not err by failing to intervene *ex mero motu* to prevent the prosecutor from making closing arguments in the guilt phase which defendant contended improperly commented on defendant's right not to testify at trial. The prosecutor's argument that defendant "hasn't told the entire truth yet" concerned defendant's pretrial statements and was designed to prepare the jury for the ensuing analysis showing that defendant's statements did not comprise the whole truth. The purpose of N.C.G.S. § 8-54 is not to restrict the prosecutor from making such comments upon the evidence and drawing such deductions therefrom so long as the prosecutor does not call attention to defendant's failure to testify.

Am Jur 2d, Trial §§ 577, 579.

6. Criminal Law § 1340 (NCI4th)— capital sentencing—felony murder—use of robbery as aggravator

The trial court properly submitted the aggravating circumstance that the murder was committed while defendant was engaged in robbery, N.C.G.S. § 15A-2000(e)(5), where defendant was convicted of first-degree felony murder and the armed robbery was not the felony supporting the felony murder conviction. The issue was not the redundancy of aggravating circumstances, but whether an armed robbery accomplished in the context of a first-degree murder must be the motivation for the killing to constitute the (e)(5) aggravating circumstance. While the (e)(5) circumstance requires that the robbery and murder be part of the same criminal episode, the circumstance by its own language does not limit use of the robbery aggravator to cases where evidence shows that robbery was the motive for the killing, and the

(e)(5) robbery circumstance is distinguishable from the (e)(6) pecuniary gain circumstance. The (e)(6) circumstance necessarily takes into account a defendant's motivation in committing a murder, while the (e)(5) circumstance deals strictly with the actions of a defendant within the same criminal episode involving the commission of a murder.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

7. Criminal Law § 1340 (NCI4th)— capital sentencing—aggravating circumstances—murder committed during another crime—continuous transaction doctrine—instructions

The trial court did not err in a capital sentencing proceeding in its instruction on the continuous transaction doctrine. Although defendant contends that the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance (murder committed during commission of another crime) excludes robberies committed as afterthoughts, once the State establishes a robbery and a use of force to achieve the robbery, the State's only burden is to show that the robbery and the use of force are transactionally related. When the (e)(5) aggravating circumstance uses the phrase "any robbery," the circumstance includes a robbery occurring during the same criminal episode as the murder itself.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

8. Criminal Law § 1362 (NCI4th)— capital sentencing—mitigating circumstances—age of defendant—not submitted

The trial court did not err in a capital sentencing hearing by not submitting the age of defendant at the time of the crime as a mitigating circumstance where defendant was twenty-three, came from a stable background, and had performed competently in school until dropping out in the tenth grade. There was no evidence that defendant was emotionally immature or suffered from impaired development.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

9. Criminal Law § 1363 (NCI4th)— capital sentencing—defendant's confession—requested nonstatutory mitigating circumstance—subsumed within submitted circumstance

There was no prejudicial error in a capital sentencing proceeding where the trial court refused to submit as a nonstatutory mitigating circumstance that defendant had shown a moral core indicating a potential for rehabilitation by confessing at the prompting of a detective, but submitted the mitigating circumstance that defendant confessed to the crime and one or more jurors found that circumstance to exist and to have mitigating value. The refusal of a trial court to submit a nonstatutory mitigating circumstance that is sufficiently supported by the evidence is not error where the requested circumstance is subsumed by a mitigating circumstance that is submitted.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552-555.

10. Criminal Law § 1318 (NCI4th)— capital sentencing—instructions—racial considerations

The trial court did not err in a capital sentencing hearing by refusing to instruct the jurors that they should prevent racial concerns from influencing their consideration of defendant's sentence. The trial court followed the directive of *Turner v. Murray*, 476 U.S. 28, allowing defense counsel wide latitude to question prospective jurors on the issue of racial bias and other issues of racial significance. *Turner* only requires that the trial court allow some examination of prospective jurors with respect to racial bias and is not authority for the proposition that a trial court in an interracial crime must instruct the jury to disregard racial considerations where defendant requests such an instruction.

Am Jur 2d, Homicide § 555; Trial § 1441.

11. Criminal Law § 1152 (NCI4th)— Fair Sentencing Act—aggravating factor—defendant armed

The trial court did not err when sentencing defendant for kidnapping under the version of the Fair Sentencing Act in effect at that time, N.C.G.S. § 15A-1340.1-.7 (1988), by finding in aggravation that defendant was armed at the time of the kidnapping.

Although defendant contended that the State was bound by his statement, which the State introduced, the State is not bound by an exculpatory statement that it introduced if there is other evidence tending to show the circumstances of the homicide in a different light. Here, the pathologist's testimony of abrasions consistent with a knife held to the victim's throat constitutes just such other evidence; moreover, the kidnapping continued to the time defendant killed the victim, so that defendant's own statement shows that he was armed with a deadly weapon during the kidnapping.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

12. Criminal Law § 450 (NCI4th)— prosecutor's argument— defendant as animal

The trial court did not err in a capital sentencing hearing by not intervening *ex mero motu* when the prosecutor characterized defendant as an animal. Although the comparison of defendants to members of the animal kingdom is not sanctioned, the use of the term in the context of a discussion of the brutality of the injuries inflicted on the victim does not descend to the level of gross impropriety that would require the trial court to intervene *ex mero motu*.

Am Jur 2d, Trial § 681.

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

A sentence of death for a first-degree murder was not disproportionate where defendant kidnapped the victim from a parking lot, forced her to drive to a secluded location, brutally raped her, and stabbed her several times, killing her. The jury found the aggravating circumstances that defendant committed the murder while perpetrating a robbery and that the murder was especially heinous, atrocious, or cruel; the death sentence has been upheld in numerous cases where the jury found the especially heinous, atrocious, or cruel circumstance; and a death sentence involving a first-degree murder victim who was also sexually assaulted has never been held disproportionate. The record supports the two aggravating circumstances found by the jury, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other consideration and this case was not substantially similar to any case in which the death

penalty was found disproportionate but is more similar to certain cases in which the death sentence was found to be proportionate.

Am Jur 2d, Criminal Law § 628.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

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 Helms, J., on 22 November 1993 in Superior Court, Union County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his robbery and kidnapping convictions was allowed by this Court on 1 May 1995. Heard in the Supreme Court 9 October 1995.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

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

MITCHELL, Chief Justice.

Defendant was tried capitally upon indictments charging him with first-degree murder, first-degree kidnapping, first-degree rape, first-degree sexual offense, and robbery with a dangerous weapon in connection with the killing of Sharon Mary ("Sherry") Clark St. Germain. The jury returned verdicts finding defendant guilty of first-degree murder on the theory of felony murder, first-degree kidnapping, first-degree rape, and robbery with a dangerous weapon, but acquitting defendant of first-degree sexual offense. Following a separate capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the murder, and the trial court entered sentence in accord with that recommendation. The trial court arrested judgment for the first-degree

rape because it was the predicate felony supporting the felony murder conviction. The trial court sentenced defendant to consecutive terms of imprisonment for the remaining offenses.

Defendant appeals to this Court as a matter of right from the judgment and sentence of death imposed for first-degree murder. We allowed his motion to bypass the Court of Appeals on his appeal of the judgments entered for the offenses of first-degree kidnapping and robbery with a dangerous weapon. For the reasons set forth in this opinion, we conclude that defendant received a fair trial, free from prejudicial error, and that the sentence of death for first-degree murder is not disproportionate in this case.

Evidence presented at trial, including a statement made by defendant, tended to show that on 11 December 1992 defendant approached Sherry St. Germain as she sat in her car in the parking lot of the Monroe Mall and asked her if she could give him a ride. Defendant then got in the car through the passenger door and locked the door as he sat down. St. Germain told defendant that she would take him where he wanted to go as long as he did not hurt her. Defendant directed St. Germain to drive out into the country and instructed her to stop at the end of a road. He then made advances toward her, and she agreed to have sex with him as long as he did not hurt her and would let her go afterwards. After they had sex, defendant stabbed and killed St. Germain and pushed her body into a stream beside the road. A newspaper carrier found her body on 14 December 1992.

Defendant's first statement to police indicated that although he did not remember the circumstances that led to his being on the deserted road, he had seen the victim trying to climb out of the stream. In a later statement, he confessed to having committed the murder. He also told a cellmate that he "robbed the girl of her money, her body and her life." After killing St. Germain, defendant left her car at the Monroe Mall and made purchases with her credit cards that included a television set and an automobile battery.

Dr. Deborah Radisch testified at trial that either of the two stab wounds that the victim had suffered could have been fatal. One wound was in the right back, piercing both lungs and the esophagus, and was eight inches deep. The other was in the abdomen, perforating the liver, pancreas, stomach, and renal artery, and was also eight inches deep. The victim also had numerous contusions, abrasions,

and shallow puncture wounds indicative of a struggle, including linear abrasions to her neck consistent with a knife wound.

[1] Defendant first assigns error to the trial court's refusal to change the status of defendant's privately retained attorneys to appointed indigent counsel, arguing that the trial court's failure to switch counsel's status while providing funds for an investigator and experts requires reversal of defendant's convictions. On 13 January 1993, defendant was found by the trial court to be indigent, and L.K. Biedler, Jr., and Harry B. Crow, Jr., were appointed to represent defendant. On 24 February 1993, two other attorneys, John G. Plumides and T. Russell Peterman, entered a general notice of appearance after defendant's parents retained them to represent defendant in the case. On 1 March 1993, the trial court granted the motion of Biedler and Crow to withdraw as defense counsel. On 7 September 1993, Plumides and Peterman informed the trial court that defendant's parents were facing financial difficulties and had paid less than one-sixth of the fee they had agreed to pay counsel prior to trial. Plumides and Peterman therefore filed a motion for determination of indigency, asking that the trial court order the State to pay for defense counsel and other necessary expenses of representation. The trial court granted the motion as to expenses for experts, but refused to change counsel's status from retained to court-appointed. The record indicates that $26,500 of the $40,000 that defendant's parents promised to pay remains unpaid.

The framework for the disposition of this issue involves several statutory provisions. An indigent person for the purposes of appointment of counsel is one "who is financially unable to secure legal representation and to provide all other necessary expenses of representation." N.C.G.S. § 7A-450(a) (1995). N.C.G.S. § 7A-450(c) provides: "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." N.C.G.S. § 7A-455(a) provides for a determination of partial indigency in situations in which a defendant is unable to pay "a portion, but not all, of the value of the legal services rendered for him by assigned counsel." N.C.G.S. § 7A-450(b) provides that whenever a defendant is found to be indigent for purposes of appointment of counsel, "it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." N.C.G.S. § 15A-143 provides that "[a]n attorney who enters a criminal proceeding without limiting the extent of his representation . . . undertakes to represent the defendant for whom the entry is made

at all subsequent stages of the case until entry of final judgment, at the trial stage." Defendant argues that 7A-450(b) and (c) and 7A-455, when read together, required the State to pay for whatever portion of the expenses of his trial representation that he could not afford after it became evident during the case that his parents were no longer able to pay these expenses. We do not agree.

Once defendant accepted the services of properly retained counsel and consented to the withdrawal of appointed counsel, he was no longer indigent within the meaning of 7A-450(a). His retained counsel's general notice of appearance pursuant to 15A-143 meant that Plumides and Peterman were required to represent him in the case through the "entry of final judgment." Plumides and Peterman themselves acknowledged that they were "in the case whether . . . compensated or not, and we understand that," and never moved to withdraw from the case. Plumides and Peterman continued their zealous representation of defendant throughout the case despite the possibility that their hard work would go uncompensated.

While defendant contends that N.C.G.S. § 7A-450(c) required the trial court to make a redetermination of defendant's indigent status for the purpose of appointive counsel in this case, this argument is without merit. Under N.C.G.S. § 15A-143, a defendant who has retained counsel who has made a general appearance on his behalf is no longer considered indigent within the meaning of the statutory framework; unless retained counsel is allowed to withdraw from the case, there is no requirement to redetermine defendant's status. Defendant cites *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992), and *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972), for the proposition that "whenever a defendant's personal resources are depleted and he can demonstrate indigency, he is eligible for state funding of the remaining necessary expenses of representation." *Boyd*, 332 N.C. at 109, 418 S.E.2d at 475. He argues that the trial court incorrectly failed to apply this rule in its treating legal fees different from other expenses of representation. Both of these cases, however, are distinguishable from the case at bar. *Boyd* held only that a defendant who has retained counsel may still be indigent for the purposes of expert witnesses and other aspects of representation. We stated in *Boyd*, "We address here only the question whether defendant's motion for a state-paid mental health expert should have been denied, as it was, because defendant, although financially unable to employ the expert, was not represented by court-appointed counsel." *Id.* at 107, 418 S.E.2d at 475. While *Hoffman* involved a defendant who

could afford counsel at the time of his interrogation but not at trial, counsel in *Hoffman* never made a general appearance to represent defendant. As Plumides and Peterman made a general appearance for defendant here, defendant could not be considered indigent under our statutory scheme unless Plumides and Peterman were allowed to withdraw from the case. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). The trial court correctly ruled that defendant was not indigent for the purposes of appointment of counsel. Accordingly, this assignment of error is overruled.

[2] By another assignment of error, defendant contends that the trial court erred by allowing the prosecution to exercise a peremptory strike on prospective juror James Gause, an African-American. Defendant contends that the trial court erroneously based its ruling that defendant had not made a *prima facie* showing of purposeful racial discrimination on its view that such a showing requires proof of a pattern of strikes against African-American jurors and that such a pattern could not be shown the first time the State strikes a black juror.

There are several factors to be considered in determining whether defendant has established a *prima facie* showing of purposeful discrimination under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), and its progeny. They include defendant's race, the victim's race, the race of key witnesses, questions and statements made by the prosecutor during jury selection, and the repeated use of peremptory challenges against venire members of one race such that it tends to establish a pattern or the prosecution's use of a disproportionate number of peremptory challenges to prospective jurors of that race. *State v. Ross*, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994). Defendant argued at trial that a *prima facie* case of discrimination had been established by the prosecution's strike of Gause because (1) there were a limited number of venire members of defendant's race, and (2) Gause's answers were the same as those of jurors who had not been excused. Defendant contended that the obvious conclusion was that these factors demonstrated a "pattern of trying to get an all white [jury] to try this man." The trial judge then briefly questioned defense counsel, asking how the striking of one juror established a pattern.

Defendant's contention that the trial court misunderstood the law with respect to the showing of a *prima facie* case is erroneous. The

trial court's questioning of defense counsel with respect to the "pattern" was in response to counsel's use of the term "pattern" in arguing the circumstances surrounding the peremptory challenge. The trial court did not limit defense counsel to showing a pattern of discriminatory challenges as the method of establishing a *prima facie* case of purposeful discrimination. Shortly after the exchange noted by defendant, the trial court commented that "whatever reason they [have to exercise a challenge] is up to them until it reaches a point of showing that a jury is being selected . . . [in] a manner other than which is racially [neutral]. . . . I'm simply going to rule that that point hasn't been reached." The trial court's comment indicates that its ruling was based not on defendant's failure to establish a pattern of discriminatory challenges, but rather defendant's failure to establish discriminatory motivation for the peremptory challenge of Gause. The burden is on defendant to establish an inference of purposeful discrimination in the selection of a jury. *State v. Mitchell*, 321 N.C. 650, 654, 365 S.E.2d 554, 556 (1988). In this case, defendant has failed to show that racial discrimination was the basis of the prosecution's dismissal of Gause. In response to questioning from the trial court with respect to any "extreme hardship" that a potential juror might have in serving, Gause explained that he had a civil case on the trial calendar for the week following the beginning of defendant's trial and that his case had already been continued twice. The prosecution's questioning of Gause was consistent with that of other members of the jury pool, both those who served on the jury as well as those who were later dismissed. The prosecution's dismissal of Gause was the first time in the case that a peremptory strike had been used to excuse an African-American. Defendant has not shown a *prima facie* case of purposeful discrimination. *See generally State v. Ross*, 338 N.C. 280, 449 S.E.2d 556. This assignment of error is therefore overruled.

[3] Defendant next assigns error to the trial court's refusal to dismiss the charge of robbery with a dangerous weapon, arguing that the evidence showed that defendant did not form the intent to steal the victim's credit cards until after he had removed them from the victim's possession. Defendant stated that he drove the victim's car back to the Monroe Mall after the killing, but that he did not notice the Sears and Lowe's credit cards until he was driving the car. Therefore, defendant argues that the "intent to steal" component of robbery was not present because defendant, through the taking of the car, possessed the credit cards for some time before he "intended" to steal them.

We have said that under N.C.G.S. § 14-87(a), robbery with a dangerous weapon is (1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by the use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. *State v. Hope*, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986). The general rule with respect to intent and robbery is that "the defendant must have intended to permanently deprive the owner of his property *at the time the taking occurred* to be guilty of the offense of robbery." *State v. Richardson*, 308 N.C. 470, 474, 302 S.E.2d 799, 802 (1983). In this case, there is sufficient evidence to support the finding that defendant kidnapped the victim to rape and rob her and possessed the intent to permanently deprive her of her property from the moment he entered her car. The evidence tended to establish that defendant, armed with a knife, entered St. Germain's car and forced her to drive to a remote location; after killing St. Germain, defendant took her car and drove back to the mall. St. Germain last spoke with her mother at around 5:30 p.m. on 11 December 1992. Defendant used one of St. Germain's cards to purchase a television set at 8:34 p.m. on the same date. Four credit cards were found at defendant's house, including two that he claimed he had thrown away. While defendant indicated in his confession that he did not notice the credit cards until after he had completed the killing and was headed back to the mall in St. Germain's car, the State is not bound by the statements of defendant it has introduced into evidence where they are contradicted by other evidence. *State v. Carter*, 335 N.C. 422, 430, 440 S.E.2d 268, 272 (1994). When viewed in the light most favorable to the State and giving the State every reasonable inference that may be drawn from the evidence, *see State v. Herring*, 322 N.C. 733, 740, 370 S.E.2d 363, 367 (1988), the evidence introduced at trial was sufficient to support a reasonable finding of each element of robbery with a dangerous weapon. This assignment of error is overruled.

[4] Defendant next assigns error to the trial court's failure to dismiss the first-degree kidnapping charge against him, contending that there was insufficient evidence to find that at the time of the kidnapping, he intended to inflict serious bodily harm on St. Germain. Kidnapping is defined in relevant part as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty

of kidnapping if such confinement, restraint or removal is for the purpose of:

. . . .

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . .

N.C.G.S. § 14-39(a)(3) (Supp. 1995). The test for sufficiency of the evidence in a criminal case is whether substantial evidence of all elements of the offense charged has been presented; this Court will find the evidence to be sufficient if any rational trier of fact could find beyond a reasonable doubt that defendant committed the offense. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994). There was substantial evidence in this case to prove that defendant kidnapped St. Germain for the purpose of doing "serious bodily harm." Although St. Germain agreed to take defendant where he wanted to go if he did not harm her, after defendant got in the car, he locked the door. Defendant directed St. Germain to drive out into the country and ordered her to drive down a dead-end road, where he made sexual advances toward her. St. Germain agreed to have intercourse with defendant only if defendant did not hurt her; shortly thereafter, defendant stabbed St. Germain several times.

In *State v. Thompson*, 306 N.C. 526, 294 S.E.2d 314 (1982), we ruled that there was ample evidence from which a jury could conclude that the defendant removed the victim for the purpose of stealing her possessions and committing sexual offenses against her where the defendant pushed the victim into her car as she was getting out, drove her to a deserted area outside the city limits, forced her to engage in sexual intercourse, and then left her at a store. The evidence in this case is as strong, if not stronger, than that in *Thompson*. This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred in failing to intervene *ex mero motu* to prevent the prosecutor from making improper comments during closing arguments in the guilt determination phase of his trial. Defendant contends that three portions of the prosecutor's closing argument improperly commented on defendant's right not to testify at trial:

> The evidence that was presented in this case, ladies and gentlemen, was presented and uncontradicted. What I mean by that is there is no evidence to contradict the evidence that was presented.

. . . .

> The State's going to argue to you that up to this point in time the defendant has yet to tell the entire truth. He hasn't told the entire truth yet. And the State is going to show to you based on the testimony that's been presented in this case why he hasn't told the truth.
>
> . . . .
>
> Now, what evidence you say could we possibly have about that scenario? Um, because no witnesses saw that. There's no witnesses. Mr. Richardson didn't state that in his testimony. Or, excuse me, in his statement. Didn't refer to that particular scenario in this case.

Defendant contends that the prosecutor's argument violated defendant's constitutional rights in that (1) it improperly commented on defendant's right not to testify, and (2) it punished defendant for availing himself of his right to put the State to its proof.

While the prosecution is forbidden by both the federal Constitution, *see Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 110 (1965), and state statute, *see* N.C.G.S. § 8-54 (1986), from commenting on the failure of a defendant to testify at trial, a prosecutor's statement that the State's evidence was uncontradicted does not constitute an improper reference to defendant's failure to testify. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976). When defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979). The prosecutor's argument that defendant "hasn't told the entire truth yet," rather than referring to defendant's failure to testify, concerned defendant's pretrial statements. This comment was designed to prepare the jury for the prosecutor's ensuing analysis showing that defendant's statements did not comprise the whole truth. The prosecutor indicated as much when telling the jury that the State "is going to show you *based on the testimony that's been presented in this case* why he hasn't told the truth." (Emphasis added.) The purpose of N.C.G.S. § 8-54 is not to restrict the prosecutor from making such

comments upon the evidence and drawing such deductions therefrom so long as the prosecutor does not call attention to defendant's failure to testify. *Smith*, 290 N.C. at 167, 226 S.E.2d at 21. The prosecutor's arguments did not improperly comment on defendant's failure to testify. This assignment of error is without merit and is overruled.

[6] Defendant next assigns error to the trial court's instruction to the jury during the capital sentencing proceeding with respect to questions from the jury about an aggravating circumstance. During the jury's sentencing deliberations, the jury foreperson asked questions regarding the aggravating circumstance that the murder was committed while defendant was engaged in the commission of robbery. *See* N.C.G.S. § 15A-2000(e)(5) (Supp. 1995). These questions had to do with whether the jury could find this aggravating circumstance only if it found that defendant murdered the victim for the purpose of robbing her.

The trial court had initially instructed the jury that it could find the (e)(5) circumstance from the evidence in this case if it found that

> when the defendant killed the victim, the defendant was taking and carrying away credit cards from the person and presence of Sherry St. Germain, without her voluntary consent, by violence or by putting her in fear, the defendant knowing that he was not entitled to take it and intending at that time to deprive her of its use permanently . . . .

After receiving questions from the jury about the timing of the robbery with respect to the killing and whether the aggravating circumstance required proof that the murder was committed because of the robbery, the trial court reinstructed the jury that

> the first aggravating factor [sic] for you to consider is, was this murder committed by the defendant while the defendant was engaged in the commission of robbery?
>
> Robbery is the taking and carrying away any personal property of another from her person or in her presence without her consent, by violence or by putting her in fear, with the intent to deprive her of its use permanently, the taker knowing that he is not entitled to take it. A killing is committed in the commission of robbery when there is no break in the chain of events leading from the act causing death to the robbery.

Defendant argues that the instruction did not properly define the proof necessary for the jury to find this circumstance, as proof of the (e)(5) circumstance requires a closer nexus between the felony and the killing.

We preliminarily note that this case does not involve a situation like that encountered in *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). While this Court ruled in *Cherry* that a robbery could not be used to aggravate a first-degree felony murder through the (e)(5) circumstance where the robbery was an essential element of the capital murder conviction, this case involves a robbery in the context of a first-degree felony murder in which the predicate felony supporting the first-degree murder conviction was not the robbery. This Court enumerated the rule barring the "double counting" of evidence with respect to aggravating circumstances in *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987). In *Quesinberry*, a majority of this Court stated that

> in the context of a robbery-murder it is neither appropriate nor equitable to submit a statutorily-enumerated aggravating factor that overlaps with another. It is apparent that, in the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain the submission of both the aggravating factors enumerated at N.C.G.S. 15A-2000(e)(5) [robbery] and (6) [pecuniary gain] is redundant and that one should be regarded as surplusage. We therefore hold that it was error to submit both of these aggravating factors to the jury.

Id. at 239, 354 S.E.2d at 453.

Quesinberry was distinguishable from the situation in *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), in which this Court held that when robbery is the underlying felony in a felony murder conviction, the trial court was allowed to submit the (e)(6) pecuniary gain aggravating circumstance. As the robbery constitutes an essential element of the felony murder in such situations, the focus with respect to the guilt phase is on a defendant's conduct. In the capital sentencing proceeding, however, the focus of the (e)(6) circumstance is on a defendant's motive in committing the murder and does not require proof that defendant actually committed the underlying felony of robbery. *Id.* at 62, 274 S.E.2d at 204.

Defendant contends that *Oliver* and *Quesinberry* dictate the conclusion that, since the scope of the (e)(5) circumstance is different from that of felony murder, the (e)(5) circumstance requires both proof that the robbery and killing were committed as part of the same criminal episode and proof that the robbery was the motive for the killing. This argument, however, misinterprets this Court's holding in *Quesinberry*. The majority did not hold in *Quesinberry* that the submission of both the (e)(5) and (e)(6) aggravating circumstances was error because both circumstances dealt with defendant's motive for the murder. *Quesinberry* merely stands for the proposition that different aggravating circumstances cannot be submitted to aggravate a first-degree murder when "one [circumstance] plainly comprises the other." *Quesinberry*, 319 N.C. at 238, 354 S.E.2d at 452. The Court acknowledged with respect to the (e)(6) circumstance that "situations are conceivable in which an armed robber murders motivated by some impulse other than pecuniary gain," *id.*, but concluded that the same evidence constituted proof of both circumstances in that case.

In this case, however, the issue is not the redundancy of aggravating circumstances, but whether an armed robbery accomplished in the context of a first-degree murder must be the motivation for the killing to constitute the (e)(5) circumstance. While the (e)(5) circumstance does require that the robbery and the murder be part of the same criminal episode, a *Quesinberry/ Oliver*-type analysis is inappropriate in this case. The (e)(5) circumstance by its own language does not limit use of the robbery aggravator to cases where evidence shows that robbery was the motive for the killing, as it states in relevant part that a murder will be aggravated where

> [t]he capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense . . . .

N.C.G.S. § 15A-2000(e)(5). Furthermore, the (e)(5) robbery circumstance is distinguishable from the (e)(6) pecuniary gain circumstance. The (e)(6) circumstance necessarily takes into account a defendant's motivation in committing a murder, while the (e)(5) circumstance deals strictly with the actions of a defendant within the same criminal episode involving the commission of a murder. We hold that the trial court properly submitted the (e)(5) circumstance in this situation where defendant was convicted of first-degree felony mur-

der and the armed robbery was not the felony supporting the felony murder conviction. This argument is without merit.

[7] Defendant further argues with respect to this assignment of error that the trial court's instruction on the continuous transaction doctrine was erroneous. He contends that, as a robbery committed as an afterthought cannot be the motive for a murder, the (e)(5) circumstance excludes robberies committed as afterthoughts. While defendant contends that the phrase "while the defendant was engaged . . . in the commission of . . . any robbery" means that the murder and the robbery have to be committed simultaneously, thereby excluding afterthought robberies, defendant misconstrues the statute's plain language. In *State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992), this Court held that neither the commission of armed robbery in the context of a killing nor the commission of felony murder based on armed robbery is contingent upon "whether the intention to commit the taking of the victim's property was formed before or after the killing." *Id.* at 529, 419 S.E.2d at 552. Accordingly, the focus of the offense of armed robbery in the context of a killing is not the time of the robbery, but the use of force to accomplish the robbery; once the State establishes a robbery and a use of force to achieve the robbery, the State's only burden is to show that the robbery and the use of force are transactionally related. Therefore, when the (e)(5) aggravating circumstance uses the phraseology "any robbery," the circumstance includes a robbery occurring during the same criminal episode as the murder itself. This assignment of error is overruled.

[8] Defendant next assigns as error the trial court's refusal to submit as a mitigating circumstance his age at the time of the crime. In *State v. Bowie*, 340 N.C. 199, 456 S.E.2d 771, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 435 (1995), we held that "chronological age is not the determinative factor with regard to this mitigating circumstance. The defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime must also be considered." *Id.* at 203, 456 S.E.2d at 773 (citations omitted). While Bowie was twenty years old at the time he committed the murder at issue, defendant in this case was twenty-three. The evidence at sentencing in this case tended to show that defendant came from a stable background and had performed competently in school until dropping out in the tenth grade. There simply was no evidence indicating that defendant was emotionally immature or suffered from impaired development. This case is distinguishable from that in *State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991), where the defendant

grew up in a dysfunctional environment with no stability or guidance and was emotionally neglected and abused as a child. *Id.* at 268-69, 410 S.E.2d at 858. This assignment of error is without merit and is overruled.

[9] By another assignment of error, defendant argues that the trial court should have submitted as a mitigating circumstance that defendant confessed at the prompting of Detective Eubanks, showing that defendant has a "moral core that indicates the potential for rehabilitation." Assuming *arguendo* that there was evidence to support this mitigating circumstance as presented to the trial court, any error caused by the failure of the trial court to submit the circumstance was harmless. The trial court submitted the mitigating circumstance that the "defendant confessed to the crime," and one or more jurors found this circumstance to exist and to have mitigating value. The refusal of a trial court to submit a nonstatutory mitigating circumstance that is sufficiently supported by the evidence is not error where the requested circumstance is subsumed, as here, by a mitigating circumstance that is submitted. *State v. Lee*, 335 N.C. 244, 288, 439 S.E.2d 547, 570, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994). Accordingly, this assignment of error is overruled.

[10] Defendant's next assignment of error concerns the trial court's refusal to give an instruction with respect to racial considerations. Defendant contends that the failure to give the proposed instruction, which would have told the jurors that they should prevent racial concerns from influencing their consideration of defendant's sentence, violated his constitutional rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. The United States Supreme Court noted the importance of dealing with the issue of racial bias within the jury in *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986). We discussed the scope of *Turner* in *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991):

> In *Turner v. Murray*, the United States Supreme Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. This rule, the Court announced, is "minimally intrusive," and the "trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively."

Id. at 13, 409 S.E.2d at 295 (citation omitted) (quoting *Turner*, 476 U.S. at 37, 90 L. Ed. 2d at 37) (emphasis omitted). In this case, the trial court followed the directive of *Turner*, allowing defense counsel wide latitude to question prospective jurors on the issue of racial bias and other issues of racial significance. *Turner* only requires that the trial court allow some examination of *prospective* jurors with respect to racial bias. *Turner* is not authority for the proposition that a trial court in the trial of an interracial crime must instruct the jury to disregard racial considerations where defendant requests such an instruction. This assignment of error is overruled.

[11] By another assignment of error, defendant argues that the trial court erred in finding as an aggravating factor under the version of the Fair Sentencing Act in effect at that time, *see* N.C.G.S. § 15A-1340.1-.7 (1988), that defendant was armed at the time of the kidnapping. Defendant contends that there was no evidence that defendant was armed during the time period beginning when he entered St. Germain's car and ending when they arrived at the scene of the murder. Dr. Radisch's testimony, however, indicated that there were linear abrasions on St. Germain's throat that were consistent with a knife wound; these abrasions give rise to the reasonable inference that defendant held a knife to St. Germain's throat while he forced her to drive out into the country. Defendant argues that the State is not entitled to use this inference because it is bound by defendant's statement, which the State introduced. We held in *State v. Carter*, 335 N.C. 422, 430, 440 S.E.2d 268, 272 (1994), that the State is not bound by an exculpatory statement that it introduced if there is other evidence tending to show the circumstances of the homicide in a different light. Dr. Radisch's testimony constitutes just such "other evidence." Furthermore, even if defendant's contention that he was not armed during the trip from the mall out into the country were to be valid, sufficient evidence to support the aggravator still exists. As the kidnapping continued from the time defendant began his restraint of St. Germain to the time that he killed her, defendant's own statement shows that he was armed with a deadly weapon during the kidnapping. This assignment of error is without merit and is overruled.

[12] Another assignment of error concerns a statement made by the prosecutor during closing arguments in the capital sentencing proceeding. Defendant contends that the trial court erred in its failure to intervene *ex mero motu* when the prosecutor characterized defendant as an "animal" in describing the violent nature of the attack on St. Germain. It is axiomatic that counsel are given wide latitude in argu-

ments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence. *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). We have noted that we do not sanction comparisons of criminal defendants to members of the animal kingdom. *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984). However, in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), we held that a prosecutor's comparative use of the term "animal" did not prejudice the defendant given the isolated nature of the commentary. So it is in the present case. The prosecutor's singular use of the term in the context of a discussion of the brutality of the injuries inflicted on St. Germain does not descend to the level of gross impropriety that would require the trial court to intervene *ex mero motu*. Therefore, this assignment of error is overruled.

With commendable candor, defendant also raises six additional assignments of error that he concedes have been decided contrary to his position previously by this Court. He raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of preserving them for any possible further judicial review of this case. We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

[13] 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. 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 defendant. N.C.G.S. § 15A-2000(d)(2). After thoroughly examining the record, transcripts, and briefs in the present case, we conclude that the record fully supports the two 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 the present case, defendant was convicted of first-degree murder based on the theory of felony murder with first-degree rape as the underlying felony. The jury found as aggravating circumstances that defendant committed the murder while 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). One or more jurors found the following mitigating circumstances: (1) defendant had no significant history of prior criminal activity, (2) defendant was a person of good character and was well-liked in his community prior to his arrest (3) defendant had never physically abused any human being prior to 11 December 1992, (4) defendant confessed to the crimes charged, (5) defendant told the authorities where to locate the credit cards and subsequently called his mother so that the credit cards could be located and turned over to police, (6) defendant confessed because he felt an emotional need to tell someone about his involvement in the murder, (7) defendant assisted elderly neighbors in his community by picking up groceries for them and driving them wherever they needed to go, (8) defendant was a help to his mother and father in caring for the grandchildren while his parents were at work, (9) defendant is a caring and loving brother who has always provided close companionship for his brothers and sisters, (10) defendant was a well-behaved and well-liked student who had no history of violence or trouble and was well-liked by his teachers in school, (11) defendant was reared by hard-working parents as one of seven children and worked to help out the family while at home, and (12) the catchall mitigating circumstance.

In our proportionality review, it is proper to compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). 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 (1988), the defendant was convicted of first-degree murder based on the theory of felony murder with pecuniary gain as the only aggravating circumstance. The jury found several mitigating circumstances, including that defendant was under the influence of mental or emotional disturbance at the time of the crime.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was one of four individuals who was involved in the beating death of a robbery victim. Again, the defendant was found guilty of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. The Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." *Id.* at 27, 352 S.E.2d at 664. Furthermore, the Court deemed it important that the defendant was only seventeen. The jury found, in contrast to the present case, that defendant suffered from impaired capacity to appreciate the criminality of his conduct, that he was under the influence of a mental or emotional disturbance at the time of the murder, and that his age at the time of the crime had mitigating value.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the defendant was convicted of first-degree murder for mistakenly shooting the victim in a parking lot during an argument with the victim's friend. The only aggravating circumstance found was that the murder was part of a course of conduct which included the commission by the defendant of other crimes of violence against another person or persons. The Court found that the "seemingly senseless shooting simply did not contain the viciousness and the cruelty present" in other death cases that involved only the "course of conduct" aggravating circumstance. *Id.* at 234, 341 S.E.2d at 731.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant, after drinking all day, robbed and stabbed a man, killing him. The Court concentrated on the fact the defendant had been drinking heavily all day and wanted to kill the victim to buy more liquor.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the evidence was speculative as to how the murder occurred or how defendant acted when he encountered the victim, a law enforcement officer. This Court emphasized the "unqualified cooperation" of the defendant during the investigation.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant shot his victim after the defendant had spent the night drinking. There was no motive for the killing, and immediately after the victim was shot, defendant sought medical help for the victim.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the victim was shot twice in the head. The defendant had flagged down the victim's car earlier, telling his companions that he intended to rob the victim. This court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with the victim." *Id.* at 46, 305 S.E.2d at 717.

In this case, defendant kidnapped Sherry St. Germain from a parking lot, forced her to drive to a secluded location, brutally raped her, and stabbed her several times, killing her. The jury found aggravating circumstances that defendant committed the murder while perpetrating a robbery and that the murder was especially heinous, atrocious, or cruel. We have upheld the death sentence in numerous cases where the jury found the heinous, atrocious, or cruel circumstance. Furthermore, this Court has never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted. The case *sub judice* is distinguishable from the seven cases in which we have held the death sentence to be disproportionate.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we have repeatedly stated that we review all of the cases in the pool when engaging in this statutory duty, it is worth noting again that "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* It suffices to say here that we conclude 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. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

For the foregoing reasons, we hold that the defendant received a fair trial, free from prejudicial error, and that the sentence of death entered in the present case must be and is left undisturbed.

NO. 93CRS347, FIRST-DEGREE MURDER: NO ERROR.

NO. 93CRS348, ROBBERY WITH A DANGEROUS WEAPON: NO ERROR.

NO. 93CRS349, FIRST DEGREE KIDNAPPING: NO ERROR.

STATE OF NORTH CAROLINA v. ELROY MITCHELL

No. 440A94

(Filed 8 March 1996)

1. Criminal Law §§ 328, 329 (NCI4th)— pretrial motion for severance—insufficient evidence of one crime—denial by court—failure to renew motion

The trial court did not err by denying defendant's pretrial motion to sever the offenses of common law robbery and first-degree murder to prevent prejudice to defendant on the ground there was insufficient evidence of the robbery where the prosecutor's forecast of evidence tended to show that defendant killed the victim during the course of the robbery; the alleged insufficiency of the evidence was not apparent to the trial judge during pretrial motions; and it was only after the presentation of the State's evidence that defendant's grounds for the severance would have been apparent. Furthermore, defendant's right to severance was lost because he did not renew his motion at the close of all the evidence, and even if the motion had been renewed, it would have been properly denied because the State presented sufficient evidence to convict defendant of the robbery.

Am Jur 2d, Trial §§ 115, 120-122, 128, 138-140.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

Appealability of state court order granting or denying consolidation, severance, or separate trials. 77 ALR3d 1082.

2. Evidence and Witnesses § 2817 (NCI4th)— allegedly leading questions—allowance not abuse of discretion

The trial court did not abuse its discretion in permitting the prosecutor to ask a number of allegedly leading questions during the direct examination of three State's witnesses where most of the questions simply directed the witness toward the particular matter being addressed without suggesting the desired answer. N.C.G.S. § 8C-1, Rule 611(c).

Am Jur 2d, Witnesses §§ 752-756.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR2d 952.

3. Appeal and Error § 504 (NCI4th)— invited error—hearsay elicited by defendant

Defendant cannot assign error to hearsay testimony which he elicited. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Appellate Review § 755.

4. Evidence and Witnesses § 906 (NCI4th)— hearsay testimony—no plain error

An officer's testimony that a robbery-murder victim's sister told him she was with the victim when she was putting Christmas money for her nieces and nephews into envelopes and that the victim used one-dollar rather then five-dollar bills was hearsay, but the admission of this testimony was not a fundamental error amounting to plain error.

Am Jur 2d, Evidence §§ 658-660; Homicide §§ 329, 330, 430.

5. Evidence and Witnesses § 2047 (NCI4th)— lay opinion testimony—proper foundation

A proper foundation was laid for lay opinion testimony by a murder victim's sister that the victim's air conditioner was in "perfect shape" prior to the victim's death where the sister testified that she had eaten dinner at the victim's house the day before the murder, the air conditioner was located in the dining room where they ate dinner, and she did not notice that the air conditioner was not working at that time.

Am Jur 2d, Expert and Opinion Evidence §§ 26-31.

6. Evidence and Witnesses § 2138 (NCI4th)— impression of color of bag—personal observation as basis

A witness's testimony that it was her best impression that a cloth bag missing from a murder victim's home was green was not mere speculation but was properly based on her personal observation of the bag. The fact that the witness was equivocal about the color goes to the weight of the evidence and not to its admissibility. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 365, 366.

7. Criminal Law § 478 (NCI4th)— written questions from juror during evidence—instruction to that juror alone—failure to admonish all jurors

The trial court did not abuse its discretion by calling one juror into the courtroom alone during a recess while the State was presenting its evidence and instructing the juror outside the presence of the jury panel that the court could not answer questions she had submitted in a handwritten note to the bailiff about perceived discrepancies in the State's evidence. Nor did the trial court err by failing to admonish all jurors of their duty not to discuss the case with one another before deliberation where the note was from one juror only and not from the entire jury. N.C.G.S. § 15A-1236.

Am Jur 2d, Trial §§ 1573-1579.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-*Parker* cases. 35 ALR4th 890.

8. Evidence and Witnesses § 1505 (NCI4th)— evidence about drawstring bag—motion to exclude properly denied

The trial court did not err when it denied defendant's motion *in limine* to exclude from defendant's robbery and murder trial all evidence regarding a green and white drawstring bag since the jury could find from the evidence presented at the motion hearing that the bag was still at the victim's house before she was killed and that a bag seen in defendant's possession on the night of the murder was the victim's bag where the victim's sister testified the victim owned a green and white drawstring bag which she had seen at the victim's house several days before the murder; the sister was unable to locate the bag after the murder; the State forecast testimony by a witness that she saw defendant carrying what appeared to be a green drawstring bag on the night the victim was killed; and investigating officers testified that defendant admitted that he was at the victim's home an hour before he was seen with the bag.

Am Jur 2d, Homicide §§ 409, 413; Trial §§ 94 et seq.

9. Evidence and Witnesses § 699 (NCI4th)— hearsay—admissibility for corroboration—absence of limiting instruction—no plain error

Assuming *arguendo* that the trial court erred by failing to instruct the jury to consider for corroboration only an officer's

testimony that a murder victim's sister told him she could not locate a green and white drawstring bag among the victim's stored belongings, this error was not plain error where the victim's sister had already testified that the family had put items into storage after the body of the victim was found and that a green and white bag was missing, and the jury would not probably have reached a different verdict if the court had instructed the jury to consider the officer's testimony only for corroboration.

Am Jur 2d, Evidence § 430.

10. Homicide § 277 (NCI4th)— felony murder—common law robbery as underlying felony—sufficient evidence

There was sufficient evidence of the underlying felony of common law robbery to support defendant's conviction of first-degree murder under the felony murder rule where the State's evidence tended to show that defendant was in the victim's house on the day the murder was committed; after the murder, defendant was seen carrying a drawstring bag similar to one that belonged to the victim, and the bag appeared to have something in it; a shoe box containing $140 and a green and white drawstring bag were missing from the victim's apartment; the bag usually hung on the back of a closet door and the shoe box was normally kept at the foot of the victim's bed in the same corner of the bedroom; a file cabinet in this corner had been moved and its handle was found on the floor near the victim's body; and the victim's wrists were tied with belts that had been taken from the closet where the bag usually hung. A reasonable fact finder could infer that defendant had been in the corner of the house where the bag and shoe box were kept, that the shoe box was in the bag defendant was seen carrying the night of the murder, and that this bag was the bag missing from the victim's house.

Am Jur 2d, Homicide § 46.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Grant (Cy A.), J., at the 28 February 1994 Criminal Session of Superior Court, New Hanover 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 common law robbery was allowed on 17 February 1995. Heard in the Supreme Court 15 November 1995.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

FRYE, Justice.

Defendant, Elroy Mitchell, was indicted for first-degree murder and common law robbery. He was tried capitally. The jury found defendant guilty of common law robbery and of first-degree murder under theories of premeditation and deliberation and felony murder. After a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial judge imposed a sentence of life imprisonment for the first-degree murder conviction. The judge also sentenced defendant to ten years' imprisonment for the robbery conviction.

Defendant makes eight arguments on appeal to this Court. We reject each of these arguments and conclude that defendant received a fair trial, free from prejudicial error.

The State's evidence at trial tended to show the following facts and circumstances: At approximately 2:00 p.m., on Friday, 14 August 1992, Ethel Corbett, the victim's sister, took the victim, Alberta Futch, to run some errands. When they returned from the errands, the victim attempted to give Corbett five dollars, which Corbett refused. The victim placed the money in her purse, entered her home, and was never seen alive again by Corbett.

Futch usually went to church every Friday night with her brother, James Mitchell, who was also defendant's grandfather. On Friday, 14 August 1992, when Mitchell attempted to telephone Futch at 6:50 p.m., no one answered. Evelyn McClain also attempted to reach Futch by telephone at 7:00 p.m. on that same evening, but did not get an answer. The last time anyone remembered speaking with Futch was at 6:00 p.m. on 14 August 1992.

Glotherine Everett, the victim's cousin, had been attempting to contact Futch by telephone since 6:45 p.m. on the evening of 14 August 1992, but no one answered. On the following morning, 15 August 1992, Everett, concerned about the victim, contacted Corbett to see if anyone had spoken with the victim. Corbett and Mitchell then drove to the victim's home, where they were joined by Carolyn Evans, the victim's daughter. Corbett had called Evans and asked her to meet them at the victim's house.

When Mitchell, Corbett, and Evans arrived at the house, they found that the front gate and the door of the house were unlocked. Upon entering the house, they found the victim's slip lying on the living room floor. All the lights were off. The eighty-one-year-old victim was lying face down on the rear bedroom floor. Her hands were bound loosely behind her back with belts from dresses which usually hung in the bedroom closet. Corbett noted that the victim was clothed in the same dress she had worn the previous day when Corbett had taken the victim to run some errands. The victim's panty hose and panties were down around her ankles. Corbett immediately untied the victim's hands and then called the Wilmington Police Department.

When the police arrived, they found the house neat and orderly, with a few exceptions. In the bedroom, a file cabinet that was in the corner near the door had been moved, and its handle was on the bedroom floor near the victim's body. Two bricks that the victim kept next to the back door of the house were also found near her body. There was a place setting for one person and a glass of water on the kitchen table. Food had obviously been eaten, and some dried cream of wheat and peas remained in pots on the stove. Clothes that had been doused with detergent were in the washing machine. The ringer on the telephone was turned off.

The victim's jewelry box was undisturbed, and none of her jewelry appeared to be missing. Futch had laid out some clothes, and $100.00 was found under the clothing. The back porch and screen doors were locked, and Futch's Bible and purse were on the kitchen table. Corbett observed that the five-dollar bill she had seen earlier in the victim's purse was missing, but $15.00 was hidden in a secret compartment in the victim's purse. A green and white duffle bag which normally hung on the back of Futch's bedroom door was also missing. A shoe box, which at one time contained approximately $140.00, was missing as well. With police approval, Futch's relatives were allowed to clean the entire house the weekend of her death.

An autopsy revealed multiple scratches and cuts about the victim's neck, pinpoint eye hemorrhages, a bruised lip and mouth, bruises on the right anterior thigh and groin, and bruises to the upper left chest. Futch had also suffered blows to the head and had multiple rib fractures consistent with her body being stomped by someone's foot. There was no evidence that she had been sexually assaulted, and her stomach contained a partially digested meal. The

medical examiner concluded that the victim had been strangled to death by someone's hands and that the pressure had been applied more than once. The victim's hands had not been tied during the strangulation.

Futch, defendant's great-aunt, had raised defendant's father, and although she treated defendant like a grandson, he had not visited her in several years. However, on the day before the body was found, Geraldine Russell, the victim's neighbor, saw defendant in the victim's yard while the victim was not at home. Defendant told Russell that he had come to the house to fix his great-aunt's air conditioner but that she was not at home. He added that he would return later. Defendant was wearing khaki shorts and a beige shirt. Defendant's grandfather, who did most of the victim's repairs, had been to Futch's house on 13 August 1992 to fix the victim's bathroom sink, and the victim neither complained about the air conditioner nor mentioned defendant. None of the witnesses who testified remembered Futch complaining about her air conditioner during the days just before the murder, nor did they remember the victim mentioning that defendant was coming to her house.

At noon on Thursday, 13 August 1992, defendant was paid by his employer, Murray's Transfer. He left in the company truck and was supposed to return it by 5:00 p.m. that day, but the truck was not seen again until shortly before noon on the next day when it appeared in the employer's parking lot. At about 4:00 p.m. on 13 August 1992, defendant picked up Milton Jones and purchased beer, cigarettes, marijuana, and crack cocaine. Defendant and Jones smoked crack and marijuana and drank beer. Defendant, still driving the company truck, dropped Jones off at about 8:00 p.m. that evening. Defendant slept at a friend's house that night and told her when he left the next morning that he would bring her some money to pay her after he picked up his paycheck from work. When he left, he was wearing his work clothing.

Defendant was next seen by Zella Smith at approximately 8:00 p.m. on the evening of 14 August 1992. Defendant stopped by Smith's house to see if another friend was there. Upon leaving Smith's house, defendant went to Rick Barnes' house. Defendant remained at Barnes' house for several days and did not return to work after he left on 13 August until 24 August 1992. When defendant returned to his place of employment on 24 August 1992, he was arrested for a probation violation.

Defendant told the investigating officers that he was at the victim's house continuously from 3:30 p.m. until 6:30 p.m. on 14 August 1992 and that she did not receive any telephone calls while he was there. He also stated that he turned a knob on her air conditioner, adjusted her blinds, and set her clock while he was there.

Defendant did not testify or present any evidence at trial. His motion to dismiss for insufficiency of the evidence was denied.

[1] As his first argument, defendant contends the trial judge erred by failing to sever the offenses of common law robbery and murder. At the beginning of the trial, the prosecutor moved for joinder of the offenses. Defendant made a severance motion. The trial judge granted the prosecution's motion for joinder and denied defendant's severance motion. Defendant argues severance was necessary to prevent prejudice to him because there was not sufficient evidence of the robbery.

N.C.G.S. § 15A-926(a) governs joinder and provides, in part, that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Once it has been determined that the offenses have a transactional connection, it is within the trial court's discretion to consolidate them for trial. *State v. Huff*, 325 N.C. 1, 22-23, 381 S.E.2d 635, 647 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Defendant does not argue that the robbery and murder were not transactionally connected. Instead, he contends that his motion for severance should have been granted because the joinder was unduly prejudicial.

N.C.G.S. § 15A-927(b)(1) governs severance and provides, in part, that "[t]he court, on motion of the prosecutor or on motion of the defendant, must grant a severance of offenses . . . [i]f before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense." We have stated that when considering a motion for severance "the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated." *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). The trial court can consider only the evidence before it when the motion is made. Therefore, this Court, when considering the pro-

priety of the trial court's ruling on the severance motion, examines only the evidence that was before the trial court.

Defendant made his motion for severance before any evidence was presented. The prosecutor's forecast of evidence tended to show that defendant killed the victim during the course of the robbery. Defendant contended that the evidence was insufficient to support a conviction of robbery. However, during the pretrial motions, this alleged insufficiency was not apparent to the trial judge. The trial judge had no grounds to find that severance was necessary to promote the fair determination of defendant's guilt or innocence. It was only after the presentation of the State's evidence that defendant's grounds for severance would have been apparent.

Defendant acknowledges in his brief that he failed to renew his pretrial motion for severance at the close of the State's case. Thus, the trial court did not have an opportunity to rule on the severance question after the presentation of evidence. Furthermore, as the severance statute specifically provides, "[a]ny right to severance is waived by failure to renew the motion" at the close of all the evidence. N.C.G.S. § 15A-927(a)(2) (1988). Because defendant did not renew his motion at the close of all the evidence, his right to severance was lost.

Nevertheless, we conclude that even if defendant had renewed his severance motion at the close of all the evidence, the trial court would not have erred by denying defendant's motion. As stated previously, defendant contends that severance was unduly prejudicial because there was insufficient evidence to convict him of robbery. However, as discussed later in this opinion, the State introduced sufficient evidence to convict defendant of the robbery. Accordingly, we reject defendant's argument.

[2] In his second argument, defendant contends the trial court erred by permitting the prosecutor to ask a number of leading questions during the direct examination of a number of the State's witnesses. Defendant did not object to these questions and now argues that this Court should review these questions under the plain error rule.

A leading question is usually defined as one which suggests the desired response and one which may frequently be answered "yes" or "no." However, a question is not necessarily leading simply because it may be answered yes or no. *State v. Riddick*, 315 N.C. 749, 755, 340 S.E.2d 55, 59 (1986). Under our rules of evidence as codified by our

legislature, "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C.G.S. § 8C-1, Rule 611(c) (1992). It is well settled in this State that a ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion. *Riddick*, 315 N.C. at 755, 340 S.E.2d at 59.

In the instant case, two of these questions were directed to the medical examiner; four to a neighbor, Willie Norse; and the remaining nine questions were to Ethel Corbett, an elderly cousin of the eighty-one-year-old victim. While some of these questions might be considered borderline, most simply directed the witness toward the particular matter being addressed without suggesting the desired answer. In any event, we have examined the questions and answers, to which no objections were made, and we find no abuse of discretion by the trial court. Accordingly, we find it unnecessary to review this assignment of error under the more stringent plain error standard.

[3] In defendant's third argument, he contends that the trial court erred by admitting inadmissible hearsay evidence. In separate assignments of error, defendant contends that statements made by Detective Harris and Officer Hayes were hearsay. However, while the statement made by Detective Harris was hearsay, it was elicited from Detective Harris by defense counsel. Defendant cannot assign error to hearsay testimony which he elicited. N.C.G.S. § 15A-1443(c) (1988) (a defendant may not complain of prejudice "resulting from his own conduct"); *State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993) ("[i]nvited error" does not merit relief); *State v. Rivers*, 324 N.C. 573, 575-76, 380 S.E.2d 359, 360 (1989). Thus, we reject defendant's assignment of error as to Detective Harris' statement.

[4] Defendant is correct that the statement by Officer Hayes was hearsay that did not fall into any recognized exception. Officer Hayes testified that Ethel Corbett told him that she was with the victim when she was putting Christmas money for her nieces and nephews into envelopes and that the victim used one-dollar bills, not five-dollar bills. Defendant did not object to this statement at trial; therefore, this assignment of error must be examined under the plain error rule. We note, however, that

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, some-

> thing so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a *fundamental* right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnote omitted)), *quoted in State v. Weathers*, 339 N.C. 441, 450, 451 S.E.2d 266, 271 (1994). This is not the exceptional case where, after reviewing the entire record, we can say that the claimed error is so fundamental that justice could not have been done. Accordingly, we reject this assignment of error and defendant's third argument.

[5] In his fourth argument, defendant contends the trial court erred by allowing witnesses to testify to matters based on speculation and conjecture and not on personal knowledge. Ethel Corbett testified that the victim's air conditioner was "in perfect shape" prior to the victim's death and that she always knew who was at the victim's house when she called because the victim would always tell her who was there.

Corbett's testimony at trial demonstrated that she and the victim spent a large amount of time together and that they talked often during the course of a day. Corbett had eaten dinner at the victim's house the day before the murder, and she testified that she had not noticed that the air conditioner was not working at the time. Corbett also testified that the victim's air conditioner was located in the dining room where they ate dinner on 13 August 1992. A proper foundation was laid for Corbett's conclusion, as a layperson, that the air conditioner was in "perfect shape." As for Corbett's testimony that the victim normally told her if anyone was there when she called the victim, defendant's contentions go more to the weight and credibility of the evidence than to its admissibility.

[6] Defendant also contends that Zella Smith should not have been allowed to testify about the green and white bag missing from the victim's residence. The following exchange took place between the prosecutor and Smith:

Q. Can you describe the cloth bag?

A. It's one of those pull string bags, I guess. It was green, light colored green. I don't really know what color. I know it was one of those cloth bags.

Q. What's your best impression as to the color of it?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Green.

Defendant argues that it was clear that Smith did not know the color of the bag; therefore, the trial court erred in admitting this testimony.

However, we conclude that Smith's testimony was not mere speculation, but was based on her personal observation of the bag. Lay witnesses are allowed to give opinions which are rationally based on perceptions of the witness and which are helpful to a clear understanding of a fact in issue. N.C.G.S. § 8C-1, Rule 701 (1986); *State v. Shuford*, 337 N.C. 641, 650, 447 S.E.2d 742, 747 (1994); *State v. Shaw*, 322 N.C. 797, 809, 370 S.E.2d 546, 552 (1988). The fact that Smith was equivocal about the color goes to the credibility and weight of the evidence and not to its admissibility. Accordingly, we reject this assignment of error and defendant's fourth argument.

[7] Defendant, in his fifth argument, contends the trial court committed plain error by instructing one juror outside of the presence of the full jury panel and by failing to admonish the full jury of its duty not to discuss the case prior to deliberations.

During a recess, and after advising counsel that juror number two had submitted a handwritten note to the bailiff, the trial judge called juror number two into the courtroom alone and advised her that he could not answer her questions. The remaining members of the jury returned, and the State continued presenting its case. Defendant contends the trial court's failure to have the entire jury in the courtroom when it received the note from the juror and when it responded to her questions was prejudicial *per se*. Moreover, defendant contends that the trial court compounded the error by failing to admonish the jurors of their duty not to discuss the case with one another before deliberation.

The contents of the note submitted to the judge were not given to defendant or the State, but the trial judge did say that the juror had

pointed out what she perceived to be several discrepancies in the State's evidence. Not wishing to reveal these discrepancies to the State, the court wisely decided not to answer the questions in the note. Defendant contends that the full jury should have been called into the courtroom and that the trial judge should have told all of the jurors that he was not going to answer the questions. Defendant argues that the entire jury should have been admonished because, although the written request came from juror number two, the note came from the entire jury. However, the judge clearly stated in portions of the transcript that the note was from juror number two only and was not from the entire jury.

This Court has held that the judge is required to address the entire jury where there has been a request from jurors for certain evidence and testimony once they begin their deliberations. *State v. Nelson*, 341 N.C. 695, 462 S.E.2d 225 (1995); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). In the instant case, the jury deliberations had not begun. Nevertheless, defendant asks that we require the trial court to address the entire jury when one juror asks a question, even before the jury has begun to deliberate. However, addressing juror number two's note in front of the entire jury would have called unnecessary attention to the situation and perhaps caused discussions among the jurors. According to N.C.G.S. § 15A-1236, the trial court has the discretion, with several enumerated exceptions, to determine when it is appropriate to admonish the jury. We believe the trial judge here chose the better course of action by addressing his response to juror number two rather than to the entire jury panel. Clearly, there was no abuse of discretion by the trial judge.

[8] As his sixth argument, defendant contends the trial court erred when it denied defendant's motion *in limine* to exclude all evidence regarding a green and white bag. Defendant makes two contentions: (1) there was no direct evidence that the bag was in the victim's house at the time of her death, and (2) the bag seen in defendant's possession on the night of the murder was not necessarily the same bag that the victim owned. Therefore, he argues, the introduction of any evidence regarding the bag was irrelevant, inflammatory, and unduly prejudicial.

Defendant made his motion *in limine* to exclude all testimony regarding the green and white bag in the middle of the presentation of the State's case-in-chief. Ethel Corbett had already testified that

the victim owned a green and white bag that she had seen in the victim's home several days before the murder. Corbett also testified that she was unable to locate the bag after the murder. Investigating officers had testified that defendant admitted that he was at the victim's home until 6:30 or 7:00 p.m. on the night of the murder, just an hour before he was seen by Smith. The State, during the motion hearing, stated that Zella Smith was going to testify that, at 8:00 p.m. on the night that the victim was killed, she saw defendant carrying what appeared to be a green drawstring bag. Corbett's and the officers' testimony and the forecast of Smith's testimony support the trial judge's ruling denying defendant's motion *in limine*. Defendant is correct that there was no *direct* evidence that the bag was in the victim's house at the exact time of death and that the bag seen in defendant's possession on the night of the murder was not *necessarily* the same bag that the victim owned. We conclude, however, that the evidence presented at the motion hearing was sufficient for the jury to find that the bag was still at the victim's house before she was killed and that the bag seen by Smith was the victim's bag. As the trial judge noted during the motion hearing, defendant's argument goes to the credibility and weight of the evidence and not to its admissibility. Accordingly, we conclude that the trial court did not err in denying defendant's motion *in limine*.

[9] For defendant's seventh argument, he contends the trial court erred by failing to properly instruct the jury concerning the corroborative purposes of certain testimony. Officer Brian Pettus of the Wilmington Police Department was allowed to testify about what the victim's sister had told him with regard to the green and white bag. He testified, "We [the police] told Corbett to look through the victim's belongings which had been stored to see if they could locate the bag. She called me the next day, or I may have called her, and said that they could not locate the bag. That it was, indeed, missing."

Defendant, although not explicitly stating so in his brief, appears to be arguing that the statement of Officer Pettus was hearsay that could only be entered into evidence for corroborative purposes. He adds that the testimony was not corroborative and, therefore, was inadmissible. Defendant neither requested that the judge give an instruction that Officer Pettus' testimony was to be introduced for corroboration only nor objected to the admission of the evidence at trial. As such, if there is an error here, it must be examined under the plain error rule.

We have said that

> [u]nder the plain error rule, a new trial will be granted for an error to which no objection was made at trial only if a defendant meets a heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict.

State v. Bronson, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992). Assuming *arguendo* that there was error here, it did not rise to the level of plain error. Corbett had already testified that the green and white bag was missing and that the family had put items into storage after the body of the victim was found. Defendant has not convinced this Court that the jury probably would have reached a different verdict had the judge instructed the jury that Officer Pettus' testimony should be considered for corroborative purposes only. Accordingly, we reject defendant's seventh argument.

In his eighth argument, defendant contends that the trial court erroneously denied defendant's motion to dismiss because the evidence was insufficient to convict defendant of both robbery and murder. We disagree.

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 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.

[10] First, defendant contends that there was insufficient evidence to convict him of common law robbery. This Court has said:

> To withstand a motion to dismiss a common-law robbery charge, the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person's will, by violence or putting the person in fear.

State v. Davis, 325 N.C. 607, 630, 386 S.E.2d 418, 430 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Defendant contends that the State did not present evidence that anything was taken from the victim. We disagree.

The State's evidence at trial showed that defendant was in the house on the day the murder was committed and that, after the murder, he was seen carrying a bag similar to the one that belonged to the victim. Zella Smith testified that the bag she saw defendant carrying the night of the murder appeared to have something in it. During the police investigation, it was determined that a shoe box containing $140 could not be found and that a green and white bag owned by the victim was also missing. Both the bag and the shoe box were kept in the same corner of the victim's bedroom. The bag usually hung on the back of a closet door and the shoe box was normally kept at the foot of her bed. A file cabinet was also in this corner. The police found that the file cabinet had been moved and its handle was found on the floor near the victim's body. Also, the victim's wrists were tied with belts that had been taken from the closet where the bag usually hung.

Therefore, a reasonable fact finder could infer that defendant had been in the corner of the house where the bag and shoe box were kept and that the shoe box was in the bag when defendant was seen by Zella Smith. The jury could also find that the bag missing from the victim's house was the same bag defendant had in his possession when he was seen by Smith on the night of the murder. *See State v. Rose*, 339 N.C. 172, 193, 451 S.E.2d 211, 223 (1994) (evidence sufficient to prove robbery where defendant seen with the victim's belongings shortly after murder).

Defendant also contends there was insufficient evidence to convict him of first-degree murder. We disagree. The jury found defendant guilty on both a theory of felony murder and a theory of premeditation and deliberation. Because we have found that there is sufficient evidence of the underlying felony to support defendant's conviction of first-degree murder under the felony murder rule, we need not discuss defendant's contention that there was insufficient evidence to convict him of first-degree murder under a theory of premeditation and deliberation. In *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989), we said, "[p]remeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." Accordingly, we reject defendant's final argument.

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

NO ERROR.

STATE OF NORTH CAROLINA v. DARRYL OBELIN MURPHY

No. 402A94

(Filed 8 March 1996)

1. Criminal Law § 621 (NCI4th)— motion to dismiss—circumstantial evidence—sufficient

The trial court did not err in a prosecution for first-degree murder, felonious breaking or entering, felonious larceny, felonious auto larceny and robbery with a dangerous weapon by denying defendant's motion to dismiss all of the charges for insufficient evidence where defendant contended that the State's case tying defendant to the offenses was built on innuendo and speculation, but the evidence, viewed in the light most favorable to the State, clearly supports a reasonable inference that defendant was the perpetrator.

Am Jur 2d, Evidence §§ 1467 et seq.

2. Appeal and Error § 150 (NCI4th)— right to remain silent—implicitly presented to trial court—appealability

The issue of whether a first-degree murder defendant's statement should have been suppressed because his right to remain

silent was violated was properly before the Supreme Court where the State argued that the issue was not presented to the trial court, but the contention was implicit in defendant's argument to the trial court that the SBI agent would not have been required to readvise defendant of his rights unless the defendant had invoked his right to remain silent.

Am Jur 2d, Appellate Review §§ 727 et seq.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent. 23 ALR4th 563.

3. Evidence and Witnesses § 1259 (NCI4th)— right to remain silent —invocation—sufficient

A defendant in a prosecution for first-degree murder, felonious breaking or entering, felonious larceny, felonious auto larceny and robbery with a dangerous weapon invoked his right to silence where the defendant's conduct in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," were clear indicators that he wished to terminate the interrogation and invoke his right to remain silent; defendant had similarly indicated a desire to end two prior interrogations by standing up; and the fact that the officers immediately ceased the interrogation and took the defendant to be "booked" makes it equally clear that the officers understood that defendant was terminating the interrogation and invoking his right to remain silent.

Am Jur 2d, Criminal Law §§ 788 et seq; §§ 749, 750.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent. 23 ALR4th 563.

4. Evidence and Witnesses § 1248 (NCI4th); Constitutional Law § 352 (NCI4th)— right to silence invoked—interrogation reinitated by police within 15 minutes—right to silence violated

The trial court erred in a prosecution for first-degree murder, felonious breaking or entering, felonious larceny, felonious auto larceny and robbery with a dangerous weapon where defendant invoked his right to silence; the interrogation was terminated; defendant was charged; and an SBI agent initiated a conversation with defendant during processing less than fifteen minutes after the initial interrogation ended for the purpose of determining

whether defendant had killed the victim and without readvising defendant of his *Miranda* rights. A *per se* rule requiring mandatory rewarning places form over substance and does not adequately emphasize the substantive conduct required by law enforcement officers after an accused has asserted his right to remain silent; where, as here, the police ceased the interrogation but then resumed within fifteen minutes of the time the defendant invoked his right to remain silent, the second interrogation involved the same subject matter as the earlier interrogation, and the defendant was not readvised of his *Miranda* rights, the defendant's right to cut off questioning was not scrupulously honored and his Fifth Amendment right to silence was violated.

Am Jur 2d, Criminal Law §§ 788 et seq; §§ 749, 750.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent. 23 ALR4th 563.

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 Strickland, J., at the 25 October 1993 Special Criminal Session of Superior Court, Pender County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for felonious breaking and entering, felonious larceny, felonious auto larceny and robbery with a dangerous weapon was allowed 19 December 1994. Heard in the Supreme Court 13 November 1995.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 24 August 1992 for the first-degree murder of Thomas Herring. Defendant was subsequently indicted on 4 January 1993 for felonious breaking and entering, felonious larceny, felonious auto larceny and robbery with a dangerous weapon in connection with the same incident. The defendant was tried capitally, and the jury found the defendant guilty of first-degree murder on the theory of premeditation and deliberation. The jury also returned verdicts

of guilty on each of the additional charges. Following a capital sentencing hearing, the jury recommended a sentence of life imprisonment for the murder conviction. Judge Strickland sentenced the defendant to consecutive terms of life imprisonment for the murder, forty years' imprisonment for the robbery with a dangerous weapon and ten years' imprisonment for each of the remaining felonies.

At trial, the State presented evidence tending to show that on 7 August 1992, the defendant worked at the Gold Banner Meat Processing Plant (Gold Banner) as the night clean-up person. The defendant normally worked from 4:00 p.m. to 4:00 a.m. Monday through Saturday. Thomas Herring, the seventy-nine-year-old victim, also worked at Gold Banner as the night security guard. Herring worked from 11:30 p.m. to 6:00 a.m. on Fridays, Saturdays and Sundays. Herring made hourly rounds and recorded what occurred in a ledger. Between rounds, Herring often napped in the reception area. The reception area door was usually left unlocked because there was a problem with the lock and because the plant was surrounded by a ten-foot-high chain-link fence that was topped with barbed wire. The fence had two gates which were always locked at night.

On 7 August 1992, Gene Horne, another night-shift employee, witnessed the defendant leave the plant by sliding underneath one of the gates in the chain-link fence. Horne later saw the defendant return to work in the same manner. After the defendant's return, Horne noticed that the door to the ladies' rest room, which was normally open, was closed. Horne pushed open the door and saw the defendant squatting down in front of a bench crushing something which the defendant said was aspirin. Horne informed Herring what he had observed. Horne and Herring noticed that the defendant was missing and once again found the defendant in the ladies' rest room crushing something. Later that night, Herring found the defendant, on his knees, in a stall in the ladies' rest room. When asked what he was doing, the defendant replied that he was praying. Due to the defendant's unusual behavior, Gene Horne called the plant manager, Charles McCarty, and told him that he thought the defendant "was on something."

When Charles McCarty arrived at the plant, he approached the defendant and noticed that the defendant's eyes were dilated and that his speech was slurred. McCarty asked the defendant what happened in the rest room, and the defendant said he had a toothache. McCarty asked the defendant to go to the hospital and give a urine sample, but the defendant vehemently protested, "You can't make me go."

Moments later, however, the defendant insisted they go immediately. McCarty then informed the defendant that he was fired. Thomas Herring was asked to escort the defendant off the premises. The defendant protested his termination but was told that the decision was final. The defendant then walked toward the door, but before leaving, he turned toward McCarty and Herring and said, "I'll see you later!"

Herring followed the defendant out of the plant and observed him leaving. After returning to the plant, Herring immediately said, "I think I'll bring my son with me tomorrow night." Herring was scheduled to work alone the following night. Herring's wife testified that before Herring left for work on Saturday, 8 August 1992, she saw him put a gun in his jacket pocket and take it to work with him. Herring's wife further testified that before this instance, her husband had never taken a gun with him to work. Charles McCarty testified that it was company policy that no firearms were allowed on the premises. McCarty further testified that he had never before seen Herring with a gun while he was working.

At approximately 9:00 a.m. on Sunday, 9 August 1992, Darryl Coleman drove by Gold Banner to check on the plant. Coleman noticed that the gate was open but that there were no cars in the parking lot. Coleman decided to check on the various pieces of equipment located inside the plant and in the process, discovered Thomas Herring's body lying in a pool of blood. A search of the plant revealed that nothing was missing except the victim's truck, keys and wallet. The victim's truck was later found abandoned in Wilmington, North Carolina, in a high crime and drug area. A can of Olde English beer was found in the bed of the truck.

Namon Murphy, the defendant's father, testified that the defendant lived at home and that their home was about a fifteen-minute walk from Gold Banner. Murphy further testified that he received a call from the defendant at approximately 5:45 a.m. on Sunday, 9 August 1992. The defendant wanted his father to drive to Wilmington to pick him up. Murphy then drove to Wilmington to pick up the defendant. A few hours after returning home, two sheriff's deputies came to talk to the defendant.

The defendant was subsequently questioned by Special Agent Bruce Kennedy of the State Bureau of Investigation regarding his activities on the night of the murder. The defendant stated that he stayed close to home most of the evening. Sometime after midnight

on the night of the murder, the defendant went to a Scotchman convenience store, located two blocks from Gold Banner, to get a snack. While there, the defendant asked a man named "Norman," whom he did not know, to give him a ride to Wilmington. According to the defendant, Norman drove him to Wilmington in a blue Celebrity automobile. The defendant stated that after arriving in Wilmington, he bought and smoked crack cocaine and then called home and asked his father to pick him up. When Agent Kennedy said that he would interview the Scotchman clerk, the defendant became uncertain about whether the clerk would have seen Norman.

Agent Kennedy checked phone records and determined that the phone call from the defendant to Namon Murphy was made from a phone booth located seven blocks from the location where the victim's truck was found. Agent Kennedy also discovered that two phone calls were made from the Murphy residence to a telephone sex line in California at 1:45 a.m. and 2:28 a.m. on 9 August 1992. Namon Murphy denied that he or his wife made those calls.

Michael Pounds, the night manager of the Scotchman convenience store, knew the defendant as a regular customer in his store. Pounds testified that on the night of the murder, the defendant came into the store with two other men, purchased an Olde English beer and then left with the same two men. Pounds testified that he never saw the defendant with anyone who drove a blue Celebrity automobile.

On 19 August 1992, Special Agents Anthony Cummings and Kelly Moser of the State Bureau of Investigation spoke with the defendant. The defendant was advised of his *Miranda* rights and waived those rights. Defendant admitted that on the night he was fired, he left Gold Banner by crawling under the security fence, bought some beer, crawled back under the fence and brought the beer into the plant. When asked why he left that way, the defendant stated, "Hell, man, that's the way an old con does it. You see, man, I'm an old B and E man, you know. I break and enter and steal." Agent Cummings informed the defendant that the State Bureau of Investigation was ready to charge him with Thomas Herring's murder, to which the defendant responded, "Don't know nothing about the crime, man." Agent Cummings also told the defendant that the one thing that had remained constant throughout the investigation was the fact that the defendant never did deny killing the victim. Defendant again stated that he knew nothing about the crime. Agent Moser told the defend-

ant that he would be glad to stay and talk about the murder, but the defendant stood up and said, "I got nothing to say, man."

The defendant was charged with the victim's murder and was sent for processing. While processing the defendant, Agent Kennedy initiated a conversation with the defendant for the purpose of determining whether the defendant had killed Mr. Herring. Agent Kennedy encouraged the defendant to "tell the truth," stating that the bad feeling in defendant's stomach would not go away until he did. Agent Kennedy testified that in response to his urging, the defendant replied, "Man, you know the position I'm in, I can't tell you about it."

[1] In his first assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss all of the charges at the close of the State's evidence because the State did not present sufficient evidence that the defendant was the perpetrator of the offenses. Specifically, the defendant argues that there was no evidence to tie the defendant to the commission of the offenses and that the State's case was based on innuendo and speculation.

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 and substantial evidence that the defendant is the perpetrator. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion for dismissal is properly denied. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

In ruling on the motion to dismiss, the trial court must view all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). The trial court need not concern itself with the weight of the evidence. In reviewing the sufficiency of the evidence, the question for the trial court is whether there is "any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). If so, it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty. *Id.* at 171-72, 393 S.E.2d at 787.

In this case, the defendant does not contest that a murder, armed robbery, breaking and entering, larceny and auto larceny were committed. Defendant does, however, contest the sufficiency of the evidence to show that he was the perpetrator of these crimes. After thoroughly reviewing the record, we are of the opinion that substantial circumstantial evidence exists which clearly supports a reasonable inference of the defendant's guilt.

The evidence shows that the defendant had access to the Gold Banner plant the night the victim was killed. His parents' home was a short walk from the plant. Defendant was home watching television with his mother until after midnight. At 1:45 a.m. and 2:28 a.m., phone calls were made to a telephone sex line from the Murphy home. Defendant's father denied that either he or his wife made those calls. It is reasonable to conclude, therefore, that the defendant was at his home until the last phone call was placed. At 3:20 a.m., the victim made the last entry in his journal. The defendant, according to his own statement, was out at that time of night and looking for a ride to Wilmington. Defendant claims to have met a man named "Norman" at the Scotchman who drove him to Wilmington in a blue Celebrity automobile. However, the clerk at the Scotchman did not see Norman or a blue Celebrity on the night of the murder.

The defendant, who by his own word was "an old B and E man," was aware that he could sneak in and out of the Gold Banner plant by sliding under a certain spot in the fence. The defendant was also aware that the victim would be working alone on the night he was killed. It is reasonable to infer that the defendant was aware that the front door to the plant had a damaged lock and was left unlocked at night, since he was one of the employees who worked at night. Furthermore, the nature of the defendant's job gave him knowledge and access to meat coats, aprons, rubber gloves, rubber sleeves and boots, all of which would protect him from leaving the plant with evidence of his presence at Gold Banner and could explain the absence of blood on defendant's clothing.

Nothing in the Gold Banner plant, other than the victim's wallet, keys and truck, was found to be damaged or missing. It is reasonable to infer that the sole target of the intruder was Thomas Herring. The defendant had a motive to kill Herring. The victim was one of the persons who reported the defendant's unusual behavior to the plant manager, Charles McCarty. McCarty arrived at the plant and fired the defendant. After his termination, McCarty and the victim were stand-

ing together when the defendant threatened, "I'll see you later!" Based on this evidence, it is reasonable to assume that the defendant viewed the victim as the cause of his termination.

It is also reasonable to infer that the defendant, after killing the victim, stole the victim's truck and drove it to Wilmington. The defendant went to Wilmington in the middle of the night and claimed to have traveled there in a car that no one saw and with people who could not be found or named. Although the defendant told law enforcement officers that he had purchased crack cocaine locally the night of the killing, he went to Wilmington late at night to purchase more drugs. Defendant stated that he traveled to Wilmington via Highway 117. The victim's wallet was found under a bridge on Highway 117. The victim's truck was found abandoned a mere seven blocks from the phone booth which defendant used to call his father on the night of the killing. When Mr. Herring's truck was discovered, there was an Olde English beer can in the bed of the truck. According to the clerk at the Scotchman, the defendant purchased an Olde English beer the night of the murder.

Finally, we reiterate that for purposes of ruling on a motion to dismiss, all of the evidence, whether competent or incompetent, must be considered by the trial court. *State v. McCullers*, 341 N.C. at 28-29, 460 S.E.2d at 168. Therefore, notwithstanding our holding in the next assignment of error, we find that the defendant's own statement to Agent Kennedy raises a reasonable inference of defendant's guilt. During the booking process, Agent Kennedy encouraged the defendant to "tell the truth" so that the "bad feeling in his stomach" would go away. The defendant responded, "Man, you know the position I'm in, I can't tell you about it." The defendant's response tends to indicate his knowledge of and participation in the killing of Thomas Herring.

When this evidence is viewed in the light most favorable to the State, including all reasonable inferences that may be drawn therefrom, we hold that it is sufficient to withstand defendant's motion to dismiss, as it clearly supports a reasonable inference that the defendant was the perpetrator of Thomas Herring's murder. Therefore, this assignment of error is overruled.

In his second assignment of error, the defendant contends that the trial court erred by denying his pretrial motion to suppress his 19 August 1992 statement to Agent Kennedy because it was elicited from defendant after he had invoked his right to remain silent. We agree.

On 19 August 1992, defendant was questioned by the agents investigating Thomas Herring's murder. The defendant was already in police custody on other charges. He was read his *Miranda* rights, and as on other occasions, the defendant waived his rights and talked with the officers about the events which led to his termination from Gold Banner. However, when informed that he was going to be charged with Herring's murder, the defendant twice denied any knowledge of the killing. When one of the agents indicated a willingness to stay and continue talking, the defendant stood up and said, "I got nothing to say." The officers immediately ceased the interrogation, charged the defendant with Thomas Herring's murder and turned him over to Agent Kennedy for booking.

During the booking process, however, Agent Kennedy began a conversation with the defendant which Kennedy testified at the suppression hearing was for the purpose of learning whether or not the defendant had killed Thomas Herring. Agent Kennedy encouraged the defendant to "tell the truth" so that the "bad feeling in his stomach" would go away. The defendant responded, "Man, you know the position I'm in, I can't tell you about it." This statement was elicited from defendant within fifteen minutes of the conclusion of the first interrogation. At no point during this conversation did Agent Kennedy readvise the defendant of his constitutional rights.

[2] The State first argues that the defendant's theory of inadmissibility was not presented to the trial court, that it was raised for the first time on this appeal, and therefore, this assignment of error is not properly before this Court.

During the pretrial suppression hearing, the defendant argued that he should have been readvised of his *Miranda* rights prior to any further interrogation by Agent Kennedy. Both the trial court and the State recognized such argument by the defendant. While not specifically argued by the defendant at the suppression hearing, it is implicit in the defendant's argument that Agent Kennedy would not have been required to readvise defendant of his rights unless the defendant had invoked his right to remain silent. Although the issue of defendant's invocation of his right to remain silent was not clearly and directly presented to the trial court, we conclude that the defendant's theory was implicitly presented to the trial court and thus is properly before this Court.

[3] The State next contends that the defendant's argument is without merit because the defendant never actually invoked his right to

silence. We disagree. It is clear that a criminal defendant who has been advised of and has waived his rights has the right to terminate a custodial interrogation by indicating "in any manner, [and] at any time prior to or during questioning, that he wishes to remain silent." *Miranda v. Arizona*, 384 U.S. 436, 473-74, 16 L. Ed. 2d 694, 723 (1966).

In the case *sub judice*, the defendant's conduct, in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," were clear indicators that he wished to terminate the interrogation and invoke his right to remain silent. The defendant similarly had indicated a desire to end two prior interrogations by standing up. Thus, the defendant's conduct ending the 19 August 1992 interrogation was consistent with his conduct ending the two previous interrogations. Finally, the fact that the interrogating officers immediately ceased the interrogation and took the defendant to be "booked" makes it equally clear that the officers understood that the defendant was terminating the interrogation and invoking his right to remain silent.

[4] The fact that the defendant indicated his desire to remain silent does not, however, end our inquiry. The vast majority of federal and state courts have held that the *Miranda* opinion does not create a *per se* prohibition against further interrogation once a defendant has invoked his right to remain silent.[1] In *Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313 (1975), the United States Supreme Court discussed the circumstances under which an interrogation may be resumed after the accused has elected to terminate questioning pursuant to his rights under *Miranda*. The Supreme Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Mosley*, 423 U.S. at 104, 46 L. Ed. 2d at 321.

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1. The present case differs slightly from a situation in which a defendant has invoked his right to counsel. In *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), the United States Supreme Court emphasized its belief that "additional safeguards are necessary when the accused asks for counsel," and adopted a *per se* rule that once an accused has invoked his right to have counsel present, the police may not resume the interrogation until counsel has been made available or until the accused himself initiates further communications with the police and waives his right to counsel. *Id.* at 484-85, 68 L. Ed. 2d at 386. This Court has followed the *per se* rule of *Edwards*. *See State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992). We note that the defendant in this case at no time invoked and does not contend to have invoked his right to counsel. Further, we decline to expand *Edwards* to those situations where the defendant has only invoked his right to remain silent.

In *Mosley*, the defendant was arrested in the early afternoon and taken to police headquarters for questioning. After being fully advised of his *Miranda* rights, Mosley read and signed the department's constitutional rights notification certificate. The arresting officer began questioning Mosley and when Mosley replied that he did not want to answer any questions, the officer immediately ended the interrogation. Mosley was taken back to his cell. Shortly after 6:00 p.m., another police officer took Mosley from his cell to an office in the homicide bureau for questioning about a murder which occurred in another robbery. Before being questioned regarding the second crime, Mosley was informed of his *Miranda* rights and again signed the notification of rights form. Mosley ultimately confessed and was convicted of the murder. The *Mosley* Court held that the statement obtained from the defendant after the second interrogation was admissible at his trial because the police had "scrupulously honored" Mosley's right to cut off questioning. *Id.* at 104, 46 L. Ed. 2d at 321. In so holding, the Court noted that the police immediately ceased the initial interrogation after Mosley invoked his right to remain silent, that the police attempted no further interrogation until a significant period of time had elapsed, that fresh *Miranda* warnings were issued and that the police limited the second interrogation to a different crime. *Id.* at 104-05, 46 L. Ed. 2d at 321-22.

Many of the substantive features leading the Court in *Mosley* to determine that the defendant's rights were "scrupulously honored" are lacking in the present case. The agents questioning the defendant in the initial interview immediately ceased their interrogation after defendant invoked his right to remain silent. This, however, is where any similarity to *Mosley* ends. Less than fifteen minutes after the initial interrogation ended, Agent Kennedy began a conversation with defendant for the purpose of learning whether or not the defendant had killed Thomas Herring. Contrary to the State's assertions, there is no evidence in the record that the defendant initiated this conversation. Based on his own testimony, it is clear that Agent Kennedy initiated the conversation and that the conversation concerned the same subject matter as that which was discussed during the immediately preceding interrogation. Finally, Agent Kennedy did not readvise the defendant of his *Miranda* rights prior to initiating this conversation.

The defendant interprets *Mosley* to establish a *per se* prohibition against reinterrogation unless the detainee has been readvised of his *Miranda* rights. While some courts have established just such a requirement, the majority of decisions addressing the issue do not

interpret *Mosley* to insist on fresh *Miranda* warnings as a prerequisite to reinterrogation. A *per se* rule requiring mandatory rewarning places form over substance and does not adequately emphasize the substantive conduct required by law enforcement officers after an accused has asserted his right to remain silent. Therefore, whether or not the defendant has been readvised of his *Miranda* rights prior to the resumption of questioning, is but one factor to consider when determining if the defendant's rights were "scrupulously honored."

Based on the facts in the case *sub judice*, we cannot say that the defendant's right to cut off questioning was "scrupulously honored." Where, as in the instant case, the police cease the interrogation but then resume the interrogation within fifteen minutes of the time the defendant invoked his right to remain silent, the second interrogation involves the same subject matter as the earlier interrogation, and the defendant is not readvised of his *Miranda* rights, the defendant's Fifth Amendment right to remain silent is violated. Because we cannot say that the admission of defendant's statement was harmless beyond a reasonable doubt, the defendant is entitled to a new trial on all the convictions.

In light of our holding on the second issue, we do not find it necessary to address the defendant's remaining assignments of error. Accordingly, for error in admitting the challenged statement, this case is remanded to the Superior Court, Pender County, for a new trial.

NEW TRIAL.

ASSOCIATED MECHANICAL CONTRACTORS, INC., PETITIONER v. HARRY E. PAYNE, JR., COMMISSIONER OF LABOR OF NORTH CAROLINA, RESPONDENT

No. 141PA95

(Filed 8 March 1996)

1. Appeal and Error § 340 (NCI4th)— assignments of error—specificity

Although petitioner could have written its assignments of error in a more efficient manner, the assignments of error were sufficiently specific to meet appellate standards. N.C. R. App. P. 10(c)(1).

Am Jur 2d, Appeallate Review §§ 544, 578.

2. Administrative Law and Procedure § 65 (NCI4th)— final agency decision—misinterpretation of statutory term—de novo review

Where petitioner asserts that the Safety and Health Review Board misinterpreted the statutory term "willful" in deciding that petitioner committed a willful violation of OSHA trenching regulations, the proper standard of review for this question is *de novo*, and the reviewing court, pursuant to N.C.G.S. § 150B-2(4), may substitute its judgment for that of the Review Board if the Board's decision was affected by an error of law. N.C.G.S. § 150B-51(b)(4).

Am Jur 2d, Administrative Law §§ 582, 620.

3. Administrative Law and Procedure § 67 (NCI4th)— final agency decision—sufficiency of evidence—whole record test

Where petitioner asserts that the evidence was insufficient to support the Safety and Health Review Board's conclusion that a safety/training violation was "serious," the proper standard of review for this question is the "whole record test" to determine the sufficiency of the evidence. N.C.G.S. § 150B-51(b)(5).

Am Jur 2d, Administrative Law §§ 585, 619.

4. Administrative Law and Procedure § 65 (NCI4th)— test for willfulness—standard for review—improper terminology—proper review

A superior court judge conducted a proper review in concluding that the Safety and Health Review Board used the correct test for willfulness in deciding that petitioner committed a willful violation of OSHA trenching regulations, and the fact that the judge called his review the whole record test rather than *de novo* would not have changed the outcome since he did not find an error of law.

Am Jur 2d, Administrative Law §§ 614, 619.

5. Labor and Employment § 33 (NCI4th)— trenching violation—test for willfulness

The Safety and Health Review Board did not commit an error of law in defining willfulness when evaluating petitioner's OSHA trenching violation where the Review Board stated that a violation is willful if "there is shown a deliberate purpose not to dis-

charge some duty necessary to the safety of persons, or property of another," and the Review Board also determined that in order to show willfulness, there must be (1) employer knowledge of a violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) commission of the violation voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 114.

6. Labor and Employment § 34 (NCI4th)— safety/training violation—test for seriousness

Petitioner's safety/training violation in failing to instruct its employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment was "serious" if there existed (1) the possibility of an accident resulting from petitioner's failure to instruct and (2) the substantial probability that death or serious physical harm could result if an accident did occur.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 83.

7. Labor and Employment § 34 (NCI4th)— trench cave-in—serious safety/training violation—supporting evidence in whole record

The record as a whole supported the Safety and Health Review Board's determination that petitioner's safety/training violation was "serious" where an employee of petitioner was killed in a trench cave-in; the walls of the trench had not been properly sloped; there was testimony that some training had taken place, but the testimony of both the employees and management shows the inadequacy of the training; supervisors of the trench site admitted that the training provided was insufficient; the evidence shows that without adequate training, employees were unable to recognize the dangerousness of the situation and the instability of the soil; and there was evidence that a cave-in in a trench of the dimensions here involved was substantially certain to cause death or serious physical harm to whoever was in the trench.

Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 72, 83, 113.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 118 N.C. App. 54, 453 S.E.2d 545 (1995), reversing and remanding an order entered by Stephens (Donald W.), J., on 5 November 1993 in Superior Court, Wake County, which affirmed a decision of the North Carolina Safety and Health Review Board. Heard in the Supreme Court 12 February 1996.

Patton Boggs, L.L.P., by Richard Conner and Lawrence J. Gillen, for petitioner-appellee.

Michael F. Easley, Attorney General, by Ralph F. Haskell, Special Deputy Attorney General and Ranee S. Sandy, Assistant Attorney General, for respondent-appellant.

FRYE, Justice.

In the instant case, we must determine whether the Court of Appeals was correct in its evaluation of an order of the superior court sitting in review of a final decision of an administrative agency. We conclude that the Court of Appeals erred in its review of the superior court's order and that the superior court did not err in affirming the final decision of the North Carolina Safety and Health Review Board (Review Board).

In the spring of 1990, petitioner, Associated Mechanical Contractors, Inc. (AMC), was constructing a wastewater treatment plant in Albemarle, North Carolina. As part of the construction process, AMC excavated trenches for the purpose of laying pipe. On 24 April 1990, one of these trenches collapsed, causing the death of a worker, Eddie Lemmons. This trench was twelve to thirteen feet deep, five feet wide at the bottom, nine feet wide at the top, and eighty feet long. It ran through a shale formation called ardulite, which is layered and very unstable when lying at an angle. The crew had been digging in this material for two days when the accident occurred.

The evidence presented before the Occupational Safety and Health Administration (OSHA) hearing examiner disclosed that the walls of the trench which collapsed were not sloped at the thirty-five- to forty-five-degree angle required by OSHA trenching standards but had only the natural and inadvertent sloping which occurred from digging the trench. On the afternoon of the accident, Eddie Lemmons was working in the trench when the east wall caved in. The cave-in occurred in two stages. First, the bottom of the east wall collapsed

into the trench and pinned Lemmons against the west wall. Second, the top of the east wall fell, covering Lemmons with approximately a dump truck load of soil and rock. Workers on the site uncovered Lemmons in approximately eleven minutes. A local emergency medical unit pronounced Lemmons dead at the site.

Both parties presented expert witnesses who disagreed about whether the work crew should have recognized the potential danger that the unsloped trench presented.

Following the accident, OSHA conducted an on-site investigation and cited AMC for three violations of OSHA standards. Two of the three violations, specifically AMC's safety/training violation and trenching violation, are at issue on this appeal. The safety/training violation was designated as "willful-serious" "in that respondent failed to instruct its employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment." The trenching violation, also designated as "willful-serious," was for "failure to slope, shore, sheet, brace, or otherwise support sides of trenches in soft or unstable material."

AMC objected to the citations and requested a hearing pursuant to N.C.G.S. § 95-137(b)(4). The contractor denied the safety/training violation and objected to the classification of the trenching violation as "willful-serious." On 31 October 1991 and 10 January 1992, Hearing Examiner Richard Koch conducted a hearing pursuant to N.C.G.S. § 95-135(i). He reduced the safety/training violation from "willful-serious" to "serious" and affirmed the trenching violation as "willful-serious." AMC petitioned the Review Board. The Review Board, in its 29 January 1993 order, affirmed the violations as determined by the hearing examiner. AMC then appealed the Review Board's order, pursuant to N.C.G.S. § 150B-43, to Wake County Superior Court. Judge Donald Stephens, after reviewing the entire record, affirmed the final agency decision of the Review Board in a final order dated 3 November 1993 and filed 5 November 1993. AMC then appealed to the Court of Appeals. The Court of Appeals reversed the superior court order and remanded to that court for further remand to the Review Board. The Court of Appeals ordered that the safety/training violation be reclassified as "nonserious" and the trenching violation as "serious." On 1 June 1995, this Court allowed the Commissioner's petition for discretionary review.

[1] The Commissioner first argues that the Court of Appeals erred by not dismissing AMC's appeal because the assignments of error were

not specific enough to meet appellate standards. The Commissioner contends that AMC's appeal should be dismissed for failure to comply with North Carolina Rule of Appellate Procedure 10(c)(1), which states in pertinent part that

> assignments of error upon which an appeal is predicated shall be stated . . . in short form without argument . . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

N.C. R. App. P. 10(c)(1) (1996). The Court of Appeals concluded that the assignments of error lacked specificity but did not dismiss the appeal. *Associated Mechanical Contractors v. Payne*, 118 N.C. App. 54, 59, 453 S.E.2d 545, 548 (1995).

In its appeal to the Court of Appeals, AMC made the following assignments of error:

> 1.1 the Superior Court committed error of law in its Final Order concerning the trench excavation citation by conducting a whole record test instead of *de novo* review and affirming a Final Agency Decision which affirmed an error of law by the hearing examiner; and
>
> 1.2 the Superior Court erred in its Final Order concerning the safety/training citation by not taking into account the significant contradictory evidence, and evidence from which conflicting inferences could be drawn, when determining the substantiality of evidence supporting the Final Agency Decision.

While recognizing that AMC could have written its assignments of error in a more efficient manner, we disagree with the Commissioner and Court of Appeals that the assignments, as written, are so lacking in specificity that they cannot be answered. Accordingly, we reject the Commissioner's first argument.

We next consider AMC's contention that the Court of Appeals used an improper standard when reviewing the order of the superior court. The Court of Appeals stated that "because of the lack of specificity of the assignments of error, . . . we read them as only raising the

issue of whether the order of the Review Board is supported by the findings of fact." As we concluded earlier, petitioner's assignments of error did not lack specificity; therefore, we must now determine the correct standard of review for considering petitioner's assignments of error.

N.C.G.S. § 95-141 governs judicial review of the Review Board's administrative decisions. The statute indicates that the courts shall conduct judicial review in accordance with Article 4 of the State Administrative Procedure Act. N.C.G.S. ch. 150B, art. 4 (1995). The proper standard of review under Article 4 is as follows:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b). In this case, we are concerned with two of the standards listed: (4) to determine whether the Review Board's decision concerning the trenching violation was affected by an error of law, and (5) to determine whether the Review Board's decision concerning the safety/training violation was supported by substantial admissible evidence in view of the entire record.

[2] " 'When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review.' " *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981) (quoting *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981)). AMC asserts that the Review Board misinterpreted the statutory term "willful" in deciding

that the contractor committed a willful violation of OSHA trenching regulations. The proper standard of review for this question is, therefore, *de novo*. The reviewing court, pursuant to N.C.G.S. § 150B-2(4), may substitute its judgment for that of the Review Board if the Board's decision was affected by an error of law.

[3] In contrast, AMC asserts that, as to the safety/training violation, the superior court erred by affirming the Review Board's final decision because it was unsupported by substantial evidence in view of the entire record. AMC is not contending that the Review Board's interpretation of the statutory term "serious" is incorrect. Rather, AMC claims that the evidence was insufficient to support the classification of "serious." The proper standard of review for this question is the "whole record test" to determine the sufficiency of the evidence:

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Wake Co. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

Thus, the proper standards of review are (1) *de novo* to determine whether the Review Board used the proper legal test for the statutory term "willful" as applied to the trenching violation, and (2) the whole record test to determine the sufficiency of the evidence to support the conclusion that the safety/training violation was "serious." These are the standards of review that should have been employed by the superior court sitting in appellate review of the final decision of the Review Board.

[4] In the instant case, petitioner's assignment of error 1.1 asked the Court of Appeals to determine whether the superior court, with reference to the trenching violation, erred in conducting a whole record test rather than a *de novo* review. The Court of Appeals did not

answer this question. Accordingly, we must determine whether Judge Stephens used the correct standard of review.

AMC is correct that *de novo* is the proper standard of review for this question and is further correct that Judge Stephens conducted a whole record test. As previously stated, a *de novo* review in this context means that, pursuant to N.C.G.S. § 150B-2(4), the reviewing court can substitute its judgment for that of the Review Board *only if the Board has committed an error of law.* Since Judge Stephens specifically concluded that the Review Board did not commit an error of law, there was no need for him to substitute his judgment for that of the Board. He concurred with the Review Board's final decision by concluding that the correct legal test for willfulness had been applied. After carefully reviewing Judge Stephens' order, we conclude that Judge Stephens conducted a proper review, regardless of the terminology, and that the fact that he called his review the whole record test instead of *de novo* would not have changed the outcome, since he did not find an error of law.

[5] We next consider whether Judge Stephens correctly concluded that the Review Board used the proper definition of willfulness when evaluating AMC's trenching violation. This Court has said that a violation is deemed willful when there is shown " *'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.'* " *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929)) (emphasis added); *see also O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 631, 353 S.E.2d 869, 871 (1987). As stated by the Court of Appeals in a recent case:

> [A] violation of an OSHA standard is willful if the employer deliberately violates the standard. A deliberate violation is one *"done voluntarily with either an intentional disregard of or plain indifference" to the requirements of the standard.* Mark A. Rothstein, *Occupational Safety and Health Law* 315 at 343 (3d ed. 1990). An employer's knowledge of the standard and its violation, although not alone sufficient to establish willfulness, is one of the most effective methods of showing the employer's intentional disregard of or plain indifference to the standards.

Brooks v. Ansco & Assoc., 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (1994) (citations omitted) (emphasis added).

The Review Board, in its discussion of AMC's violations, stated that a violation is willful if "there is shown a deliberate purpose not to discharge some duty necessary to the safety of persons, or property of another." The Review Board also determined that in order to show willfulness, there must be (1) employer knowledge of a violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act. The definition and elements used by the Review Board are consistent with the definitions of willfulness expounded by this Court and quoted above. Accordingly, we conclude that Judge Stephens did not err in concluding that the Review Board did not commit an error of law in defining willfulness when evaluating AMC's trenching violation.

[6] We next consider petitioner's assignment of error 1.2, which concerns AMC's safety/training violation. AMC asked the Court of Appeals to determine whether the superior court erred in concluding that there was sufficient evidence, when reviewing the record as a whole, to support the safety/training violation's classification as "serious." As with petitioner's assignment of error 1.1, the Court of Appeals, because it found the assignments of error insufficient, did not make this determination. As stated above, the standard of review for this question is the whole record test.

Pursuant to statute,

> [a] "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

N.C.G.S. § 95-127(18) (1993). This Court has interpreted this statute to mean that a violation is serious if there is "(1) the *possibility* of an accident resulting from the conditions at the work site and (2) the *substantial probability* that death or serious physical harm could result if an accident did occur." *Brooks*, 303 N.C. at 584, 281 S.E.2d at 31. The safety/training violation at issue consisted of AMC's failure to instruct its employees in the avoidance and recognition of unsafe

conditions and the regulations applicable to the work environment necessary to control or eliminate hazards or exposure to injury. Applying the *Brooks* standard, AMC's safety/training violation was "serious" if there existed (1) the *possibility* of an accident resulting from AMC's failure to instruct and (2) the *substantial probability* that death or serious physical harm could result if an accident did occur.

[7] We now turn to Judge Stephens' order to determine whether he erred in concluding that there was sufficient evidence when examining the record as a whole to support the Review Board's classification of the violation as serious. Judge Stephens concluded that "[t]here was sufficient competent evidence of record to support the Board's findings of fact" and that these findings supported proper conclusions of law. After examining the evidence in the record, including contradictory evidence, we conclude that Judge Stephens did not err.

The Review Board was presented with a multitude of evidence that showed that AMC failed to properly train its employees, that this failure created the possibility of an accident, and that there was a substantial probability that the accident would result in death or serious physical injury.

The following evidence was presented through employees of AMC who testified at the hearing: (1) several workmen could not articulate the proper trenching procedures, had little knowledge of OSHA standards, and stated that they had received little training on the proper procedure and soil types; (2) although the walls on all the trenches at this site were vertical, employees were not taught to use the variety of safety techniques that would prevent cave-in; (3) employees who were aware of the dangerousness of the trenching condition and the instability of the soil on this project asked supervisors about it and were ignored; (4) the employee who was responsible for conducting safety meetings had not been trained on how to conduct them; and (5) after a cave-in on a previous project, AMC became safety-conscious for a couple days but then went back to "normal operating" and abandoned trenching safety procedures such as sloping and shoring.

There was also evidence presented through Carl Collins, an OSHA Safety Compliance Officer for the North Carolina Department of Labor, who investigated the accident. Collins found that the company had attempted some training, but the personnel on site were not knowledgeable enough to conduct the training. Although AMC had

been on this site for months before the accident, corporate safety personnel had not inspected the site for compliance, and their first visit was after the accident. AMC's safety manual was created before the accident but not given to laborers, pipe fitters, or the pipe fitters' foreman on this project prior to the date of the accident. Collins found that two employees had not been trained at all and that others had not been trained to properly recognize and avoid hazardous conditions. Collins concluded that the cave-in occurred because of (1) the lack of sloping of the trench, (2) the lack of training of the workers on the site, (3) the lack of proper equipment, and (4) the inadequate supervision of the trenching operation. He further concluded that AMC had a "willful disregard" for the OSHA training standard, and that AMC did not make a "substantial effort" to train its employees as required.

The Review Board adopted the following summarized findings of the Hearing Officer to support the classification of the safety/training violation as "serious":

> 15. AMC had not trained either of the two employees who worked in the trench which caved in.
>
> 16. The project supervisor, pipe foreman and project manager admitted to Collins that the training was insufficient.
>
> 17. AMC furnished and maintained a safety manual at the project site that included a section on excavation, sloping, and shoring.
>
> 18. AMC instructed its employees that they could refuse to enter a trench they considered unsafe, but employees felt that refusing to enter a trench might jeopardize their employment.
>
> 19. AMC held safety meetings with a frequency of once a week to once every two weeks and these safety meetings included topics and training pertaining to trenching operation.
>
> 20. AMC's pipe foreman and project supervisor conducted the safety meetings which were of or related to trenching.
>
> 22. At the point of the accident, the trench which collapsed and killed worker Eddie Lemmons was 12.5 feet deep, 5 feet wide at the bottom, 9 feet wide at the top and approximately 80 feet long.

29. Approximately one month prior to the accident, one of AMC's employees was covered up to his knees when a portion of a trench he was working in caved in. This occurred on the same project, and AMC became safety conscious for a while but returned to the practice of making trenches with vertical walls.

30. The project supervisor was aware of this cave-in as well as a potential cave-in on the project.

32. AMC's employees had informed the management that they thought the trenches were unsafe prior to the cave-in that killed Lemmons.

39. The hazardous condition of the unstable soil was observable to a reasonable and prudent employer discharging the duty of safety to its employees.

Applying the whole record test, the reviewing court, in determining the substantiality of evidence supporting the Board's decision, must take into account evidence which both supports and detracts from that decision. As the Court stated in *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 923 (1979), "[t]he 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence."

We conclude, based on the whole record, that the Review Board's decision that the safety/training violation was "serious" has a rational basis in the evidence. The evidence shows that the lack of proper training created the possibility of an accident and that, if an accident did occur, there was a substantial probability of death or serious physical harm. Although there was testimony that some training had taken place, the testimony of both the employees and the management shows the inadequacy of the training. In fact, the supervisors at the site admitted that the training provided was insufficient. Without adequate training, employees were unable to recognize the dangerousness of the situation and the instability of the soil. A cave-in in a trench of the dimensions here involved was substantially certain to cause death or serious physical harm to whoever was in the trench. Accordingly, we conclude that Judge Stephens was correct in concluding that there was sufficient evidence to support a safety/training violation classification of "serious."

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand to that court for further remand to the superior court for reinstatement of Judge Stephens' order.

REVERSED AND REMANDED.

CROWELL CONSTRUCTORS, INC., PETITIONER v. STATE OF NORTH CAROLINA, EX REL., WILLIAM W. COBEY, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, RESPONDENT

No. 178PA94

(Filed 8 March 1996)

1. Costs § 37 (NCI4th)— attorney fees—action by State for mining violations—test for substantial justification

For purposes of N.C.G.S. § 6-19.1, which permits the prevailing party (other than the State) to recover attorney fees in a civil action brought by the State if the agency acted without "substantial justification," substantial justification should be construed as justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person. This standard should not be so strictly interpreted as to require the agency to demonstrate the infallibility of each suit it initiates, but should not be so loosely interpreted as to require the agency to demonstrate only that the suit is not frivolous. An outcome determinative test based upon which party prevailed at trial was erroneously applied in this case; when deciding whether a State agency has pressed a claim without substantial justification, the law and facts known to, or reasonably believed by, the State agency at the time the claim is pressed must be evaluated.

Am Jur 2d, Costs § 64.

2. Costs § 37 (NCI4th)— attorney fees—action by State for mining violations—substantially justified

Crowell Constructors was not entitled to recover attorney fees under N.C.G.S. § 6-19.1 where Crowell purchased land which had previously been operated as a sand and gravel pit; poor quality sand had been stockpiled on the property 20 years previously above the original surface soil; the stockpiled sand lay fallow and varying densities of natural vegetation began to grow on top of the sand; Crowell began to remove the stockpiled sand after it

purchased the property; the State pursued penalties for mining without a permit; the superior court found that there was no evidence to support a finding that Crowell's activities constituted a violation of the Mining Act; and Crowell petitioned for attorney fees on the grounds that the State was without substantial justification in pressing its claim. Under the Mining Act, N.C.G.S. § 74-49(7)(a), mining means the breaking of the surface soil in order to facilitate or accomplish the extraction of minerals, with sand being defined as a mineral. DEHNR was justified to a degree that could satisfy a reasonable person in asserting its position or opinion that the top portion of the sand over a period of twenty-four years had become the surface soil when a black band of second soil growth existed upon which scrub pines and other types of vegetation grew.

Am Jur 2d, Costs § 64.

On respondent's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 114 N.C. App. 75, 440 S.E.2d 848 (1994), modifying and affirming judgment awarding attorney's fees for petitioner entered by Brewer, J., in Superior Court, Cumberland County, 12 August 1992. Heard in the Supreme Court 16 March 1995.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Anne Mayo Evans, for petitioner-appellee.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn and Kathryn Jones Cooper, Special Deputy Attorneys General, and David W. Berry, Associate Attorney General, for respondent-appellant.

LAKE, Justice.

This case comes before this Court for the second time and currently presents an issue of first impression involving an award of attorney's fees pursuant to N.C.G.S. § 6-19.1.

In 1979, Crowell Constructors, Inc. ("Crowell") purchased a thirty-six-acre tract of land in Moore County. This land had previously been operated as a sand and gravel pit by Cumberland Sand & Gravel Company. Gravel and sand were brought to the property and separated by a washing and screening process. As a by-product of this process, poor-quality sand was produced and stockpiled on the prop-

erty. When Cumberland Sand & Gravel ceased its operations in 1960, it left behind some 150 tons of this poor-quality sand in stockpiles as high as twenty-five feet; some of these stockpiles were conical in shape, and some were ridge-like. All of the sand was stockpiled above the original surface soil.

From 1960 until the early 1980s, the stockpiled sand lay fallow. During these intervening years, varying densities of natural vegetation, including scrub pine trees, began to grow on top of the sand. After Crowell purchased the property, it began to remove the stockpiled sand from the site with the aid of front-end loaders and trucks. On 8 February 1984, the North Carolina Department of Natural Resources and Community Development, the predecessor of the Department of Environment, Health and Natural Resources ("DEHNR"), *see* N.C.G.S. §§ 143B-279.1 to -279.5 (1993), sent Crowell a notice of violation informing the company that by removing the sand, it was mining without a permit in violation of The Mining Act of 1971. *See* N.C.G.S. §§ 74-46 to -68 (1985) (amended 1994); *see also* N.C.G.S. §§ 143B-290 to -293 (1993). After communications with Crowell's legal counsel, DEHNR determined that, due to the short-term nature of the removal, Crowell would not be required to apply for a mining permit, although it was DEHNR's opinion that Crowell's activities technically met the definition of "mining." DEHNR determined that Crowell's activities would be better regulated by the Sedimentation Pollution Control Act of 1973. Accordingly, Crowell submitted a soil erosion and sediment control plan, which DEHNR later approved.

Nearly two years later, DEHNR inspected the site again and observed that Crowell was still removing the stockpiled sand and that Crowell had not properly implemented its soil erosion and sediment control plan. On 14 February 1986, DEHNR sent Crowell a second notice of violation informing Crowell that it was subject to a civil penalty of up to $5,000 for each day of illegal mining. After conferring with DEHNR concerning the violations, Crowell agreed to immediately cease removing the stockpiled sand and to apply for a mining permit. On 19 February 1986 and 14 March 1986, DEHNR inspected the site again and found Crowell still removing the sand. In response, DEHNR assessed a $10,000 civil penalty against Crowell for mining on two occasions without a permit in violation of The Mining Act.

Crowell contested the penalty assessment and petitioned for agency hearing before an Administrative Law Judge ("ALJ"). The

ALJ's recommended decision concluded that while Crowell had violated The Mining Act, the civil penalty was arbitrary and capricious as the penalty amount was based upon unpublished guidelines, and the penalty was reduced to $2,000. The North Carolina Mining Commission next heard the matter and, on 16 September 1988, issued its final agency decision which modified the ALJ's recommended decision by reinstating the original $10,000 penalty assessment. Crowell filed a petition for judicial review of the agency decision in Superior Court, Cumberland County. On 15 August 1989, the superior court reversed the Mining Commission on the ground there was no competent, material or substantial evidence in the record to support a finding that Crowell's activities constituted mining in violation of The Mining Act.

DEHNR appealed to the Court of Appeals which, in a divided opinion, reversed the superior court and, in reinstating the $10,000 penalty, held that the record demonstrated substantial evidence to support a finding that Crowell's activities constituted mining within the meaning of The Mining Act and that the Commission's decision was neither arbitrary nor capricious. *Crowell Constructors v. State ex rel. Cobey*, 99 N.C. App. 431, 393 S.E.2d 312 (1990) (hereinafter *Crowell I*). Crowell appealed to this Court based on the dissent filed, and, because DEHNR had failed to include a written notice of appeal in the record pursuant to Rule 3(a) and Rule 9(a)(1)(i) of the North Carolina Rules of Appellate Procedure, this Court held the Court of Appeals lacked jurisdiction over the appeal and thus vacated the decision in *Crowell I* and remanded for dismissal of the appeal. *Crowell Constructors v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991) (per curiam).

Thereafter, Crowell filed a petition for attorney's fees pursuant to N.C.G.S. § 6-19.1 in Superior Court, Cumberland County, on the basis that DEHNR acted "without substantial justification" in pressing its claim against Crowell. On 12 August 1992, the superior court entered judgment granting Crowell's petition for reimbursement of attorney's fees in the amount of $16,529.20. DEHNR appealed the award to the Court of Appeals and relied upon the *Crowell I* opinion, which held that substantial evidence showed Crowell's activities constituted mining, as a basis for the position that DEHNR was not "without substantial justification" in assessing the civil penalty against Crowell. However, the Court of Appeals noted that since this Court had vacated *Crowell I*, the opinion was a nullity and void. Thus, the Court of Appeals held that the agency, in relying upon a nullity, failed to

carry its burden of showing "substantial justification." The Court of Appeals further held that the trial court had concluded that there was no competent or substantial evidence that Crowell violated The Mining Act, and since DEHNR had failed to properly preserve an appeal from that conclusion, this was the law of the case and binding on appeal. *Crowell Constructors v. State ex rel. Cobey*, 114 N.C. App. 75, 440 S.E.2d 848 (1994) (hereinafter *Crowell II*). The Court of Appeals then modified the amount of attorney's fees allowed to $14,619.20 and affirmed the superior court. *Id.* at 80-81, 440 S.E.2d at 851.

This Court granted DEHNR's petition for writ of supersedeas and discretionary review on 5 May 1994. On 16 June 1994, this Court also allowed DEHNR's motion to amend the record on appeal of *Crowell II* to include the record on appeal of *Crowell I*. We therefore note at the outset of our review that when the Court of Appeals reached its latest decision in this matter, it only had before it the record on appeal of *Crowell II*, which essentially contains the procedural history of this case. The underlying facts of this dispute are contained in the record on appeal of *Crowell I*. Thus, in reaching our decision on this appeal, this Court has been able to rely upon facts that were unavailable to the panel of the Court of Appeals which last considered this matter.

[1] The essential issue presented here for resolution is whether DEHNR was "without substantial justification" under N.C.G.S. § 6-19.1 in pressing its claim that Crowell was engaged in mining without a permit in violation of The Mining Act. We conclude that, based upon the records of *Crowell I* and *Crowell II*, we cannot say that DEHNR was "without substantial justification" in its determination that Crowell was illegally mining. Crowell is, therefore, not entitled to reimbursement of its reasonable attorney's fees pursuant to N.C.G.S. § 6-19.1. Accordingly, we reverse the Court of Appeals.

This Court has not previously considered the meaning of "substantial justification" pursuant to N.C.G.S. § 6-19.1. This statute provides in pertinent part:

> In any civil action . . . brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 . . . unless the prevailing party is the State, the court may, in its discretion, allow the *prevailing party* to recover reasonable attorney's fees . . . 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 circumtances* that would make the award of attorney's fees unjust.

N.C.G.S. § 6-19.1 (1986) (emphasis added). Thus, in order for the trial court to exercise its discretion and award reasonable attorney's fees to a party contesting State action in one of the prescribed ways, the prevailing party must not be the State, the trial court must find the State agency acted "without substantial justification" in pressing its claim and the trial court must find no special circumstances exist which make an award of attorney's fees unjust. In resolving issues concerning statutory construction, this Court's first task is to ascertain legislative intent in order to assure that both the purpose and the intent of the legislature are carried out. *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). The words "substantial justification" are undefined within the statute. Therefore, absent any ambiguity in the language employed in the statute, these words must be accorded their plain and definite meanings. *State ex rel. Util. Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977).

The Court of Appeals, in construing "substantial justification," has followed the United States Supreme Court's construction of similar language under the Equal Access to Justice Act ("EAJA") in *Pierce v. Underwood*, 487 U.S. 552, 101 L. Ed. 2d 490 (1988). *See Crowell II*, 114 N.C. App. at 79-80, 440 S.E.2d at 851. We concur with the Court of Appeals in this regard.

The EAJA contains an attorney's fees provision almost identical to our statute, N.C.G.S. § 6-19.1, and provides in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a *prevailing party* other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was *substantially justified* or that *special circumstances* make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994) (emphasis added). In *Pierce*, the United States Supreme Court noted that the word "substantial" was subject to two different connotations:

> On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large,"—as, for example, in the statement "he won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main,"—as, for example, in the statement "what he said was substantially true."

Pierce, 487 U.S. at 564, 101 L. Ed. 2d at 504 (citations omitted). Of these two connotations, the Court held that the connotation most naturally conveyed by the EAJA was " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Id.* at 565, 101 L. Ed. 2d at 504.

We agree and conclude that for purposes of N.C.G.S. § 6-19.1, "substantial justification" should be construed as " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565, 101 L. Ed. 2d at 504. Our legislature, in enacting N.C.G.S. § 6-19.1 in order that a prevailing party may recover its reasonable attorney's fees when a State agency has pressed a claim against that party "without substantial justification," obviously sought to curb unwarranted, ill-supported suits initiated by State agencies. In order to further the legislature's purpose of reining in wanton, unfounded litigation, the State's action, for purposes of N.C.G.S. § 6-19.1, is measured by the phrase "substantial justification." This standard should not be so strictly interpreted as to require the agency to demonstrate the infallibility of each suit it initiates. Similarly, this standard should not be so loosely interpreted as to require the agency to demonstrate only that the suit is not frivolous, for "that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce*, 487 U.S. at 566, 101 L. Ed. 2d at 505. Rather, we adopt a middle-ground objective standard to require the agency to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency.

DEHNR argues that the Court of Appeals, rather than viewing the circumstances and information known by DEHNR at the time it assessed the civil penalty against Crowell to decide whether DEHNR was "without substantial justification," applied instead what amounted to an outcome determinative test based upon which party prevailed in the trial court below. According to DEHNR, this shift in focus disregards prior precedent set by the Court of Appeals in

S.E.T.A. UNC-CH v. Huffines, 107 N.C. App. 440, 420 S.E.2d 674 (1992). While we agree with DEHNR that an outcome determinative test was, in essence, applied in this case, in fairness to the Court of Appeals, we recognize that this shift from the Court of Appeals' prior precedent and previous holding in *Crowell I* primarily resulted from the peculiar procedural history of this case, as contained in the limited record on appeal before the Court of Appeals. In light of the expanded record and additional facts available to this Court, we necessarily reach a different result.

S.E.T.A. involved an award of attorney's fees pursuant to N.C.G.S. § 6-19.2 which has the same criteria for awarding attorney's fees as N.C.G.S. § 6-19.1, but applies instead to a State agency's refusal to permit public access to public records. The Court of Appeals stated:

> The test for substantial justification is not whether this [c]ourt ultimately upheld respondent's reasons for resisting public disclosure of the requested documents as correct but, rather, whether respondent's reluctance to disclose was " 'justified to a degree that could satisfy a reasonable person' " under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure.

S.E.T.A., 107 N.C. App. at 443-44, 420 S.E.2d at 676 (citations omitted). Thus, pursuant to *S.E.T.A.*, in deciding whether a State agency has pressed a claim against a party "without substantial justification," the law and facts known to, or reasonably believed by, the State agency at the time the claim is pressed must be evaluated.

When the test or focus of whether an agency's position or action is "without substantial justification" is directed to the end result in the trial court, the standard becomes more a question of which party prevailed at that point and less a question of whether the agency's position, at the inception of the controversy, was justified to a degree that could satisfy a reasonable person. Indeed, the Supreme Court in *Pierce* rejected such an outcome determinative test under the EAJA in stating:

> Obviously, the fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified. Conceivably, the Government could take a position that is not substantially justified, yet win; even more

likely, it could take a position that is substantially justified, yet lose.

Pierce, 487 U.S. at 569, 101 L. Ed. 2d at 507.

[2] In the instant case, the crux of DEHNR's claim against Crowell, and hence the threshold measure of its justification, hinged upon whether Crowell's activities met, or could reasonably be considered to have met, one of the three definitions of "mining" contained within The Mining Act. Under the first of these definitions, "mining" means "[t]he breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter." N.C.G.S. § 74-49(7)(a). Under N.C.G.S. § 74-49(6), "sand" is defined as a "mineral." Thus, in order to determine whether DEHNR was or was not "without substantial justification" for assessing the $10,000 civil penalty against Crowell for illegal mining, consideration must be given to whether the agency, at the time the claim was pressed, had a basis, satisfactory to a reasonable person, to conclude that Crowell had broken through the "surface soil" in order to remove the sand.

Based upon our review and analysis of the records before us in *Crowell I* and *Crowell II*, we conclude under the above standard that DEHNR, at the time it assessed the civil penalty against Crowell, was not "without substantial justification" in asserting that Crowell, by removing sand that had been stockpiled for some twenty-four years, was technically engaged in mining without a permit in violation of The Mining Act. The records reveal that the stockpiles of sand were as high as twenty-five feet in 1960 when Cumberland Sand & Gravel ceased operations. Twenty-four years later in 1984, the sand was covered to varying degrees with vegetation, including pine trees. Photographs indicate a brown or dark band of material, indicative of a second growth of soil, at the top of the sand, upon which scrub pines and other vegetation grew. In order to remove the sand, Crowell cleared the vegetation on the newer "surface soil" from the top of the sand and cut into and extracted the sand with a front-end loader. Under these circumstances, we conclude DEHNR was justified to a degree that could satisfy a reasonable person in asserting its position or opinion that the top portion of the sand over a period of twenty-four years had become the "surface soil," when a black band of second soil growth existed, upon which scrub pines and other types of vegetation grew. Because we hold that DEHNR was not "without substantial justification" in its initial position, Crowell is not entitled to recover attorney's fees under N.C.G.S. § 6-19.1.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Cumberland County, for proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. BEN FITZGERALD RANSOME

No. 57A95

(Filed 8 March 1996)

Evidence and Witnesses §§ 168, 959 (NCI4th)— uncommunicated threats—state of mind—admissibility to show self-defense—exclusion as prejudicial error

In a prosecution for two first-degree murders in which defendant presented evidence that he shot and killed the victims in self-defense, the trial court erred by excluding hearsay statements made by the victims to two witnesses, but not communicated to defendant, that the victims wanted to fight defendant and intended to "get" him, since the statements were admissible under the state of mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3), and were relevant to support defendant's contention that the victims were the aggressors in the fatal confrontation with defendant. This error was not cured by the admission of defendant's testimony about threats one victim made to him during a confrontation with both victims the afternoon prior to the killings since the fact that the victims had made a series of threats against defendant, both communicated and uncommunicated, had a stronger tendency to show that they were the aggressors in the fatal confrontation than the fact that one victim threatened defendant solely during the heat of another confrontation.

Am Jur 2d, Evidence §§ 556-558.

Justice WHICHARD dissenting.

Justices PARKER and LAKE join in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of life imprisonment entered by Brown

(Frank R.), J., at the 15 August 1994 Criminal Session of Superior Court, Edgecombe County, upon jury verdicts of guilty of first-degree murder in a case in which defendant was tried capitally. Heard in the Supreme Court 11 October 1995.

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

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for defendant-appellant.

ORR, Justice.

Defendant was tried for two counts of first-degree murder on the theory of premeditation and deliberation for the shooting deaths of Marcel and Kelvin Johnson. The State and the defendant presented conflicting evidence about the shooting incident. Defendant's evidence supported the conclusion that Marcel and Kelvin Johnson were the aggressors in the fatal confrontation and that defendant acted in self-defense. Because defendant presented sufficient evidence that he acted in self-defense, the trial court gave a self-defense instruction to the jury.

The State's evidence tended to show that on 29 November 1993, while leaving the home of his friend Quashie Whitley, defendant was approached by Marcel and Kelvin Johnson, who were brothers. Defendant and the Johnson brothers then engaged in a verbal confrontation because the Johnson brothers believed defendant was interested in Kelvin Johnson's girlfriend. During the confrontation, each of the Johnson brothers tried to punch defendant, and defendant pulled out a small knife. Defendant ultimately got into his car and drove away.

Later that evening, Marcel and Kelvin Johnson and a friend, Antonio Jones, drove to Hardee's, where Kelvin Johnson's girlfriend, Asya McNair, worked. Jones stayed in the car while Kelvin and Marcel Johnson went inside. Defendant approached the car and looked in the car window. Defendant said, "my fault" to Jones, then entered the restaurant. Jones followed defendant into the restaurant, where he saw defendant standing inside near the door with a pistol.

Defendant was speaking to McNair and Marcel and Kelvin Johnson, who were sitting in booths. Kelvin Johnson said, "I'm sorry Fitzgerald, I didn't mean to do it." Marcel Johnson said, "Why you got to pull out a gun, my brother don't have one. If ya'll gonna fight ya'll

fight straight up. You don't got to use no gun." Jones told defendant to put the gun away, but defendant pointed the gun at Jones and said, "You ain't got nothing to do with it." The restaurant manager came into the dining area and said, "Would you quiet down or leave 'cause you're running my customers out." Defendant turned around with the gun in his hand and said, "You ain't got nothing to do with this, stay out of it, somebody might shoot you." The manager went back behind the counter.

Then Marcel Johnson stood up and began walking toward the door, and defendant shot him. Marcel Johnson was several feet from the side door, slumped over, when defendant fired a second shot into his back. Kelvin Johnson stood and tried to run past defendant toward the counter. Defendant shot Kelvin in the chest and then fired another shot. Defendant then walked to his car and drove away.

Several witnesses testified that neither of the deceased brothers had a weapon and that neither made movements or threats directed toward defendant.

Defendant testified that he went to Hardee's to tell McNair to tell Marcel and Kelvin Johnson that he did not want to have any more problems. He said he took the gun because he felt he needed protection. He testified that at Hardee's, he fired at Marcel Johnson after Marcel jumped up and pulled out a gun. He said that Kelvin Johnson then started rushing as if he was going to tackle defendant, and defendant shot Kelvin. Defendant testified that he did not have any intention of killing anybody.

Several witnesses testified that Marcel Johnson had a reputation as a "fighting person" and as a "violent person." Several witnesses also testified to defendant's character for being law-abiding, truthful, and peaceful.

We have reviewed the assignments of error brought forward by defendant and have found reversible error in the trial court's exclusion of testimony of Tonya Sumlin and Mark Johnson regarding threats against defendant that the deceased brothers communicated to them, but not to defendant. The excluded testimony supported defendant's self-defense theory and should have been admitted.

Defendant gave written notice before the trial began of his intent to offer the testimony in question under Rules 804(b)(5) and 803 of

the North Carolina Rules of Evidence. When defendant offered the testimony at trial, the court ruled that it could not be admitted, but allowed the testimony to be placed in the record.

Out of the presence of the jury, Tonya Sumlin testified that four weeks before the shooting, Marcel Johnson phoned her. She described the substance of the conversation as follows:

> Marcel had asked me did Fitzgerald [defendant] like Asya [Kelvin Johnson's girlfriend] and I told him I didn't know. He said somebody had told him that Fitzgerald was trying to talk to Asya and he said he was going to tell Cal [Kelvin Johnson] and Cal was going to jump on him because they had been wanting to fight him.

Also out of the presence of the jury, Mark Johnson testified that two hours before the shooting, he was with Marcel and Kelvin Johnson in a parking lot where they saw defendant. When asked what Kelvin Johnson said, Mark Johnson replied:

> He said, "There's Fitzgerald. I'm going to get Fitzgerald because he's trying to talk to my girl." I told him, I said, "Leave it alone, it ain't worth it." That's when Marcel said, "No, that's not right, he trying to talk to his girl. That's his girlfriend, we going to get him." I said, "Ya'll leave him alone, it ain't worth it." So we sat there, and kept waiting for the guy to come. That's when he started the car and drove over there by his car and they was staring at him. I kept telling them, just to leave it alone. So we went back over there and he left. Fitzgerald left.

Both defendant and the State acknowledge the common law rule that in homicide cases involving evidence of self-defense, under certain circumstances, uncommunicated threats made by a deceased against a defendant are admissible in evidence. *See State v. Goode*, 249 N.C. 632, 107 S.E.2d 70 (1959); *State v. Minton*, 228 N.C. 15, 44 S.E.2d 346 (1947).

> Generally speaking, uncommunicated threats are not admissible in homicide cases. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. The statement of the rule in *S. v. Baldwin*, 155 N.C. 494, 495, 71 S.E. 212[, 213 (1911)], . . . is applicable here: "It is now generally recognized that in trials for homicide uncommunicated threats are admissible . . . where they tend to throw light on the occurrence and aid the jury to a correct inter-

> pretation of the same, and there is testimony *ultra* sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation," . . . .

State v. Minton, 228 N.C. at 17, 44 S.E.2d at 348 (alterations in original) (citations omitted).

Both *State v. Minton* and *State v. Goode* were decided before the enactment of the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, which became effective on 1 July 1984. However, the reasoning underlying this common law rule supports the admission into evidence of the statements in question under the North Carolina Rules of Evidence.

Rule 802 provides that "[h]earsay is not admissible except as provided by statute or by these rules." " '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. R. Evid. 801(c). Defendant does not claim that the statements by the Johnson brothers were not hearsay. Because the threats were not communicated to defendant, they were not offered to show their effect on defendant. Instead, they were offered to prove the truth of the matter asserted, that Marcel and Kelvin Johnson wanted to fight defendant and intended to "get" defendant. Therefore, the threats are hearsay.

Rule 803(3) of the North Carolina Rules of Evidence, entitled "Then Existing Mental, Emotional, or Physical Condition," provides what is often referred to as the "state of mind" exception to the hearsay rule. It provides that the hearsay rule does not exclude

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In interpreting Rule 803(3), we have held that the rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act. *State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988).

The State argues that the hearsay statements would have been inadmissible under the common law rule because they were general

statements rather than specific threats. Although the Johnson brothers did not specifically threaten to kill defendant, their statements can only be considered threats to the physical safety of defendant. Marcel Johnson told Tonya Sumlin that Kelvin was going to "jump on" defendant and that he and Kelvin had been wanting to fight defendant. Kelvin Johnson said to Mark Johnson, "I am going to get [defendant] because he is trying to talk to my girl," and Kelvin Johnson said to Mark Johnson, "we going to get him." In applying Rule 803(3), we have held that 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. *E.g., State v. Meekins*, 326 N.C. 689, 695-96, 392 S.E.2d 346, 349-50 (1990). We conclude that the hearsay statements constitute statements of the Johnson brothers' then-existing states of mind as expressions of their intentions to be aggressors in a confrontation with defendant.

Rule 402 of the North Carolina Rules of Evidence provides that "[e]vidence which is not relevant is not admissible." " '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. R. Evid. 401. In this case, defendant relied on the theory of self-defense and presented sufficient evidence, other than the testimony in question, in support of the theory to warrant a jury instruction on self-defense. One element of self-defense is that defendant was not the aggressor in the confrontation. *State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992). Thus, whether Marcel and Kelvin Johnson, rather than defendant, were the aggressors in the fatal confrontation is a fact that is of consequence to the determination of the action. Evidence that Marcel and Kelvin Johnson wanted to fight defendant and intended to "get" defendant tends to make the existence of the fact that the Johnson brothers were the aggressors in the fatal confrontation more probable than it would be without the evidence. Therefore, the testimony about the threats made by Marcel and Kelvin Johnson was relevant. Because the testimony in question was admissible under Rule 803(3) and was relevant, the trial court erred in excluding it.

The State argues that if the exclusion of the statements in question was error, defendant was not prejudiced because evidence of similar statements by Marcel Johnson was admitted.

The State correctly notes that the exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or when the evidence is thereafter admitted, or when the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence. *See State v. Edmondson*, 283 N.C. 533, 538-39, 196 S.E.2d 505, 508 (1973). However, the "similar statements" cited by the State do not meet the standard enunciated in *Edmondson*. In this argument, the State relies on defendant's testimony about statements Marcel Johnson made to him during the incident in front of the Whitley home the afternoon of the killing. Defendant testified as follows:

> When I pulled out my knife, Kelvin started backing off a little bit. That's when Marcel kept coming over. He was walking up on me even though I had a knife. I kept telling him I wasn't going to have no trouble over no girl. He was like, "No, I don't want to hear it. You a punk. I been wanting you anyway. I ain't never really liked you anyway." He was jumping at me.
>
> . . . .
>
> Well, Marcel—when he started walking towards me, I was backing up. I still had the knife, but I was still backing up. So, after about two or three minutes of that, him walking up on me, calling me a punk, this and that, he started walking back towards his car kind of fast. So, I didn't know if he was going to get a gun or what, so I hurried up and got in my car. By the time I got in my car he ran back over and kicked my door and said, "I'm going to get you."

These communicated threats by Marcel Johnson were of lesser import than, and failed to give defendant the full benefit of, the fact defendant sought to establish—that the deceased brothers had made a series of threats against defendant, both communicated and uncommunicated. The admitted, communicated threats occurred during a confrontation between defendant and the Johnson brothers. The excluded, uncommunicated threats told to Tonya Sumlin were made four weeks before the shooting; the excluded, uncommunicated threats told to Mark Johnson, two hours before the shooting. The excluded, uncommunicated threats tended to show the deceased brothers' intention to be the aggressors at a future time, while the admitted, communicated threats only showed Marcel Johnson's behavior during the course of a particular confrontation. The fact that the Johnson brothers had made a series of threats against defendant,

both communicated and uncommunicated, has a stronger tendency to show that they were the aggressors in the fatal confrontation, and therefore to support defendant's plea of self-defense, than the fact that Marcel Johnson threatened defendant solely during the heat of a confrontation. We conclude that there is a reasonable possibility that if the trial court had not excluded the uncommunicated threats, a different result would have been reached at trial. Therefore, the erroneous exclusion of the uncommunicated threats prejudiced defendant. N.C.G.S. § 15A-1443(a) (1988).

For the foregoing reasons, defendant is entitled to a new trial.

NEW TRIAL.

Justice WHICHARD dissenting.

Assuming *arguendo* that the uncommunicated threats were admissible, I nonetheless disagree with the majority's holding that their exclusion prejudiced defendant to such an extent that he is entitled to a new trial.

It is the rule in this jurisdiction that not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered. *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 514 (1981). To warrant a new trial, an appellant must show not only error, but also that "there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 624 (1988); *accord* N.C.G.S. § 15A-1443(a) (1988). A new trial should not be granted where evidence improperly excluded would not, if included, have changed the outcome of the trial. "[W]hether the [trial court's] actions amount to reversible error is a question to be considered in light of all of the circumstances, and the burden is on the defendant to show prejudice." *State v. Heath*, 77 N.C. App. 264, 271, 335 S.E.2d 350, 355 (1985), *rev'd on other grounds*, 316 N.C. 337, 341 S.E.2d 565 (1986).

Here, the State's evidence tended to show that defendant entered the Hardee's restaurant waving a pistol at Marcel and Kelvin Johnson, who were sitting in booths. Marcel Johnson and Antonio Jones both told defendant to put the pistol away. The restaurant manager also came over and attempted to calm defendant. Despite their combined efforts, defendant continued to brandish the weapon and behave in a threatening manner. When Marcel Johnson stood up and walked toward the door, defendant shot him. After Marcel had fallen, defend-

ant fired a second, fatal shot at his back. Kelvin Johnson tried to run, but defendant shot him in the chest and then fired another shot. The paramedics and police officers who went to the crime scene found no weapons on either victim. All of the State's witnesses testified that the only person they had seen with a weapon was defendant and that the victims appeared to have done nothing to provoke defendant at the time of the shootings. Other than defendant's own self-serving testimony, no evidence was presented to the contrary.

Additionally, evidence substantively similar to that excluded was introduced through defendant's own testimony. As the majority notes, defendant testified about statements Marcel Johnson made to him in front of the Whitley home the afternoon of the murders. Defendant testified that Marcel Johnson said: "You a punk. I been wanting you anyway. I ain't never really liked you anyway." Defendant also testified that when he retreated to his car, Johnson ran over, kicked the door of the car, and said, "I'm going to get you."

As the majority concedes, the exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence. *State v. Edmondson*, 283 N.C. 533, 538-39, 196 S.E.2d 505, 508 (1973). Defendant's own testimony about the threats Marcel communicated to him the very afternoon of the murders gave defendant the full benefit of presenting evidence to the jury supporting his claim that Marcel was the aggressor. Thus, because defendant, through his own testimony, received the full benefit of evidence that Marcel was the aggressor, the exclusion of the testimony of Tonya Sumlin and Mark Johnson concerning Marcel Johnson's uncommunicated threats was not prejudicial.

In view of the totality of the evidence presented, I cannot conclude that defendant carried his burden of proving that had the error in question not been committed, a different result would have been reached at trial. I therefore respectfully dissent.

Justices PARKER and LAKE join in this dissenting opinion.

THE DEMOCRATIC PARTY OF GUILFORD COUNTY AND ELLEN EMERSON, INDIVIDUALLY AND AS CHAIRPERSON OF THE DEMOCRATIC PARTY OF GUILFORD COUNTY, AND AFRICA S. HAKEEM v. GUILFORD COUNTY BOARD OF ELECTIONS, B. J. PEARCE, JAMES PFAFF AND ROBERT NEWSOME, III; AND GEORGE GILBERT, SUPERVISOR OF THE GUILFORD COUNTY BOARD OF ELECTIONS

No. 116A95

(Filed 8 March 1996)

Injunctions § 43 (NCI4th)— election hours—temporary restraining order extending—expiration of order—damages

In an action arising from the 1990 general election in which plaintiffs had obtained a temporary restraining order keeping the polls in Guilford County open past the scheduled closing time, the Court of Appeals correctly affirmed the denial of a motion to vacate the temporary restraining order but incorrectly remanded for a hearing on damages. An *ex parte* temporary restraining order expires by its terms and cannot exceed ten days duration; plaintiffs here sought no other relief and the order expired, at the latest, ten days after it was entered. Defendants' motion to vacate the order and recover damages and plaintiffs' voluntary dismissal, both thirty days after the order, both came too late. There was no order then in existence. In the absence of statutory or common law, damages will not issue when parties in an election setting seek damages for improperly entered restraining orders in the absence of bad faith by the parties obtaining the orders, of which there is no record here. However, courts should exercise great caution before intervening in ongoing elections.

Am Jur 2d, Injunctions §§ 326, 327.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order. 19 ALR3d 403.

Appeal by defendants 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. 633, 453 S.E.2d 243 (1995), affirming an order entered by Freeman, J., on 13 May 1991 in Superior Court, Guilford County, which denied defendants' motion to vacate a temporary restraining order entered by John, J., on 6 November 1990 in Superior Court, Guilford County, and remanding for a new hearing on the issue of damages. On 27 July

1995, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 11 December 1995.

Smith Helms Mulliss & Moore, L.L.P., by McNeill Smith and Andrew S. Chamberlin, for plaintiff-appellees.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, J. Daniel Bishop, and Lawrence C. Moore, III, for defendant-appellants.

WHICHARD, Justice.

North Carolina held a general election on 6 November 1990. Defendant Guilford County Board of Elections (Board) had published notices informing voters that the polls would be open from 6:30 a.m. until 7:30 p.m. Throughout the morning, defendant George Gilbert, the Guilford County Supervisor of Elections, received several complaints concerning the length of lines at several polling places in the county. Gilbert personally visited five precincts and, over the course of the day, observed a general decline in the length of the polling lines.

At approximately 11:00 a.m., plaintiff Ellen Emerson, chair of the plaintiff Guilford County Democratic Party, filed a formal written complaint with the Board requesting an extension of the voting hours until 8:30 p.m. In her request, Emerson listed twenty-one specific complaints. Among other things, she alleged that there were several broken machines and that in several precincts, the use of only one registration book was causing very long lines for voters to sign in to vote. The Board took no immediate action on Emerson's request. At approximately 3:00 p.m., Emerson filed a second written complaint seeking an extension of the voting hours until midnight.

The Board, consisting of two Republicans and one Democrat, met in the late afternoon. Sometime between 4:00 and 5:00 p.m., Gilbert reported the complaints to the Board and informed it that steps had been taken in an effort to resolve the problems. At approximately 5:00 p.m., Board member Robert Newsome, III, made a motion to extend the voting hours until 8:30 p.m. His motion failed for lack of a second. Neither Gilbert nor the Board formally responded to plaintiffs' written complaints. Plaintiffs learned shortly after 5:00 p.m. that the Board would take no action on Emerson's written requests.

Shortly after 7:00 p.m., plaintiffs delivered to the home of then-Superior Court (now Court of Appeals) Judge Joseph R. John a written complaint and motion requesting a temporary restraining order and a preliminary injunction directing that the Board keep the polls open at all precincts until 10:00 p.m. and that paper ballots be provided to facilitate the process. Plaintiffs presented to Judge John numerous handwritten sworn affidavits concerning long lines and lack of duplicate voting books, which affidavits had been gathered after 5:00 p.m. when the Board last considered and took no action on plaintiffs' request. One affidavit indicated that hundreds of employees of Cone Mills Corporation had worked a twelve-hour shift that day from 7:00 a.m. to 7:00 p.m.

At about 7:25 p.m., Judge John signed a temporary restraining order[1] directing the Board to keep the polls open until 8:30 p.m. Judge John did not require plaintiffs to post a bond, and the temporary restraining order did not indicate why it was granted without notice to defendants. Judge John immediately telephoned the Board to inform it of his order. Through the efforts of Gilbert and his staff, most of the 107 precincts were contacted before 7:30 p.m. and instructed to remain open as Judge John had ordered. Between 391 and 431 potential voters arrived at the polling places after 7:30 p.m. and before 8:30 p.m; between 317 and 349 were allowed to vote. Although the Board heard several complaints about the extension of the voting time, all of the election results from Guilford County were eventually certified by the State Board of Elections.

On 6 December 1990, defendants filed a motion to vacate Judge John's temporary restraining order and a request for damages resulting from its issuance. Two and a half hours later, plaintiffs filed a notice of dismissal of their action without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Defendants' motion came on to be heard at the 4 February 1991 Civil Term of Superior Court, Guilford County. Defendants presented evidence that they were damaged in the amount of $12,593.12. The damages included overtime pay for poll workers, building maintenance workers, and the supervisor and assistant supervisor of elections, as well as the cost of conducting the hearings resulting from the complaints filed concerning the polls being open an additional hour.

1. The order perhaps should have been designated as a mandatory injunction rather than a temporary restraining order; if so, it expired by its own terms when the polls closed following the extended hours ordered. The parties and the courts below have treated it as a temporary restraining order, however, and we do so as well in order to respond to the parties' contentions as presented.

In an order entered 13 May 1991, Judge William H. Freeman denied defendants' motion. Judge Freeman made twenty-one findings of fact, consistent with the facts just recited. Based on these findings, he entered twelve conclusions of law: (1) that the Board did not abuse its discretion in denying plaintiffs' request; (2) that plaintiffs exhausted all of their effective administrative remedies available at that time and that any further attempts to exhaust administrative or other judicial remedies would have been futile; (3) that plaintiffs had legal standing to request equitable remedies and/or judicial review from the Superior Court, Guilford County; (4) that based on the information before plaintiffs at the time the complaint was filed, they had a reasonable basis for and acted in good faith in requesting equitable relief and/or judicial review from the Superior Court, Guilford County; (5) that based on the information before Judge John, he did not abuse his discretion in issuing the temporary restraining order and his actions were neither arbitrary nor capricious; (6) that Judge John had the jurisdiction and authority to review the actions of the Board, to issue the temporary restraining order, and to reverse the decision of the Board, and that under the circumstances the Board's denial of plaintiffs' requests was final agency action, and the Superior Court, Guilford County, was a proper court to hear plaintiffs' complaint seeking equitable relief; (7) that plaintiffs did not wrongfully restrain defendants; (8) that the voluntary dismissal filed by plaintiffs and/or the expiration of the temporary restraining order by its own terms in ten days mooted the issues as to the validity and dissolution of the temporary restraining order; (9) that neither the voluntary dismissal nor the expiration of the temporary restraining order mooted a review by Judge Freeman of the issue of whether plaintiffs wrongfully restrained defendants; (10) that the voluntary dismissal without prejudice filed by plaintiffs was not a *per se* admission of wrongful restraint that automatically entitled defendants to damages; (11) that the alleged damages claimed by defendants were part of their legal duty to supervise and conduct elections and are not recoverable from private citizens or groups; and (12) that awarding damages against private citizens or groups would impermissibly repress their constitutional rights to contest election improprieties and to vote.

Defendants appealed to the Court of Appeals, contending that Judge John's entry of the *ex parte* temporary restraining order was improper because the Board had validly exercised its discretion in declining plaintiffs' requests to keep open the polls, because there was no evidence of irreparable injury to plaintiffs, and because no

bond was issued. The Court of Appeals dismissed defendants' argument because defendants did not appeal from the temporary restraining order; the court determined that it therefore did not have jurisdiction to hear defendants' appeal. *Democratic Party of Guilford Co. v. Guilford Co. Bd. of Elections*, 117 N.C. App. 633, 638, 453 S.E.2d 243, 246-47 (1995). The court also dismissed defendants' argument that Judge Freeman should have vacated the temporary restraining order, determining that no temporary restraining order was in existence at the time Judge Freeman heard the motion. The court further dismissed defendants' contention that plaintiffs' voluntary dismissal of the temporary restraining order on 6 December 1990 constituted a *per se* admission of wrongful restraint. As plaintiffs had prevailed on the only issue raised in their complaint, the court reasoned that "it would be illogical to conclude that a later voluntary dismissal, which did nothing more than terminate the action, could somehow be construed as an acknowledgement that plaintiff was not entitled to the relief it had already won." *Id.* at 640, 453 S.E.2d at 248. Because Judge Freeman considered only the evidence before Judge John in determining whether defendants were entitled to damages, the Court of Appeals remanded the case to the trial court for an additional hearing to determine defendants' right to damages based on all the evidence. Judge (now Justice) Orr dissented, concluding that the question whether Judge John had authority to grant the temporary restraining order should have been reviewed; that Judge John lacked such authority; and that this lack of authority, and the failure to post a bond, constituted wrongful restraint *per se*. *Id.* at 642-43, 453 S.E.2d at 249-50 (Orr, J., dissenting).

We agree with the Court of Appeals that Judge Freeman properly refused to vacate the temporary restraining order because that order had already expired. Assuming *arguendo* that Judge John's entry of the order was improper, we address the question whether defendants are entitled to damages. Rule 65(e) of the North Carolina Rules of Civil Procedure provides that "[a]n order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction." N.C.G.S. § 1A-1, Rule 65(e) (1990). An *ex parte* temporary restraining order expires by its terms and cannot exceed ten days in duration. N.C.G.S. § 1A-1, Rule 65(b). Here, defendants moved to vacate the temporary restraining order on 6 December 1990, thirty days after it was entered. The order had

already expired by operation of law no later than 16 November 1990, however. Because there was no temporary restraining order in existence for Judge Freeman to vacate or dissolve, defendants could not recover damages in a dissolution order entered pursuant to Rule 65(e).

Defendants contend, as they contended in the Court of Appeals, that plaintiffs' voluntary dismissal of the action less than three hours after defendants had moved to vacate the temporary restraining order constituted a *per se* admission of wrongful restraint which automatically entitled defendants to damages. In so arguing, defendants rely principally upon the rule set forth in *M. Blatt Co. v. Southwell*, 259 N.C. 468, 130 S.E.2d 859 (1963). In *Blatt*, this Court noted that damages for wrongful restraint are not available unless and until the court finally decides that the plaintiff was not entitled to the restraining order or something occurs equivalent to such a decision. One such equivalent is the voluntary and unconditional dismissal of the proceedings by the plaintiff, " 'since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought.' " *Id.* at 472, 130 S.E.2d at 862 (quoting *Gubbins v. Delaney*, 64 Ind. App. 65, 71, 115 N.E. 340, 342 (1917).

Two Court of Appeals decisions have adopted the rule set forth in *Blatt*. In *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 338 S.E.2d 918, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986), and *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 311 S.E.2d 1 (1984), the Court of Appeals held that the parties' dismissals of their temporary restraining orders before their cases were decided on the merits could "only be construed as an acknowledgement by the [parties] that they could not establish their entitlement to the restraining order[s]." *Pinehurst*, 79 N.C. App. at 65, 338 S.E.2d at 926; *see Warner*, 66 N.C. App. at 78, 311 S.E.2d at 4. In holding that the plaintiffs in *Pinehurst* were entitled to damages under Rule 65, the Court of Appeals stated:

> Because the only purpose for obtaining the injunction was to have their rights fully adjudicated upon the trial of this case, defendants may not prevent the issue from being tried and then be heard to maintain that the judgment is erroneous because that issue has not been determined.

79 N.C. App. at 65, 338 S.E.2d at 926.

This case is distinguishable from *Pinehurst* and *Warner*. In those cases an underlying action remained to be adjudicated following the parties' dismissals of their temporary injunctions, whereas plaintiffs here sought no relief other than the temporary restraining order, and that order expired, at the latest, ten days after Judge John entered it. Plaintiffs' voluntary dismissal of that order, twenty days after it expired, was thus without legal effect. Defendants' motion to vacate the temporary restraining order could not be granted because it came too late, and for the same reason plaintiffs' voluntary dismissal was a legal nullity. Accordingly, defendants are not entitled to damages under either Rule 65 or the foregoing cases.

In the absence of statutory or common law controlling when parties in an election setting may seek damages for improperly entered temporary restraining orders, we hold that damages will not issue in such situations in the absence of evidence of bad faith on the part of the party or person(s) obtaining the orders. Having scrutinized the record, we find no evidence that plaintiffs here acted in bad faith. We therefore affirm the Court of Appeals opinion insofar as it affirmed the denial of the motion to vacate the temporary restraining order, and we reverse the Court of Appeals opinion insofar as it remanded for a further hearing on the issue of damages.

In so holding, we note for the guidance of trial courts considering similar questions in the future that conventional wisdom generally favors leaving matters regarding the conduct of ongoing elections to the legislature and the administrative agencies it establishes to serve that function. Courts should exercise great caution before intervening in ongoing elections and should recall the following from *Pickard v. Castillo*, 550 S.W.2d 107, 111 (Tex. Ct. App. 1977), quoted in Judge (now Justice) Orr's dissent in the Court of Appeals: "As to such matters, the law does not purport to substitute the judgment of a judge (or jury) for that of duly elected officials, and the judiciary should not, in the absence of a clear mandate, interfere in the conduct of an election after the election process has begun . . . ." 117 N.C. App. at 643, 453 S.E.2d at 250.

AFFIRMED IN PART, REVERSED IN PART.

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

STATE OF NORTH CAROLINA v. KENNETH JUNIOR FRENCH

No. 501A94

(Filed 8 March 1996)

1. Evidence and Witnesses § 1731 (NCI4th)— first-degree murder—videotape of crime scene—victims moved to show wounds—admissible

The trial court did not err in a first-degree murder prosecution in showing a crime scene videotape to the jury where the crime scene was Luigi's restaurant in Fayetteville and the videotape included several segments in which victims were moved from the positions in which they were found to show their wounds. The principles that govern the admissibility of photographs apply to motion pictures; the Evidence Code did not change the rule of *State v. Strickland*, 276 N.C. 253, and it is still valid. The State may introduce photographs although the defendant stipulates the cause of death and a videotape may be played for a jury even if it is gory and gruesome if it is relevant and is not used solely to arouse the passions of the jury.

Am Jur 2d, Evidence §§ 979, 981-985, 987.

2. Criminal Law § 491 (NCI4th)— first-degree murder—shooting spree in restaurant—jury view

The trial court did not err in a first-degree murder prosecution by granting the State's motion for a view of the restaurant where the murders occurred. Although defendant argued that there was voluminous evidence as to the layout of the premises and that the numerous police officers present to maintain order conveyed the message that Cumberland County wanted the defendant to be convicted, evidence does not have to be excluded because there is other evidence of the matter to be proved and it is no more than speculation as to what the jury believed from seeing forty law enforcement officers at the scene. The trial judge's noted reason for allowing the view (to permit the jurors to have an improved understanding of the space in which the incidents occurred) was valid.

Am Jur 2d, Trial §§ 258 et seq.

3. Evidence and Witnesses § 945 (NCI4th)— murder—testimony of bystanders—reactions of people at the scene—chain of events

The trial court did not err in a first-degree murder prosecution arising from multiple shootings in a restaurant in admitting the testimony of six witnesses who were present and who testified as to what they observed. Although defendant argues that none of the testimony was relevant and that it was unduly prejudicial, the reactions of people at the scene were so intertwined with the crimes that they formed an integral and natural part of the account of the crimes. The testimony was necessary to complete the story of the crimes for the jury.

Am Jur 2d, Evidence § 564; Witnesses §§ 1003, 1012, 1014, 1020.

4. Evidence and Witnesses § 3127 (NCI4th)— first-degree murder—third-party statement to witness—third party looked down before shot—corroborative

The trial court did not err in a prosecution which arose from a series of shootings in a restaurant by admitting testimony from Bennie Williams about a statement made by Patrick Kidd where Mr. Kidd testified that he and his father got under the table in their booth when the shooting started; that the gunman almost kneeled to look under their table; that Mr. Kidd looked him in the face and then lowered his head; that he heard a gunshot and felt his father jerk; and that the person who had done the shooting had stuck the gun under the table and pulled the trigger. The testimony of Mr. Williams corroborated Mr. Kidd's testimony and, although Mr. Kidd may not have seen defendant shoot his father, he could conclude that defendant had done so from what he saw and heard at the time.

Am Jur 2d, Witnesses §§ 1003, 1012, 1014, 1020.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Brewer, J., at the 14 February 1994 Special Criminal Session of Superior Court, New Hanover County, upon jury verdicts of first-degree murder. The defendant's motion to bypass the Court of Appeals as to the additional judgments was allowed 14 November 1994. Heard in the Supreme Court 14 September 1995.

The defendant was indicted on four counts of first-degree murder, eight counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of discharging a firearm into an occupied building. The case was moved from Cumberland County to New Hanover County for trial.

The evidence showed that shortly before 10:00 p.m. on 6 August 1993, the defendant, after drinking heavily and attending a party with friends, drove his pickup truck to Luigi's, a restaurant in Fayetteville. Armed with at least one shotgun and a .22-caliber rifle, the defendant shot at cars in the parking lot and into the building as he made his way inside. Once inside, the defendant shot and killed the owners of the restaurant, Pete and Ethel Parrous, and two customers, Wesley Cover and James Kidd. He wounded at least eight others. Fayetteville police officer William Simons eventually subdued the defendant by shooting him several times.

The defendant testified that he had no recollection of shooting anyone at Luigi's and no explanation for why he had done so.

The jury found the defendant guilty of four charges of first-degree murder, three counts of assault with a deadly weapon with intent to kill inflicting serious injury, four counts of assault with a deadly weapon inflicting serious injury, one count of misdemeanor assault with a deadly weapon, and one count of discharging a firearm into an occupied building. At the sentencing proceeding, the jury could not agree as to whether to impose the death penalty. The defendant was sentenced to four consecutive life sentences on the murder charges and to the presumptive terms for each of the other crimes, to be served consecutively.

The defendant appealed.

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

James R. Parish for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the showing of a crime scene videotape to the jury. The videotape lasted approximately twenty minutes. The defendant objected to showing the last ninety-three seconds.

Specifically, the defendant objected to the following: (1) a seventeen-second segment that showed someone pulling Wesley Cover onto his side to show the wounds to his shoulder and back of his ear and then rolling him over onto his stomach; (2) a twenty-six-second segment that showed James Kidd in several positions that did not represent the position in which he was found and showed him at one point with his shirt removed to reveal the wounds on his back; (3) a twenty-three-second segment that graphically displayed the destruction of Pete Parrous's face and depicted the body in a position other than that in which he was found; and (4) a twenty-four-second segment that showed someone holding open the wound to the back of Ethel Parrous's ear, as well as a close-up of her face.

The defendant says that he stipulated to the cause of death, and there was plenary evidence as to how these individuals were shot and killed. He says the only effect of the showing of this videotape was to inflame the jury. He contends its showing was more prejudicial than probative, and it should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 403.

The State may introduce photographs into evidence although the defendant stipulates the cause of death. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). The principles that govern the admissibility of photographs apply to motion pictures as well. *State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970). *Strickland* was decided before the enactment of the Evidence Code, Chapter 8C of the General Statutes. The Evidence Code did not change the rule of *Strickland* and it is still valid. The videotape was used in this case to illustrate the testimony of an agent of the State Bureau of Investigation as to what he saw when he was at the crime scene, and as substantive evidence to prove premeditation and deliberation. *See State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 336 (1993). A videotape may be played for a jury even if it is gory and gruesome if it is relevant and is not used solely to arouse the passions of the jury. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). The videotape was competent evidence to prove the matters for which it was introduced. It was apparently shown only once. We cannot hold the court abused its discretion under Rule 403 in allowing the introduction of this evidence.

This assignment of error is overruled.

[2] The defendant next assigns error to the granting of the State's motion for a view of the restaurant. The defendant contends that voluminous evidence was introduced as to the layout of the premises. He says a view of it could not have added anything to the jury's knowledge of the crime scene but would only prejudice the defendant. He also contends that allowing the view was prejudicial error because there were at least forty police officers at the scene to maintain order and to direct traffic. This, says the defendant, gave the jury, which was composed of residents of New Hanover County, the idea that the residents of Cumberland County were anxious for the defendant to be convicted.

N.C.G.S. § 15A-1229 provides that a judge may within his discretion permit a jury view. *State v. Simpson*, 327 N.C. 178, 393 S.E.2d 771 (1990). Judge Brewer noted that his primary reason for allowing the jury view was "to permit the [jurors] to have an improved understanding of the size of, the dimensions of, and the configuration of the various portions of the restaurant so that they would have a better sense of exactly in what type of space these incidents occurred." This is a valid reason for allowing a jury view.

Evidence does not have to be excluded because there is other evidence of the matter to be proved. It is no more than speculation as to what the jury believed from seeing forty law enforcement officers at the scene. We cannot hold the court abused its discretion by allowing the view. *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992).

This assignment of error is overruled.

[3] The defendant next assigns error to the admission of testimony of six witnesses who were present during the incident, and who testified to what they observed. The defendant argues that none of the testimony was relevant and that it was unduly prejudicial.

Kerry Wheelehan testified that after she had left the restaurant and before the shooting ended, someone ran to her and shouted, "Where is my baby?" William Wheelehan was allowed to testify that he and his wife went to the cook and "told him with no exaggeration that he had saved our lives by telling us that [the defendant] was coming in the back door." Sgt. Jeffrey Wheeler was permitted to testify that his wife asked him where their baby was and that when he told her the baby was still inside, she became hysterical. Willie McCormick, a cook who was the first person who was shot, testified

that when he regained consciousness, he began praying. Patrick Kidd testified that he was with his father, who was shot, and that his father's last words were, "I love you, Patrick." Bennie Williams, an emergency medical technician who came to the scene after the shooting, was allowed to testify that he found a part of a jaw a few inches from a body.

The testimony of the six witnesses as to the reaction of people at the scene described part of the chain of events surrounding the crimes. The reactions were so intertwined with the crimes that they formed an integral and natural part of the account of the crimes; the testimony was necessary to complete the story of the crimes for the jury. *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990).

This assignment of error is overruled.

[4] In his final assignment of error, the defendant contends Bennie Williams was allowed to testify to a statement by Patrick Kidd that did not corroborate Mr. Kidd's testimony. Patrick Kidd testified that when the shooting started, he and his father got under the table in the booth in which they were sitting. The following colloquy then occurred:

Q. The gunman got down, so to speak, on his knees to look at you and your father?

A. Almost. Basically, yes.

Q. Sir?

A. Basically in this position.

Q. Is that the point in time you are looking him in the face?

A. Yes.

Q. All right. Now, tell the jury what happened then.

A. Um, I was just staring at him. He was staring at me for a few seconds. And I lowered my head.

Q. And then what happened?

A. Then I heard a gunshot go off.

Q. Sir?

A. I heard a gunshot go off a few seconds later.

Q. Did you feel anything when that gunshot went off?

A. I felt my father jerk forward slightly and I heard some air escape from his lips.

Mr. Kidd then testified that he heard a second shot.

Bennie Williams testified that "[t]he gentleman told me that the person who had done the shooting stuck the gun under the table and pulled the trigger."

The defendant argues that Mr. Kidd testified that he "lowered [his] head" and thus could not have seen the defendant "pull[] the trigger." He says Mr. Williams's testimony was substantial new evidence of a premeditated and deliberate murder presented in the guise of corroborating testimony. He argues that it was prejudicial error to admit it.

The testimony of Mr. Williams as to what Mr. Kidd told him corroborated Mr. Kidd's testimony that the defendant shot his father. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Although Mr. Kidd may not have seen the defendant shoot his father, he could conclude that the defendant had done so from what he saw and heard at the time. The statement Mr. Williams said Mr. Kidd made to him is consistent with Mr. Kidd's testimony. The two statements were simply two ways of describing one event. Mr. Williams's testimony as to what Mr. Kidd told him was properly admitted as corroborating testimony. *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988).

This assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. BENJAMIN ROMAN WILLIAMS

No. 285A95

(Filed 8 March 1996)

Homicide § 380 (NCI4th)— murder trial—self-defense instruction not required

A defendant on trial for first-degree murder was not entitled to an instruction on self-defense because defendant could not have subjectively believed it necessary to kill the victim in order to save himself from death or great bodily harm, and no such belief could have been objectively reasonable, where defendant testified that he fired his pistol three times into the air to scare a

group from Tarboro and make them retreat so he could leave the area during a second confrontation between a friend of defendant and the Tarboro group, that he did not know anyone had been shot until the next day, and that he never intended to shoot anyone; defendant himself was neither directly nor indirectly threatened by anyone during either of the two confrontations with the Tarboro group; and the victim was shot in the back while attempting to run from the scene. Defendant's contention that his possession of a pistol was a result of his fear from the shooting and leg amputation of his brother two weeks earlier and his belief that his brother's assailant might be after him was irrelevant where defendant's brother was shot in a different town, and there was no evidence that anyone from Tarboro was involved in the shooting of his brother.

Am Jur 2d, Homicide §§ 480, 498, 499, 514, 519-521.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

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 Brown (Frank R.), J., at the 12 December 1994 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 16 February 1996.

Michael F. Easley, Attorney General, by James Peeler Smith, Special Deputy Attorney General, for the State.

T. Perry Jenkins for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 31 May 1994 for the first-degree murder of Kenneth L. Freeman. The defendant was tried noncapitally, and the jury found the defendant guilty of first-degree murder on the theory of premeditation and deliberation. By judgment and commitment dated 13 December 1994, Judge Brown sentenced defendant to a term of life imprisonment.

The State's evidence tended to show that in April 1994, the defendant lived in Rocky Mount, North Carolina, with his mother, his

two brothers and his sister. One of defendant's brothers was in the hospital because he had been shot and his leg had been amputated. On 17 April 1994, defendant went to Tarboro, North Carolina, with a group of friends. Among those who went to Tarboro with the defendant were Barry Williams, Derrick Whitaker, Derrick Anderson and Jock Hargrove. The defendant had recently bought a pistol because he had heard that the person who shot his brother "was going to get him next." Defendant testified that unknown to him, Hargrove brought the pistol with him to Tarboro.

Shortly after the group arrived in Tarboro, Colon Booker, a local Tarboro man, and Whitaker began to argue. Booker flagged down a car in which William Staton, Donald Parker and the victim were riding. Booker told Staton that the group from Rocky Mount was going to jump him. Defendant testified that Booker then pulled up his shirt and reached for a pistol. One of the men in the car said, "shoot the one," which is street talk for a one-on-one, hand-to-hand fight. Defendant then testified that he told Booker that they had "no beef" with Booker. Defendant and his friends then left the area and drove to the home of Whitaker's uncle, Larry Foster.

Whitaker went into Foster's house while the others remained in the car. Whitaker told his uncle that Colon Booker had given him some trouble and that he wanted to go back and fight. Foster suggested that they go together and try to resolve the problem peacefully. Foster, Whitaker and the rest of the group from Rocky Mount returned to the scene of the altercation with Booker. When they returned, Whitaker again indicated that he wanted to fight. The defendant and the others got out of their cars. Whitaker approached William Staton, one of the men from Tarboro, as if ready to fight. Donald Parker and the victim then joined Staton to help defend him.

Parker testified that at this point the defendant, who was standing in front of defendant's car, drew a pistol from the waist of his pants and pointed it directly at Staton and said, "Brace yourself." The defendant fired the pistol as Parker, Staton and the victim tried to run away. Three shots were fired. The third shot struck the victim, causing him to fall. The victim got up and continued to run until collapsing a short distance later. Police arrived at the scene and called the rescue squad. The victim died in the ambulance on the way to the hospital. No weapon was found in the victim's possession.

Foster testified that he was standing near the defendant when the defendant fired the weapon. Foster stated that the defendant fired

toward the middle of the intersection where Staton, Parker and the victim were standing. Foster further testified that no one was bothering the defendant in any manner.

Dr. Lewis Levy, a pathologist at Nash General Hospital, performed an autopsy on the victim. The autopsy revealed that the victim died from a gunshot wound which caused him to bleed to death. The bullet entered the right side of the victim's back and travelled to the left front of his body, crossing the chest through the lungs and heart. The lack of residue around the wound indicated that the pistol was not fired at close range.

The defendant testified that during the first altercation, Booker pulled up his shirt and reached for a pistol, and that he heard one of the Tarboro men say, "shoot the one." Defendant stated that they then left the scene. When the defendant and his friends returned to the scene, Whitaker went over to Parker and asked why they wanted "to jump him." Staton then came over and asked several times, "What's up?" The defendant testified that he felt threatened because Staton reached at his belt as if he were reaching for a pistol. Defendant testified that he then pointed his pistol in the air and fired three shots to scare Staton and the others and make them back off. Defendant did not think anyone was hit by the shots. Defendant also indicated that Hargrove brought the pistol to Tarboro and that he took the pistol from Hargrove only after hearing someone say "shoot the one," because he believed weapons were about to be "pulled" on him and his friends. Other defense witnesses testified that the Tarboro men were "digging in their pants" as if they were going to pull out pistols.

In his sole assignment of error, the defendant contends that the trial court erred by refusing to instruct the jury on the theory of self-defense. The defendant specifically argues that the trial court erred because the evidence, when viewed in the light most favorable to him, clearly showed that his possession of a pistol was the result of his fear of bodily harm in view of the shooting and leg amputation of his brother two weeks earlier, and in view of the first altercation with the men from Tarboro in which defendant saw a pistol and heard someone say "shoot the one." Based on this evidence, defendant argues that the jury could have found it reasonable for the defendant to believe that deadly force was necessary to save himself and his friends.

It is well settled that perfect self-defense excuses a killing when at the time of the killing:

(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 the 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. Maynor, 331 N.C. 695, 699, 417 S.E.2d 453, 455 (1992) (quoting *State v. Bush*, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982)).

In the case *sub judice*, the defendant did not testify that he fired his weapon at the victim because he believed that deadly force was necessary to save himself from death or great bodily harm. Instead, the defendant testified that he fired his pistol three times into the air to scare Staton and the others and make them retreat so he could leave the area. The defendant further testified that he did not know anyone had been shot until the next day and maintains that he never actually intended to shoot anyone. The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

Furthermore, even if the defendant believed that deadly force was needed, such belief was not objectively reasonable as required by the second element of perfect self-defense. The facts show that the defendant himself was neither directly nor indirectly threatened by anyone during either of the two confrontations between Whitaker and the group from Tarboro. When the defendant shot the victim, the defendant was standing in front of his car, some distance from the altercation. Defendant testified that he saw Staton reach for his belt as if reaching for a pistol. However, defendant also testified that he

never actually saw Staton with a pistol. Other than the defendant's self-serving claim that he thought Staton was reaching for a weapon, the evidence shows only that Staton approached the scene and inquired, "What's up?" repetitively. The record is totally void of any evidence showing that Staton had a pistol or threatened defendant in any manner. There is also no evidence that the victim ever had a weapon or made any threatening gesture toward the defendant.

Finally, the evidence shows that the defendant fired three shots. After the first shot was fired, the victim turned and began to run away. The victim was struck, in the back, by the third shot. The fact that the victim was shot in the back while attempting to run from the scene is significant. It is entirely unreasonable to believe that a person of ordinary firmness would have considered the use of deadly force necessary to protect himself or herself from an unarmed person who was running from the scene. The defendant's fear, resulting from his brother's shooting and from the belief that the assailant might be after him, is irrelevant. The defendant's brother was shot in Rocky Mount, not Tarboro. There is no evidence whatsoever that anyone from Tarboro was involved in the shooting of the defendant's brother. Even assuming the defendant's fear was real, it did not justify a preemptive strike against an unarmed individual. Thus, the second element of perfect self-defense is not reflected in the evidence.

In light of the defendant's own testimony, it is apparent he could not have subjectively believed it necessary to kill the victim in order to save himself from death or great bodily harm. Nor could any such belief have been objectively reasonable. We, therefore, find it unnecessary to discuss the last two elements of perfect self-defense, although we note in passing that the evidence shows that defendant was the aggressor in the affray and that he used excessive force. We thus hold defendant's argument to be without merit and overrule this assignment of error.

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

NO ERROR.

STATE OF NORTH CAROLINA v. CARL LORICE BREWTON

No. 252A95

(Filed 8 March 1996)

1. **Homicide § 508 (NCI4th)— felony murder—armed robbery as predicate—no instruction on common law robbery or misdemeanor larceny**

The trial court did not err in a first-degree murder prosecution in which defendant was convicted of felony murder based on armed robbery by not charging the jury on the lesser included offenses of common law robbery and misdemeanor larceny where the State introduced substantial evidence of defendant's guilt of robbery with a dangerous weapon under an acting in concert theory. Although defendant contended that the court should have instructed on the lesser offenses because defendant testified that his accomplice returned to rob one of the victims only after they fled to a nearby field, such testimony does not establish the requisite break in time or circumstances between the taking and the use of the dangerous weapon.

Am Jur 2d, Homicide §§ 34 et seq.

2. **Evidence and Witnesses § 222 (NCI4th)— first-degree murder—flight**

The trial court did not err in a first-degree murder prosecution by giving the pattern jury instructions on flight where defendant ran from the scene on foot, went briefly to his mother's home in a nearby apartment complex, checked into a hotel, and surrendered the next day after learning that detectives were searching for him. These facts, taken in the light most favorable to the State, justify giving the instruction. The court correctly informed the jury that the evidence of flight could not be considered as tending to show premeditation and deliberation.

Am Jur 2d, Evidence §§ 532-535.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing two sentences of life imprisonment entered by Beal, J., on 26 January 1995 in Superior Court, Buncombe 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

for robbery with a dangerous weapon was allowed 22 November 1995. Heard in the Supreme Court 12 December 1995.

Michael F. Easley, Attorney General, by James P. Erwin, Jr., Assistant Attorney General, for the State.

Bob Clark for defendant-appellant.

MITCHELL, Chief Justice.

Defendant Carl Lorice Brewton was indicted on 6 December 1993 for the 1 November 1993 murders of Raymond Walter Cody and Linda Blanton Cody. He was tried noncapitally at the 23 January 1995 Criminal Session of Superior Court, Buncombe County. The jury found defendant guilty of premeditated and deliberate murder for the killing of Mr. Cody, robbery with a dangerous weapon of Mrs. Cody, and first-degree murder under the felony murder rule for the killing of Mrs. Cody. The trial court sentenced defendant to consecutive sentences of life imprisonment for the murders. Because the armed robbery served as the underlying predicate felony for the finding of first-degree murder as to Mrs. Cody, the trial court arrested judgment for the conviction for robbery with a dangerous weapon.

The State's evidence tended to show *inter alia* that on 1 November 1993, James Garner, Phillipio Jackson, and defendant hired a taxi in Shelby, North Carolina, for transportation to Asheville, North Carolina. Linda Cody, the driver of the taxi, was accompanied on the trip by her husband, Raymond Cody. In a statement given to police on 2 November 1993, defendant stated that Garner asked Mrs. Cody to stop the taxi when they reached a specific location in Asheville. Defendant then shot Mr. Cody and Garner shot Mrs. Cody. Defendant admitted that as he took money from Mrs. Cody's pockets, he noticed that Mr. Cody was still moving. Defendant then shot Mr. Cody a second time. At trial, the medical examiner testified that both Mr. and Mrs. Cody died as a result of gunshot wounds to the head.

At trial, defendant denied shooting the Codys. Instead, defendant testified that upon arriving in Asheville, two quick shots were fired at the victims "without any warning." Defendant testified that he did not see who fired them, but that as Garner was getting out of the taxi, Garner reached over and fired the second shot at Mr. Cody. Defendant also testified that he originally told police detectives "what he believed they wanted to hear even though it was not the truth" and

that he gave a statement in which he admitted shooting Mr. Cody because "that was what [he] was told to write."

Defendant conceded in his brief that he was unable to show error in two of the four assignments of error he raised on appeal. These two assignments of error are therefore abandoned pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure.

[1] In another assignment of error, defendant argues that the trial court erred in charging the jury on robbery with a dangerous weapon without charging the jury on the lesser included offenses of common law robbery and misdemeanor larceny. The jury found defendant guilty of the first-degree murder of Mrs. Cody based on the felony murder theory, with robbery with a dangerous weapon serving as the underlying felony. Therefore, defendant's conviction for robbery with a dangerous weapon was merged with his conviction for the murder of Mrs. Cody. Thus, defendant directs this assignment of error only to his first-degree murder conviction for the killing of Mrs. Cody.

According to defendant's testimony at trial, he heard the first two shots without seeing who actually fired the weapon. Then defendant saw Garner fire a third shot as defendant was exiting the taxi. Defendant testified that after he and Garner fled from the taxi, they met briefly in a nearby field. Defendant testified it was only then that Garner returned to the taxi to take Mrs. Cody's money. Thus, defendant argues that there was no continuous transaction that directly related Garner's larceny to the use of a dangerous weapon. Because no continuous transaction occurred, according to defendant, the trial court erred by failing to charge the jury on common law robbery and misdemeanor larceny, both misdemeanors and lesser included offenses of robbery with a dangerous weapon. Defendant contends this improperly denied him the possibility that the jury might find him guilty of one of the lesser included misdemeanors and, as a result, acquit him of the murder of Mrs. Cody under the felony murder theory.

We conclude that the State introduced substantial evidence of defendant's guilt of robbery with a dangerous weapon under an acting in concert theory and that the trial court did not err by refusing to charge on the lesser included offenses. Before the trial court was allowed to submit robbery with a dangerous weapon under an acting in concert theory, it was required to find that substantial evidence would support a finding that Garner's use of a dangerous weapon preceded or was concomitant with the taking, "or [was] so joined by time

and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992). Defendant's own statement to police the day after the murders, which was introduced at trial, supports such a finding. Defendant stated:

> Me and [Garner] and Phillipio was in the back seat. We stopped at the back of the school. We was going to take their money. I didn't know there was bullets in it, but I pulled the trigger and it shot. I don't know why [Garner] shot the woman, but he did. I went on and took her money, but the man was still moving. I thought that he would be able to tell on me, so I shot again. Then I ran.

Defendant's statement alone is substantial evidence from which the jury could reasonably conclude that Garner's shooting Mrs. Cody was concomitant with defendant's taking of her money. Thus, the trial court did not err by instructing the jury on robbery with a dangerous weapon.

Further, the trial court did not err by refusing to instruct the jury on the lesser included offenses of common law robbery and misdemeanor larceny. Even if defendant's testimony at trial that Garner returned to rob Mrs. Cody only after defendant and Garner fled to a nearby field is taken as true, such testimony does not establish the requisite break in time or circumstances between the taking and the use of the dangerous weapon. *Id.*; *accord State v. Handy*, 331 N.C. 515, 529-30, 419 S.E.2d 545, 552 (1992). Taking the evidence in the light most favorable to defendant, we conclude that the elements of violence and taking nevertheless were so joined in time and circumstances that the trial court did not err by refusing to instruct the jury on the lesser included offenses.

[2] In another assignment of error, defendant argues that the trial court erred by instructing the jury that it could consider his flight from the scene as evidence of guilt. The trial court gave the pattern jury instructions on flight. N.C.P.I.—Crim. 104.36 (1994). In support of this argument, defendant contends that "it would be human nature for anyone, let alone a sixteen year old, to flee from the scene that [defendant] said Garner had caused." Defendant also notes that he surrendered to police within twenty-four hours of the crime.

The evidence at trial tended to show that defendant ran from the scene of the murders on foot, went briefly to his mother's home in a nearby apartment complex, and then checked into a hotel where he

remained overnight. While defendant did turn himself in the following day, he surrendered only after he discovered that police detectives were searching for him. These facts, taken in the light most favorable to the State, justify the trial court's action in giving the pattern jury instructions on flight. Further, the instruction correctly informed the jury that evidence of flight, although some evidence which may be considered with other facts and circumstances in determining guilt, may not be considered as tending to show premeditation and deliberation. *State v. Myers*, 309 N.C. 78, 87, 305 S.E.2d 506, 511-12 (1983); *see also State v. Jefferies*, 333 N.C. 501, 509-11, 428 S.E.2d 150, 154 (1993) (approving of N.C.P.I.—Crim. 104.36). Thus, defendant's assignment of error is overruled.

Defendant received a fair trial free of prejudicial error.

NO ERROR.

RUSSELL C. WALTON, JR. AND WIFE, MARGIE G. WALTON v. CITY OF RALEIGH

No. 50A95

(Filed 8 March 1996)

Municipal Corporations §§ 183, 222 (NCI4th)— consent judgment—access to sewer "subject to obtaining tap-on privileges"—requirement of water connection

Where plaintiffs and a county entered into a consent judgment in a condemnation action giving plaintiffs the right of access to a sewer line to be installed on their remaining property subject to their "obtaining tap-on privileges from the appropriate governing bodies," and the county transferred all of its interest in the sewer easement to defendant city, the parties contemplated that some governing body other than the county might have to be satisfied before plaintiffs could connect to the sewer line, and defendant city could set the requirements for obtaining the tap-on privilege and could properly require plaintiffs to connect to the city water system in order to obtain access to the sewer line.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 569-574, 870-872.

WALTON v. CITY OF RALEIGH

[342 N.C. 879 (1996)]

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 117 N.C. App. 614, 452 S.E.2d 602 (1995), affirming a judgment for defendant entered by Bowen, J., on 26 August 1993 in Superior Court, Wake County. Heard in the Supreme Court 13 September 1995.

The plaintiffs initiated this action seeking an order requiring the defendant to allow them access to a sewer line without having to connect to the City water system. The plaintiffs made a motion for summary judgment.

The materials submitted at a hearing on the motion for summary judgment showed that in 1975, Wake County instituted a special proceeding to condemn twenty-eight acres of land owned by the plaintiffs. A consent judgment was entered in which the County received approximately twenty acres of the land, with the plaintiffs retaining 7.7 acres. As part of the judgment, the County received an easement to construct a sanitary sewer line over the property retained by the plaintiffs. The plaintiffs were given access to the sewer line by the following provision of the consent judgment.

> The respondents, their heirs, successors and assigns specifically retain the right to access to a sewer line to be installed within an easement to be granted to the petitioner by the respondents, said sewer line easement to be located within the area designated as Tract B and more particularly described in Exhibit B, attached hereto, subject to the respondents, their heirs and assigns obtaining tap-on privileges from the appropriate governing bodies.

In 1985, Wake County transferred all its interest in several sanitary sewer easements, including the one over the plaintiffs' property, to the City of Raleigh. In October of 1986, the plaintiffs notified the defendant City that they wanted to connect with the existing sewer line. The City then notified the plaintiffs that they would not be allowed to connect with the sewer line unless they also connected with the City's water system pursuant to City regulations. The water line does not run to the plaintiffs' property, and there was evidence the plaintiffs would have to pay at least $270,000 to bring City water to their property.

The superior court granted summary judgment for the defendant. The Court of Appeals affirmed with a dissent.

The plaintiffs appealed to this Court.

Steven L. Evans for plaintiffs-appellants.

Thomas A. McCormick, City Attorney, for defendant-appellee.

WEBB, Justice.

This case involves the interpretation of a consent judgment. A consent judgment is a court-approved contract subject to the rules of contract interpretation. *Yount v. Lowe*, 288 N.C. 90, 215 S.E.2d 563 (1975). If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624-25 (1973).

In this case, the language is clear. It is said in the consent judgment that the plaintiffs may have access to the sewer line subject to their "obtaining tap-on privileges from the appropriate governing bodies." We read this to mean that before the plaintiffs can connect with the sewer line, they must have the consent of the appropriate governing body, in this case the City, which consent will only be given when the plaintiffs have complied with the City's regulations. We note that the requirement of obtaining tap-on privileges refers to "the appropriate governing bodies." This is an indication that the parties contemplated that some governing body other than the County might have to be satisfied before the plaintiffs could connect with the sewer line.

The plaintiffs argue that without the agreement to allow them to connect with the sewer line, they would have equal rights with all other property owners to make the connection. The agreement, say the plaintiffs, must give the plaintiffs something more. This may be true, but it cannot be something more that conflicts with the plain words of the consent judgment.

The plaintiffs filed affidavits from the attorneys who represented the plaintiffs and the County when the consent judgment was entered, in which they say that the parties did not contemplate that the plaintiffs would have to meet other conditions such as connecting to the water system in order to connect to the sewer line. We are governed by the plain words of the consent judgment. We cannot consider these affidavits.

The plaintiffs say further that the defendants have conceded that the "parties have a different interpretation of the relevant language," and this makes the consent judgment ambiguous. Parties can differ as

to the interpretation of language without its being ambiguous, and we find no ambiguity here.

The plaintiffs also say that the City has to abide by the terms of the agreement, and it cannot impose a requirement on them which was not in effect when the consent judgment was executed. The City is abiding by the agreement. The consent judgment provides that the plaintiffs must obtain tap-on privileges from the appropriate authority, in this case the City, and the City may set the requirements for obtaining this privilege.

The cases relied on by the plaintiffs, *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 199 S.E. 712 (1938), *Mulberry-Fairplains Water Ass'n v. Town of North Wilkesboro*, 105 N.C. App. 258, 412 S.E.2d 910, *disc. rev. denied*, 332 N.C. 148, 419 S.E.2d 573 (1992), and *Raintree Corp. v. City of Charlotte*, 49 N.C. App. 391, 271 S.E.2d 524 (1980), are not helpful to them. In each of those cases, the city was attempting to do something contrary to the terms of a contract. In this case, the City acted in accordance with the terms of the consent judgment.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHARLES WAYNE MUNSEY

No. 417A95

(Filed 8 March 1996)

Evidence and Witnesses § 1256 (NCI4th)— Miranda warnings—request for counsel—subsequent incriminating statements—conversation not initiated by defendant

The trial court properly suppressed incriminating statements made by defendant on 11 June 1993 on the ground that defendant did not initiate the dialogue with officers after defendant requested an attorney where defendant was arrested and given the *Miranda* warnings; defendant told officers he would like to have a lawyer; an officer unsuccessfully attempted to contact an attorney requested by defendant; defendant then asked the officer to call his brother and said "that would do instead of" the attorney; defendant's brother was contacted and visited defendant in jail; defendant answered that he would talk with the sher-

iff and another officer when they asked him if he was then ready to talk with them; and defendant made the 11 June statements. Furthermore, the trial court also properly suppressed a statement made by defendant to two SBI agents on 16 June 1993 on the ground that defendant did not initiate the conversation with the SBI agents.

Am Jur 2d, Criminal Law §§ 788 et seq.

Denial of, or interference with, accused's right to have attorney initially contact accused. 18 ALR4th 669.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

What constitutes assertion of right to counsel following Miranda warnings—federal cases. 80 ALR Fed. 622.

Appeal as of right pursuant to N.C.G.S. § 15A-1445(b) and § 15A-979(c) from an order entered by Rousseau, J., on 10 May 1995 in Superior Court, Wilkes County, suppressing statements made by the defendant to law enforcement officers. Heard in the Supreme Court 12 February 1996.

The defendant was charged with first-degree murder. He made a motion to suppress statements he made to law enforcement officers, and a hearing was held on his motion. The evidence at the hearing showed that on 11 June 1993, the defendant was arrested for a parole violation and taken to the sheriff's office. At approximately 5:50 p.m., the defendant was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). At that time, the defendant said, "I would like to have a lawyer."

At the defendant's request, Lieutenant Bobby Walsh of the Wilkes County Sheriff's Department called Dennis Joyce, an attorney, but was unable to reach him. When Lieutenant Walsh was unable to procure an attorney, the defendant asked him to call his brother and said "that would do instead of Mr. Joyce." Lieutenant Walsh called the defendant's brother, who went to the sheriff's office and conferred in private with the defendant "for approximately fifteen to twenty minutes."

Lieutenant Walsh testified that after the defendant's brother left, "I walked back in the office and Charles Munsey told me he would

now talk to me without a lawyer." Sheriff Dane Mastin testified to this occurrence as follows:

> THE COURT: All right, after he talked with his brother, what did he say?
>
> A. He was willing to talk to us, he was ready to talk to us.
>
> THE COURT: Did he say, "I'm willing to talk to you"?
>
> A. He just indicated to us, we asked him if he was, as I recall, when we asked him if he was ready to talk to us now, he said, "Yes."

The defendant then made a statement to the law enforcement officers.

On 16 June 1993, two agents of the State Bureau of Investigation interviewed the defendant in the sheriff's office. They advised him of his rights pursuant to *Miranda*, and he agreed to talk to them. The defendant then made a statement to the SBI agents.

At the conclusion of the hearing, the court dictated an order in open court in which it concluded that the defendant did not initiate the conversation with the officers after his brother had left him on the night of 11 June 1993 and that the defendant did not intelligently and voluntarily waive his rights on that date. The court ordered the statement suppressed. As to the interrogation of 16 June 1993, the court concluded that the defendant did not initiate the conversation with the SBI agents and suppressed the statement made on that day.

The court then entered a written order in which it did not make a specific finding that the defendant did not initiate the dialogue with the officers on 11 June 1993, but concluded that the defendant "did not fully, voluntarily, and understandingly initiate his willingness to answer questions from the officers." The court ordered the statement of 11 June 1993 suppressed. The court also found in its written order that the defendant did not initiate the dialogue with the officers on 16 June 1993 and ordered the statement made on that date suppressed.

The State appealed.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State-appellant.

Bradley J. Cameron and John W. Gambill, for the defendant-appellee.

WEBB, Justice.

This case brings to the Court questions as to the admissibility of two separate statements made by the defendant to law enforcement officers. On 11 June 1993, after the defendant had been arrested and warned of his rights pursuant to *Miranda*, he told the officers he would like to have a lawyer. When a person under arrest tells a law enforcement officer that he wants to have an attorney, any interrogation must stop, and the officers cannot again interrogate that person without an attorney being present unless the person under arrest initiates further dialogue with the officers. *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L. Ed. 2d 405 (1983); *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981).

In this case, the court concluded in its order dictated in open court that the defendant did not initiate the dialogue with the officers on 11 June 1993. Although the court did not put this conclusion in its written order, it was a conclusion of the court, and we are bound by it if it was properly reached.

When a court conducts a hearing to determine the admissibility of evidence, it should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court. *State v. Penley*, 318 N.C. 30, 45-46, 347 S.E.2d 783, 792-93 (1986).

The court did not make a specific finding of fact in regard to the testimony by Lieutenant Walsh and Sheriff Mastin as to how the interrogation was resumed after the defendant's consultation with his brother. The court did say at the conclusion of the *voir dire* hearing, "[W]ell, there's no evidence before me that that [sic] after the brother left, that the Defendant said, without further questions, that, 'I'll talk.' " We believe this shows the court concluded, and we agree, that there was no conflict in the evidence on this point. Sheriff Mastin and Lieutenant Walsh both testified that defendant said he would talk to them, but Sheriff Mastin explained that the defendant said this after they asked him whether he would talk to them. This shows the defendant did not initiate the dialogue. It was not necessary for the court to make a finding of fact on this uncontradicted evidence in order to conclude that the defendant did not initiate the dialogue. *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976).

We hold that the superior court was not in error in excluding the defendant's statement made on 11 June 1993.

As to the statement of 16 June 1993, the court found as a fact that the two SBI agents went to the sheriff's office on that date and interviewed the defendant, who was incarcerated. The court concluded the defendant did not initiate this dialogue and excluded the defendant's statement. In this we find no error. The court's finding is supported by competent evidence and in turn supports the conclusion of law that the defendant's statement was obtained in violation of his constitutional rights.

AFFIRMED.

FIRST HEALTHCARE CORPORATION D/B/A HILLHAVEN SOUTH, INC. D/B/A WINSTON-SALEM CONVALESCENT CENTER v. NELL H. RETTINGER, IND., AND NELL H. RETTINGER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LAWRENCE JOHN RETTINGER, DECEASED

No. 230A95

(Filed 8 March 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) and on discretionary review pursuant to N.C.G.S. § 7A-31(a), from the decision of a divided panel of the Court of Appeals, 118 N.C. App. 600, 456 S.E.2d 347 (1995), reversing the order allowing plaintiff's summary judgment entered by Cornelius, J., on 19 January 1994 in Superior Court, Forsyth County. Heard in the Supreme Court on 12 February 1996.

Smith Helms Mulliss & Moore, L.L.P., by Maureen Demarest Murray and Christine T. Nero, for plaintiff-appellant.

Allman Spray Leggett & Crumpler, P.A., by David C. Smith and Linda L. Helms, for defendant-appellee.

North Carolina Health Care Facilities Association, by Sally J. Marshall, General Counsel; North Carolina Hospital Association, by William A. Pully, Vice President and General Counsel; and North Carolina Association for Home Care, by Nancy H. Temple, Executive Director, amici curiae.

Kate Mewhinney, Associate Clinical Professor, Legal Clinic for the Elderly, Wake Forest University School of Law; Booth, Harrington, Johns & Campbell, by A. Frank Johns; and Craige,

Brawley, Liipfert, Walker & Searcy, by B. Bailey Liipfert, III, on behalf of National Academy of Elder Law Attorneys, amicus curiae.

Booth, Harrington, Johns & Campbell, by A. Frank Johns; and Anna Moretti Kavolius on behalf of Choice in Dying, Inc., amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge Walker in the Court of Appeals, the decision of the Court of Appeals is reversed.

REVERSED.

TITLE INSURANCE COMPANY OF MINNESOTA v. SMITH, DEBNAM, HIBBERT AND PAHL, A NORTH CAROLINA GENERAL PARTNERSHIP, AND W. THURSTON DEBNAM, JR., FRED J. SMITH, JR., CARL W. HIBBERT, JR., J. LARKIN PAHL, JOHN W. NARRON AND BETTIE KELLEY SOUSA, GENERAL PARTNERS

No. 366A95

(Filed 8 March 1996)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 119 N.C. App. 608, 459 S.E.2d 801 (1995), affirming in part and reversing in part the judgment entered by Johnston, J., on 25 February 1994 in Superior Court, Mecklenburg County, and remanding for a new trial on damages. On 5 October 1995, the Supreme Court allowed both plaintiff's and defendants' petitions for discretionary review of additional issues. Heard in the Supreme Court 12 February 1996.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., and John H. Carmichael, for plaintiff-appellee and -appellant.

Crews & Klein, P.C., by Paul I. Klein, James P. Crews, and James N. Freeman, Jr., for defendant-appellees and -appellants.

PER CURIAM.

As to the sole issue brought forward on appeal by the dissent in the Court of Appeals, the decision of the court by Judge Lewis is affirmed except that the following sentence in the opinion is dis-

avowed and stricken: "We agree that plaintiff suffered no actual damages until it cancelled the deed of trust, which it did while the jury deliberated." *Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 611, 459 S.E.2d 801, 804 (1995). As to the additional issues raised in the petitions for discretionary review, discretionary review was improvidently allowed.

AFFIRMED IN PART AND DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

IN THE MATTER OF: THE APPEAL OF SEARS, ROEBUCK AND COMPANY FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CATAWBA COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

AND

IN THE MATTER OF: THE APPEAL OF J.C. PENNEY COMPANY, INC., FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CATAWBA COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 387PA95

(Filed 8 March 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous unpublished decision of the Court of Appeals, 119 N.C. App. 800, 461 S.E.2d 36 (1995), reversing a final decision of the North Carolina Property Tax Commission entered 30 December 1993 and remanding for a new hearing. Heard in the Supreme Court 14 February 1996.

Johnson, Mercer, Hearn & Vinegar, P.L.L.C., by Charles H. Mercer, Jr., and Shawn D. Mercer; and O'Keefe, Ashenden, Lyons & Ward, by Mark R. Davis, for petitioner-appellees Sears, Roebuck and Company and J.C. Penney Company.

Patrick, Harper & Dixon, by Robert Oren Eades, for respondent-appellant Catawba County.

PER CURIAM.

AFFIRMED.

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

IN THE MATTER OF: THE APPEAL OF THE MAY DEPARTMENT STORES COMPANY FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 344PA95

(Filed 8 March 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 596, 459 S.E.2d 274 (1995), reversing a final decision of the North Carolina Property Tax Commission entered 16 August 1993 and remanding for a new hearing. Heard in the Supreme Court 14 February 1996.

Manning, Fulton & Skinner, P.A., by Michael T. Medford; and Doody And Lafakis, Ltd., by Gregory J. Lafakis, for May Department Stores Company, petitioner-appellee.

Davida W. Martin, Assistant County Attorney, for Forsyth County, respondent-appellant.

PER CURIAM.

AFFIRMED.

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

IN RE APPEAL OF BELK-BROOME CO.

[342 N.C. 890 (1996)]

IN THE MATTER OF: THE APPEAL OF BELK-BROOME CO. FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE CATAWBA COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1991

No. 343PA95

(Filed 8 March 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 470, 458 S.E.2d 921 (1995), reversing a final decision of the North Carolina Property Tax Commission entered 16 August 1993 and remanding for a new hearing. Heard in the Supreme Court 14 February 1996.

Manning, Fulton & Skinner, P.A., by Michael T. Medford, for Belk-Broome Co., petitioner-appellee.

Patrick, Harper & Dixon, by Robert Oren Eades, for Catawba County, respondent-appellant.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. CEASAR B. KIRKLAND

No. 272A95

(Filed 8 March 1996)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 119 N.C. App. 185, 457 S.E.2d 766 (1995), finding no error in a trial that resulted in a judgment imposing a sentence of fourteen years imprisonment entered by Duke, J., on 5 February 1993 in Superior Court, Pitt County. On 5 October 1995, we denied defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 13 February 1996.

Michael F. Easley, Attorney General, by Lorinzo L. Joyner, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor and Charlesena Elliott Walker, Assistant Appellate Defenders, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMOTHY TYRONE SESSOMS

No. 268A95

(Filed 8 March 1996)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 119 N.C. App. 1, 458 S.E.2d 200 (1995), affirming an order entered by Hudson, J., on 14 June 1993 in Superior Court, Hertford County, holding that there was not a violation of the Constitution of the United States in the selection of the jury. Judge Hudson made this determination on remand from the Court of Appeals, 104 N.C. App. 375, 410 S.E.2d 76 (1991). Heard in the Supreme Court 14 February 1996.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charles L. Alston, Jr., Assistant Appellate Defender, and Benjamin Sendor, Assistant Appellate Defender, for the defendant-appellant.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Anita S. Hodgkiss for The North Carolina Association of Black Lawyers and The North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

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

ALAMANCE COUNTY BD. OF EDUCATION v.
BOBBY MURRAY CHEVROLET

No. 51P96

Case below: 121 N.C.App. 222

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

ALLEN v. N.C. DEPT. OF TRANSPORTATION

No. 500P95

Case below: 120 N.C.App. 627

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

ARTIS v. OCCIDENTAL LIFE INS. CO.

No. 58P96

Case below: 121 N.C.App. 396

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

AUNE v. UNIVERSITY OF NORTH CAROLINA

No. 497P95

Case below: 120 N.C.App. 430

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

BRYANT v. STATE FARM MUT. AUTO. INS. CO.

No. 38P96

Case below: 121 N.C.App. 219

Petition by plaintiff (Roark) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

CAROLINA WATER SERVICE v. TOWN OF ATLANTIC BEACH

No. 14P96

Case below: 121 N.C.App. 23

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

CORNELIUS v. HELMS

No. 430P95

Case below: 342 N.C. 653

120 N.C.App. 172

Motion by defendants (Helms and Parham, Helms and Kellam) for reconsideration of petition for discretionary review dismissed 7 March 1996.

CRAWFORD v. BOYETTE

No. 28P96

Case below: 121 N.C.App. 67

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 March 1996.

DUNKLEY v. SHOEMATE

No. 59P96

Case below: 121 N.C.App. 360

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 March 1996.

HOWELL v. OWEN MFG. CO.

No. 485P95

Case below: 120 N.C.App. 642

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

HUDSON v. FLAMINGO'S, INC.

No. 52P96

Case below: 121 N.C.App. 396

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

JOHNSON v. FRIENDS OF WEYMOUTH, INC.

No. 479P95

Case below: 120 N.C.App. 255

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

METROMONT MATERIALS CORP. v. R.B.R. & S.T.

No. 532P95

Case below: 120 N.C.App. 616

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

NAEGELE OUTDOOR ADVERTISING, INC. v. HUNT

No. 39P96

Case below: 121 N.C.App. 205

Petition by respondent (Hunt) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

N.C. DEPT. OF CORRECTION v. MYERS

No. 489P95

Case below: 120 N.C.App. 437

Petition by respondent (Myers) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

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

No. 75P96

Case below: 121 N.C.App. 517

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 7 March 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

RUSS v. GREAT AMERICAN INS. COMPANIES

No. 47P96

Case below: 121 N.C.App. 185

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

STATE v. BARBER

No. 574P95

Case below: 120 N.C.App. 505

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

STATE v. BARNES

No. 74PA96

Case below: 121 N.C.App. 503

Motion by Attorney General for temporary stay allowed 26 February 1996.

STATE v. BROWN

No. 452P95

Case below: 116 N.C.App. 445

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

STATE v. ELLIS

No. 573P95

Case below: 120 N.C.App. 648

Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

STATE v. LEE

No. 247A90-2

Case below: Watauga County Superior Court.

Petition by defendant (Lee) for writ of certiorari to review the order of the Superior Court, Watauga County denied 7 March 1996.

STATE v. MERRITT

No. 561P95

Case below: 120 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 13 February 1996

TINCH v. VIDEO INDUSTRIAL SERVICES

No. 571P95

Case below: 120 N.C.App. 640

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996

TOWER DEVELOPMENT PARTNERS v. ZELL

No. 432PA95

Case below: 120 N.C.App. 136

Motion by petitioner (Zell) to dismiss the appeal allowed 7 March 1996

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

VENTURE PROPERTIES I v. ANDERSON

No. 48P96

Case below: 120 N.C.App. 852

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

WHITIN ROBERTS CO. v. ALLIANCE INS. GROUP

No. 31P96

Case below: 120 N.C.App. 884

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 March 1996.

PETITION TO REHEAR

STATE v. LINEBERGER

No. 533A94

Case below: 342 N.C. 599

Petition by Attorney General to rehear pursuant to Rule 31 denied 27 February 1996

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff
v.
BRENDA KAY MABE, et al, Defendants

JESSE WILLARD SCOTT, JR., Individually, as the Parent of Lucinda Sue Scott, and as the Administrator of the Estate of Carolyn Mabe Scott, and LUCINDA SUE SCOTT, by her Guardian ad Litem, Anne Connolly, Third-Party Plaintiffs
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Third-Party Defendant

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BRENDA KAY MABE, ROGER LEE MABE, KIMBERLY HOPE MABE, a minor b/h/g/a/l S. MARK RABIL and HEATHER DORA MABE, a minor b/h/g/a/l GREGORY W. SCHIRO, Plaintiffs,
v.
ROBERT LEONARD GREGORY, and MARY ELIZABETH WILSON, Defendants

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JESSE WILLARD SCOTT, JR., Individually as the parent of LUCINDA SUE SCOTT and as the Administrator of the Estate of Carolyn Mabe Scott, and LUCINDA SUE SCOTT, b/h/g/a/l ANNE CONNOLLY, Plaintiffs
v.
ROBERT LEONARD GREGORY, MARY ELIZABETH WILSON, and JODY RAY BULLINS, Defendants

ORDER

No. 312PA94

(Filed 1 May 1996)

Upon consideration of the *amicus curiae* petition for rehearing the above-captioned action, the affidavit of counsel for appellant Lucinda Sue Scott, and third-party defendant North Carolina Farm Bureau Mutual Insurance Company's motion to strike affidavit, the following order is entered:

1. This Court's opinion in the above-captioned action as it appears in the advance sheets to the North Carolina Reports, 342 N.C. 482, 498, 467 S.E.2d 34, 43 (1995), is corrected by deleting the following sentence:

> However, the language of this statute makes it clear that both inter- and intrapolicy stacking are available only when the coverage is nonfleet *and* the vehicle covered is of the private passenger type." *Aetna Cas. & Sur. Co.*, 105 N.C. App. at 567, 414 S.E.2d at 71.

and substituting the following sentence in lieu thereof:

> "The language of this statute makes it clear that intra-policy stacking is only available when the coverage is nonfleet *and* the vehicle covered is of the private passenger type." *Aetna Cas. & Sur. Co.*, 105 N.C. App. at 567, 414 S.E.2d at 71.

Except as herein expressly allowed, the petition for rehearing is denied.

2. Third-party defendant North Carolina Farm Bureau Mutual Insurance Company's motion to strike affidavit is allowed.

By order of the Court in Conference, this the 1st day of May, 1996.

Orr, J.
For the Court

APPENDIXES

PRESENTATION OF
CHIEF JUSTICE SUSIE MARSHALL SHARP
PORTRAIT

CLIENT SECURITY FUND

COMPENSATION FOR STATE
BAR COUNCILORS

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR
CONCERNING THE OF COUNSEL
COMMITTEE

RECOGNITION OF FRANKLIN FREEMAN

BY

CHIEF JUSTICE BURLEY B. MITCHELL, JR.

Chief Justice Burley B. Mitchell, Jr. welcomed official and personal guests of the Court. The Chief Justice then recognized the Sharp family and Franklin Freeman, 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 an event honoring one of North Carolina's most celebrated citizens. We honor the first woman elected Chief Justice of any Supreme Court in the United States, the first woman Superior Court Judge in North Carolina, and we honor one of this Court's greatest legal minds. This Court and the entire Judicial Branch benefited from the integrity and respect which surrounded Chief Justice Sharp during her years on this Court and continued throughout her life.
>
> The family of Chief Justice Sharp chose a uniquely qualified individual to present remarks about her this morning. Honorable Franklin Freeman, Secretary of the Department of Correction, knew Susie Sharp as a family friend when he grew up in Surry County and as his career as a public servant blossomed. He served as the Assistant Director of the Administrative Office of the Courts during Justice Sharp's tenure as Chief Justice, and has remained a friend of hers and the Court. At this point, I will ask Secretary Franklin Freeman to come to the podium and present his remarks.

PRESENTATION ADDRESS

BY

FRANKLIN FREEMAN

MAY IT PLEASE THE COURT:

The late Susie Marshall Sharp who served with dignity, fortitude, and rare distinction as an Associate Justice and as Chief Justice of the Supreme Court of North Carolina for more than seventeen years, died March 1, 1996 in Raleigh, North Carolina and was buried in her beloved Reidsville's Greenview Cemetery.

On behalf of the Sharp family, I have the high honor to present to the court this portrait, soon to be unveiled, as a memorial of her exemplary life, her pioneering spirit, and her remarkable career.

The portrait was painted from life by the late Irene Price in her studio in Blowing Rock, NC not long before Ms. Price's death in 1970. A gifted artist, she had previously painted portraits of Chief Justices Walter Stacy, Emery Denny, and William H. Bobbitt. All of these portraits now hang in this courtroom.

Susie Marshall Sharp was born in Rocky Mount, North Carolina on July 7, 1907 to James M. and Annie Britt (Blackwell) Sharp. Her mother and father were the parents of ten children, seven of whom lived to maturity, five girls and two boys. In addition to Susie, those who reached maturity included Sally Blackwell, Annie Hill, Thomas Adolphus, Louise Wortham, Florence Abigail, and James Vance. All but Sally and Florence survive Justice Sharp.

Justice Sharp was the 7th generation of Sharps to live in Rockingham County. The progenitor, John Sharp, came from Buckingham County, Virginia to the area that became Rockingham County in approximately 1760. At that time, the area was a part of Rowan County. John Sharp died in early 1778 and was survived by his wife Catherine and nine children.

James Sharp was the only son of John's to remain in Rockingham County. He and his wife had two sons, including James Jr., born in approximately 1776, and one daughter. James Jr. (1776-1852) married Jane (Jenny) Joyce. Six children were born to this union including James Archer Sharp, born January 4, 1804.

James Archer Sharp (January 4, 1804-February 17, 1863) and Margaret (Peggy) Joyce (October 20, 1810-October 20, 1869) were married April 5, 1826. To them were born ten children. Their eighth child, James Marshall Sharp, was born March 23, 1844 in Mayo township, Rockingham County. Soon after the Civil War began, he enlist-

ed in Company F of the 45th North Carolina Confederate Infantry. Although seriously injured at the Battle of Gettysburg in July of 1863, he recovered sufficiently to rejoin his Company. Once again he was wounded, captured at the Battle of Spotsylvania Courthouse in mid-May of 1864, and spent the remainder of the war in a Northern prison. After the war, he returned home with rifle balls in his chest and jaw to take up farming. The courage, persistence, and inner strength signified by James Marshall Sharp's bravery and conduct during the Civil War undoubtably served as an example of how to conduct one's life for his granddaughter, and namesake, Susie Marshall Sharp.

James Marshall Sharp (March 23, 1844—June 16, 1910) married Eliza Merritt Garrett (August 13, 1845—August 22, 1938) on November 20, 1866. She was the daughter of Jay Bolyn Garrett and Clarisa Walton Hill Garrett of Huntsville township in Rockingham County. Nine children were born to them, eight boys and one girl. Eight lived to maturity, including their sixth son, James Merritt Sharp, who was born September 26, 1877.

As a child James Merritt Sharp attended school in a one room, log schoolhouse. Determined as a teenager to broaden his education, he, on his own motion, attended Whitsett Institute in Whitsett, North Carolina with money he earned from raising tobacco. By the age of eighteen, he was teaching school.

In 1900, Mr. Sharp established Sharp Institute, a co-educational day and boarding school. In order to obtain a post office for the Institute, Mr. Sharp had to pick a name for the neighborhood, and did so, naming the community Intelligence, North Carolina. Opening in October of 1900 with 50 students, the enrollment climbed to 225 by 1906. Known by then as one of the best preparatory institutions in north central and northwest North Carolina, the school burned in 1907, ending J. M. Sharp's career as "Professor Sharp" as he was affectionately known by Institute alumni.

Even before the fire, J. M. Sharp was reading law. The fire's end to a career of teaching led to a career in the law as he passed the Supreme Court's Bar examination in 1908 after studying under the famous Wake Forest Law School Dean, N. Y. Gulley. He began his 44-year practice of the law in Stoneville, North Carolina, moving to Madison in 1910. Four years later, in 1914, he moved his practice to Reidsville, North Carolina where he remained for the next 38 years, continuously practicing law, serving his community, and rearing his family. During his years in Reidsville, he built a reputation as a tenacious trial lawyer who as his last law partner, Norwood Robinson, said "never had a guilty client". Constantly active in the political and

social life of his community, he served in the North Carolina State Senate in 1925 and 1927, representing the 17th Senatorial District. He was county attorney for the county of Rockingham and served a number of successive terms as President of Reidsville's Chamber of Commerce and the Rockingham County Farm Bureau.

While in Vance County recruiting students for his Institute, Professor Sharp stayed with the family of a faculty member. There he met the faculty member's sister, Annie Britt Blackwell (March 4, 1884-April 9, 1971), the daughter of John Pomfret Blackwell and Sally Wortham Blackwell. She also was hired as a teacher at Sharp's Institute and in 1906, J. M. Sharp and this gracious, steadfast and learned lady of faith were married.

The first of J. M. and Annie Sharp's ten children, a girl, was born on July 7, 1907 in Rocky Mount, North Carolina where the Sharps briefly lived following the destruction of the Institute. She was given the name Susie Marshall after her mother's younger sister, Susie, and her Civil War grandfather, James Marshall Sharp. Between 1907 and 1924, nine more children were to be born to the Sharps. As the oldest, Judge Sharp early on assumed a responsibility to assist her mother with the day-to-day rearing of her younger siblings. On two occasions before she left home in 1924 to attend the North Carolina College for Women (now known as the University of North Carolina at Greensboro) tragedy struck the Sharp family thrusting Judge Sharp into an increasing role of responsibility while at the same time molding her character.

J. M. and Annie's second child, James Merritt, was born in 1910. Like Judge Sharp, he greatly admired his father and wanted to help him by being his father's stenographer or, as he called it, "stenog". That was not to be, however, for at the age of four he was stricken with a brain tumor and died 6 weeks before his sixth birthday. Young Susie, a girl of nine, told her daddy that she would be his "stenog". Thus began her focus on her father's work as a lawyer.

In 1921, twin boys, John and James, were born to J. M. and Annie Sharp. At twenty-two months of age, the twins developed colitis from drinking spoiled milk and died within three weeks of each other. Annie Sharp's grief over the terrible, quick loss of her two healthy sons was overwhelming. So overwhelming was her grief that Judge Sharp, at age 16, had to assume day-to-day responsibility for the running of the household. With the help of the family's maid, Matilda Purcell, Judge Sharp prepared the meals, cleaned the house, and tended to her younger brothers and sisters. Contemporaries of Judge Sharp can still vividly recall more than seventy years ago her leading

her neatly dressed siblings into the Main Street United Methodist Church for Sunday School. The strengths she gained from dealing with this family tragedy were to stand her in good stead the remainder of her long and distinguished life.

Judge Sharp attended the Reidsville public schools from 1913 to 1924, the eleven years required at that time. She was an excellent student, contending with her friend, Dillard Gardner, for the best grades in her class. Upon graduation and examination of the two students' marks that had to extend back to the sixth grade in order to break the tie, Dillard Gardner was declared the valedictorian of the class, and Susie Sharp the salutatorian. The competition was, however, friendly because Judge Sharp and Dillard Gardner remained good friends throughout their careers. Dillard Gardner served this court as its marshall and librarian from June 30, 1937 until his death, April 15, 1964. When Judge Sharp joined this court in 1962, their longstanding friendship was renewed.

Judge Sharp was not only an excellent student but a champion debater also. This ability led many of her classmates to encourage her to become a lawyer. However, following her graduation from high school in 1924 and her entrance to the North Carolina College For Women, she developed an interest in chemistry. Since proclaiming her interest in being her father's "stenog" or "nographer" in 1916, she had listened to many a supper-table discussion of legal issues by her father and to the advice of her friends that she should become a lawyer because of her debating ability. These influences steadily channeled her toward the study of law, and in 1926, following an all-night session of wrestling over her decision, she chose the law over chemistry. As befits an all-night struggle with one's conscience, that choosing was to become a calling.

In 1926, after only two years at Women's College, Judge Sharp entered law school at the University of North Carolina as the only woman in her class. She soon encountered the entrenched attitudes of the time against women being lawyers. Notes were left in her chair that were designed to offend her and, presumably, cause her to leave. One note, for instance, referred to a case where the Supreme Court had upheld the right of a man to discipline his wife by whipping her. State v. Black, 60 N.C. (1. Winst., 266) 262 (1864). The unknown authors of the notes, however, did not know they were dealing with a person of great determination and persistence. Undeterred, she pursued her legal studies with the same high degree of success as she had pursued her studies in college and high school, becoming an editor of the North Carolina Law Review, a member of the Order of the

Coif, and a 1929 LL.B. with honors graduate of the University of North Carolina's Law School. The last note placed in her chair read, "If you're going to stay, get some rubber for those high heels."[1]

While in law school, Judge Sharp's already well-established traits of scholarship, hard work, and achievement led her, in the summer of 1928, to stand the bar examination. In August of that year, she was notified that she had passed, ten months before she received her law degree on June 10, 1929.

Susie Sharp returned to Reidsville, North Carolina in 1929 to begin a twenty-year practice of the law with her father in the firm of Sharp and Sharp. As the only female lawyer in Rockingham County and one of the few such in North Carolina, she was, as a 1939 story on her in the Winston-Salem Journal & Sentinel said, "Almost as rare as the night blooming cereus in North Carolina towns".[2] Not only was she a rarity, but in the town of Reidsville she soon discovered that she was an oddity. She had not long been at the Bar when an old native of the town with great difficulty climbed the stairs to her office and asked, "Are you the lady lawyer?" "Yes, I am. What can I do for you?" replied Judge Sharp. "You can't do nothin' for me. I just heard there was a woman lawyer up here and I came to see what she looked like."[3] Not only was she a rarity and oddity in Reidsville, but she was in the courtrooms of North Carolina. Her first jury trial was in 1929 in Wentworth at the Rockingham County Courthouse. Her opponent was her friend and contemporary, the late Alan D. Ivie, Jr., a great orator who until his death in 1987 dressed in a swallowtail coat with a bat wing collar. Since women were not allowed to serve on juries in North Carolina until 1946, Justice Sharp found herself as the sole female in a courtroom full of males. With characteristic aplomb, she did not let this deter her but moved forward with the trial of the case before the all-male jury. At the conclusion of the evidence, Mr. Ivie arose to begin his summation to the jury and opened with words that Justice Sharp chuckled about the rest of her life; "Gentleman of the jury, the presence of sweet womanhood in this courtroom today rarefies the atmosphere".

By 1929, Justice Sharp had already developed a reputation as an appellate lawyer. A newspaper of that time in its April 2 edition headlined, "Ms. Sharp Argues Supreme Court Case", began the story by saying, "Ms. Susie Sharp, of Reidsville, who is rapidly becoming a

1. Morello, Karen Berger. *The Invisible Bar*. Random House, New York. 1986. pp. 241-243.

2. *Winston-Salem Journal and Sentinel*, October 15, 1939.

3. *Id.*

familiar figure at the Bar of the Supreme Court, made her semi-annual appearance yesterday.....".[4] That same story also documented an early encounter with this court's traditions, which she revered, and which also undoubtably stood her in good stead 33 years later and thereafter. The reporter continued, "Ms. Sharp was almost through her argument when the clock struck two, but not even lady lawyers are exceptions for the inexorable rule of the court and her plea will be resumed at ten o'clock this morning."[5] Rest assured I shall conclude these remarks before two.

For the next twenty years Susie Sharp grew steadily in stature as a lawyer and leader in her community. In a role she was to repeatedly find herself in throughout the remainder of her professional career, she was appointed the first town attorney in the state's history when she was appointed Reidsville's city attorney in 1939.

In 1948, her growing influence in the governmental and political affairs of Rockingham County led her father's fellow farmer friend, Kerr Scott, to appoint Judge Sharp as his campaign manager for Rockingham County in the Democratic primary for Governor. She was the first female campaign manager of a gubernatorial campaign in Rockingham County. Kerr Scott carried Rockingham County by a plurality in the first, six-candidate primary. In the second, run-off primary, Scott carried Rockingham over Charles Johnson by almost 2 to 1, (2,976 votes to 1,772 votes) compared to a statewide vote of 54% for Scott and 46% for Johnson (217,620 to 182,684).[6] That fall, Scott carried Rockingham County by a margin of almost 5 to 1 (Scott 10,040—George Pritchard (R)—2,134) compared to a statewide margin of less than 3 to 1 (Scott 570,995—Pritchard 206,166).[7] Kerr Scott was impressed.

In the summer of 1949, Governor Scott had eight appointments to make to special Superior Court judgeships. Recalling the leadership of his campaign by Judge Sharp in Rockingham County, and having "the imagination and the foresight to bring a woman to the bench",[8] Kerr Scott on June 21, 1949 appointed Susie Sharp the first female judge in the then 364th year of the history of the state.

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4. *The News and Observer*, April 2, 1929.

5. *Id.*

6. *North Carolina Government, 1585 - 1979, A Narrative and Statistical History*, 1981. Issued by the Office of the Secretary of State. p. 1381.

7. *Id.* at 1413.

8. *The First Woman of the Law: Chief Justice Susie Marshall Sharp, Her Life, Her Legacy*, Lorrin Freeman, November 27, 1995, from Freeman's interview with Governor Terry Sanford, November 16, 1995, p. 2.

On July 1, 1949, James Merritt Sharp saw his childhood "stenog" and law partner of 20 years sworn into the judiciary of North Carolina, where Susie Sharp was to serve continuously for the next 30 years and one month. Mr. Sharp was not, however, to live to see her climb the judicial ladder. On August 2, 1952, the man who most influenced Judge Sharp's calling to the bar and bench, and who instilled in her his Primitive Baptist qualities of honesty, devotion to truth, and hard work, died.

Judge Sharp's appointment created a stir in the legal community, pride among the women of the state, and a scurrying among lawyers and laymen alike. Lawyers had difficulty figuring out how to address her. Most of the time, Judge Sharp said she was referred to as "His Honor". Sometimes she was addressed as "Your Honoress". Attorney John McElroy of Madison County defended his tardiness to her court by claiming he had been in his office practicing how to say "Her Honor".[9] Another kept referring to her as "His Honor" and to a jury of men and women as "Gentlemen of the Jury" during his closing argument. Finally, after being laughed at by a number in the courtroom, the lawyer turned to Judge Sharp and said, "Your Honor, with you on the bench and women in the jury, it's no wonder I have pronoun trouble."[10] Tom Bost of the Greensboro Daily News questioned "what would happen if Sharp was faced with trying a case of rape? Wouldn't that be too much for a woman?" Judge Sharp wrote back that "In the first place, there could have been no rape had not a woman been present, and I consider it eminently fitting that one be in on the 'pay-off'."[11] The Burke County commissioners refused, upon learning of her assignment to their county, to modify the only bathroom facilities in the judge's chambers; a sink and a urinal that hung on the wall. Judge Sharp opened court on Monday morning at 10:00 a.m. and ordered the sheriff to "invite" the county commissioners over to the courthouse. By 11:00, the courthouse was aflutter with the scurrying about of plumbers, carpenters, and electricians, while the county commissioners narrowly avoided a few nights repose in the county jail.[12] A Charlotte Observer article in 1949 reported, "Judge Susie Sharp is a woman for us womenfolk to be proud of."[13]

9. Freeman, *The First Woman of the Law*. p. 4.

10. *Charlotte Observer, First Woman Judge of NC Holds High Place in Associates' Hearts*, Katharine Halyburton, November, 1949.

11. Morello, Karen Berger. *The Invisible Bar*. Random House, New York. 1986.

12. Freeman, *The First Woman of the Law*. p. 5.

13. *Charlotte Observer*, November, 1949.

Judge Sharp's very first term of court, which she held in Richmond County, made it clear that she was going to be firm, decisive, and an agent for change. Before her was a prison superintendent charged with keeping a prisoner handcuffed in a standing position for some 60 hours as punishment for making a casual remark to another prisoner while at work. His defense that prison rules allowed such punishment led her, after his conviction, to soundly condemn such rules. Her denunciation led the Highway Commission, which oversaw the prisons of that day, to revise the rules so that a prisoner could not be handcuffed more than 24 hours, and then only as emergency punishment. Other rule changes precipitated by her indignation placed definitive limits on the use of flogging as a disciplinary measure. Throughout the remainder of her professional career, Judge Sharp maintained a strong interest in the humane, but firm, treatment of the state's prisoners. Her speech before the 1975 North Carolina Bar Association's annual meeting advocating widespread, far-ranging improvements in the state's prison system even before judges received a pay increase, was a major impetus for the dramatic changes that have occurred in North Carolina's penal system in this last generation.

For the next 13 years, Judge Sharp served as a Special Judge of the Superior Court of North Carolina under successive appointments of Governors Umstead, Hodges, and Sanford. During those 13 years, she held court in 64 of North Carolina's counties from Currituck to Cherokee. Traveling on the two-lane, oft times curvy, hog-backed roads of the era, she would leave home alone on Sunday afternoon or early Monday morning driving to court, returning on Friday night or Saturday morning to be with her family, to fellowship with her friends in Reidsville, and to attend Main Street Methodist Church with her mother on Sunday mornings. Those 13 years, which she thought would be only a four-year appointment, cemented her commitment to the judiciary and exposed the Bar and public of North Carolina to her remarkable mix of courage, industry, humor, compassion, and an incisive legal mind.

In 1960, North Carolina elected as its Governor, a progressive, Terry Sanford. Two years later, Chief Justice Wallace Winborne retired and was succeeded by Associate Justice Emory Denny, thus creating a vacancy for the appointment of a new Associate Justice. Governor Sanford had already indicated that as part of his plan to improve the lot of women in North Carolina, he intended to appoint more women to leadership roles in state government. The vacant associate justiceship gave him that opportunity and in a move

that surprised the press and unsettled the other members of the court, Special Superior Court Judge Susie Sharp was appointed Associate Justice Susie Sharp on March 9, 1962. According to Governor Sanford, some of the court's members' first concerns dealt with the unavailability of facilities for a female justice.[14]

Justice Sharp's appointment made her the first female member of this court and only the second Associate Justice at that time from Rockingham County, Thomas Settle having preceded her nearly 100 years earlier in 1868. Justice Sharp served under Governor Sanford's appointment until the general election of November 1962. She was elected, at that time, to complete Justice Denny's unexpired term. In 1966, she was elected to a full eight-year term, and in 1974, she became the first female in the United States to be elected Chief Justice of a state Supreme Court, garnering 74% of the vote, the highest percentage of any statewide candidate that year. Questioned the next day by a reporter as to whether she anticipated any upheaval because of her status as the first woman elected Chief Justice, she replied with characteristic humor, "Well, I've been a curiosity all these years, so what difference will that make?"[15]

Her assumption of the chief justiceship of this court on January 2, 1975, was an historical day for this court, the State of North Carolina, and Justice Sharp. It was also a poignant day for Justice Sharp, for by taking the oath of Chief Justice from Associate Justice I. Beverly Lake, Sr., she was replacing her "special friend" with whom she had worked for 13 years, Chief Justice William Haywood Bobbitt. Forced by a newly enacted retirement law to retire at the end of his term in 1974, Chief Justice Bobbitt, and the other five members of the court, encouraged Justice Sharp as the Senior Associate Justice to seek the chief justiceship. She would have just as well preferred that Chief Justice Bobbitt remain as Chief Justice. With a characteristic combination of humor and humbleness, she observed the day she took office, that "the law that impoverished the state in 1974 may very well save it in 1979".[16]

During Justice Sharp's 17-year tenure on the court, first as Associate Justice and then as Chief Justice, she wrote 459 majority opinions which are reported in Volumes 257 through 298 of the North Carolina Reports. Her first reported case was Trust Company v. Willis, 257 N.C. 59 (1962) and her last reported case was Pipkin v. Thomas &

14. Freeman, *The First Woman of the Law*. p. 6.

15. *The News & Observer*, November 7, 1974.

16. *The News and Observer*, January 3, 1975.

Hill, Inc., 298 N.C. 278 (1979). In addition, she authored 124 concurring opinions and 45 dissenting opinions for a total of 628 written opinions. These opinions reflect her strong regard for the doctrine of stare decisis, her capacity for gathering and marshaling the facts, her breadth of scholarship, her wit and humor, and the single principle she said she kept in mind throughout her 17 years of opinion-writing, "the separation of powers".[17] Some of her major opinions include her 1964 opinion in Toone v. Adams, 262 N.C. 403 (1964), about an umpire's right to sue a baseball team and manager who had incited the crowd against him; her 1966 opinion in D & W, Inc. v. Charlotte, 268 N.C. 577 (1966), ruling that brown-bagging in restaurants was not permitted under the law then in existence (given her distaste for alcoholic beverages, this opinion must have given her some personal satisfaction); her 1967 opinion in Rabon v. Rowan Memorial Hospital, Inc., 269 N.C. 1 (1967), that abolished hospitals' immunity from liability under the charitable immunity doctrine, a doctrine the North Carolina Supreme Court had upheld on numerous occasions for nearly 100 years; her 1972 opinion in Hall v. Board of Elections, 280 N.C. 600 (1972), establishing criteria for college students' eligibility to vote where they went to college; her 1976 opinion in Smith v. State, 289 N.C. 303 (1976), that limited the ancient doctrine of "sovereign immunity"; and her 1978 opinion in In re Peoples, 296 N.C. 109 (1978), the first opinion of this court removing a judge from office for willful misconduct in office.

By these opinions, and many others, she made her mark on the law of this state. But from my perspective as her administrative assistant from January 1975 through December 1978, she made a significant mark on the judiciary quite apart from her contributions as a developer of the law.

As Chief Justice, she did not tolerate misconduct by her fellow judges. Being Chief Justice is a lonely position in the best of circumstances—no one is your peer, and none of the people who are closest to being your peer, your colleagues on the Supreme Court, have much reason to know what you have to deal with as chief. Nor are they, or anyone else, responsible in the same way as the Chief Justice. It falls to the person who is chief to be the spokesman, but even more importantly to be the symbol of what our justice system is trying to become. Justice Sharp accepted that responsibility with grace and steadfast devotion to the challenge.

As chief she had to make many decisions that affected the people who work in the courts—from my vantage point the value that

17. *The News and Observer*, July 15, 1979.

directed those decisions was a desire to make sure that the **system** was served by the people in it, not the reverse. So when judges or others strayed from the path that brought honor to the courts as a system, she took action. She took it quickly, and decisively, and with compassion for those who were the subject of her decisions—but she knew in a way that has benefited us all, that the system was bigger than she was, or than anyone else who was fortunate enough to work in it.

As Chief Justice, and thus Chief Executive of the judicial branch of government, Justice Sharp set not only as her goal for the judiciary high standards of moral and judicial conduct, she also set about to improve the administration of justice in North Carolina while at the same time protecting those traditions she believed in. She advocated for a change in the judicial selection system, despite garnering 74% of the vote in her 1974 race for Chief Justice against the fire extinguisher salesman, James Newcombe. Startled that a layman, untutored in the complexities of the law, would run for Chief Justice or for any other judgeship, she successfully advocated for a constitutional amendment passed in 1980, requiring that all judges be lawyers. Concerned that televisions in the courtroom would turn important trials into circuses, thus measurably damaging the peoples' confidence in their court system, she never wavered from her opposition to cameras in the courtroom.

In her 30 years as the first female superior court judge in North Carolina, the first female Associate Justice of the Supreme Court of North Carolina, the first female Chief Justice of the Supreme Court of North Carolina, and the first elected female Chief Justice of any Supreme Court in the United States, she followed the advice that Chief Justice Walter Stacy gave her, advice she passed on to others over the years: "A new knife is very keen. It'll cut deeply without you knowing it. You watch your sentencing power. If you don't, as you grow older, you'll regret some of the sentences you hand out. It's mighty easy to be generous with somebody else's time." As the Greensboro Daily News said in an editorial at the time of her retirement as Chief Justice on July 30, 1979:

> "Chief Justice Sharp has never been 'generous with somebody else's time'. But she has proved that genuine fairness in the administration of justice is a goal devoutly to be sought and supremely worth the price of devotion to duty and dedication to the public weal."[18]

18. *The Greensboro Daily News*, July 30, 1979.

Because of her devotion to duty and dedication to the public weal she received many honors, beginning in 1950 with an honorary LL.D. degree from her alma mater Woman's College. Thereafter, Justice Sharp was the recipient of an LH.D. degree from Pfeiffer College in 1960, an LL.D. from Queens College in 1962, an LL.D. from Elon College in 1963, an LL.D. from Wake Forest College in 1965, an LL.D. from Catawba College in 1970, an LL.D. from the University of North Carolina at Chapel Hill in 1970, and an LL.D. from Duke University in 1974. Her friend, U.S. Senator Sam Ervin, Jr., recommended her for the U.S. Supreme Court. In 1952, the February issue of the Ladies Home Journal recognized her as one of the 13 outstanding women in public office throughout the country. This honor was followed 24 years later by her being named by Time magazine in its January 6, 1976 cover story edition as one of 12 women of the year for 1975. In so doing, Time magazine called her a "trail blazer" with a "reputation as both a compassionate jurist and an incisive legal scholar".[19]

Although she never set out to be a trail blazer for women, desiring only to be the very best lawyer she could, her accomplishments resulted in a series of awards from women's organizations including the 1959 Achievement Citation from the North Carolina Federation of Business and Professional Women's Clubs, the distinguished Service Award for Women from the Chi Omega Sorority in 1959, the Alumni Service Award from the University of North Carolina at Greensboro in 1975, and the Special Award for Outstanding Legal Achievement from the New York Women's Bar Association in 1976. And in 1982, three years after her retirement, she and her special friend, the late Chief Justice William H. Bobbitt, received distinguished law alumni awards from their alma mater, the UNC School of Law.

Chief Justice Sharp's relationship with Chief Justice Bobbitt was a rare friendship. As A. C. Snow, their friend and weekly luncheon companion, wrote earlier this year, "Her friendship with Judge Bobbitt was one of the most beautiful and totally trusting I have witnessed".[20] For over 25 years, this friendship sustained the two of them through good times, difficult times, and tragic times. Throughout them all, they were there to share each other's sparkling wit, their keen interest in all things legal and governmental, and to comfort, support, and buoy each other in times of crisis.

When she died earlier this year, Chief Justice Sharp was lauded by editorial writers across North Carolina. The Greensboro Daily News said, "Susie Sharp was an unlikely heroine. But she was one of

19. *Time*, January 6, 1976, p. 19.

20. *The News and Observer*, March 3, 1996.

the best North Carolina has ever had."[21] The News and Observer said, "By her presence, Susie Sharp made the state better, and it was a splendid thing."[22]

Her presence in this state made North Carolina a better place. Her presence in this courtroom for 17 years, in the superior courtrooms of North Carolina as a trial judge for 13 years and a lawyer for 20 years rarified the atmosphere of the many courtrooms across this state. Now this portrait to be unveiled by Dr. Lawrence Taylor, nephew of Chief Justice Sharp, will forevermore rarefy the memory of this courageous, ethical, brilliant first lady of the law, Susie Marshall Sharp.

ACCEPTANCE OF CHIEF JUSTICE SHARP'S PORTRAIT BY CHIEF JUSTICE MITCHELL

Thank you Secretary Freeman for sharing memories of Chief Justice Sharp and reminding us of the many contributions she made to the State and to the Judiciary in North Carolina.

At this point, I would like to call upon Dr. Lawrence Taylor, a nephew of Chief Justice Sharp to come forward and unveil his aunt's portrait.

It is with pleasure that I, on behalf of the Court, accept the donation of the portrait to the Court. I instruct the Clerk to, as quickly as possible, have the portrait hung above the door and beside the portrait of former Chief Justice Bobbitt in the Courtroom. I would also instruct Ralph White, our Reporter, to have the entire contents of this proceeding, including the full presentation of Secretary Freeman's, reprinted in the next published volume of the North Carolina reports.

21. *Greensboro Daily News*, March 5, 1996.

22. *The News and Observer*, March 5, 1996.

CLIENT SECURITY FUND

IN RE CLIENT SECURITY FUND OF)
THE NORTH CAROLINA STATE BAR) ORDER

This matter coming on to be considered before the North Carolina Supreme Court in conference duly assembled on November 2, 1995, upon the request of the North Carolina State Bar, and it appearing from information submitted by the Council of the North Carolina State Bar that no assessment of the active members of the North Carolina State Bar will be needed in 1996 in order to support and maintain properly the Client Security Fund;

Now, therefore, it is hereby ordered that there be no assessment of the active members of the North Carolina State Bar to support The Client Security Fund in 1996.

This the 7th day of March, 1996.

s/ Orr, J.
For the Court

COMPENSATION FOR STATE BAR COUNCILORS

IN RE THE COUNCIL OF THE)
NORTH CAROLINA STATE BAR) ORDER

This matter coming on to be considered before the North Carolina Supreme Court in conference duly assembled on March 7, 1996, upon the request of the North Carolina State Bar, and it appearing that the North Carolina State Bar Council established, subject to this Court's approval, new rates of per diem compensation for councilors pursuant to G.S. 84-20 at its regular business meeting on October 20, 1995; and, it further appearing that the council's actions increasing the rates of per diem compensation from $10 to $50 per day for in-state service, and from $10 to $100 per day for out-of-state service were reasonable and appropriate;

Now, therefore, the North Carolina Supreme Court does hereby approve the above stated actions of the North Carolina State Bar Council, pursuant to G.S. 84-20.

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 OF COUNSEL 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 is quarterly meeting on April 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 Of Counsel Committee, as particularly set forth in 27 N.C.A.C. 1A. 0701 be amended by deleting section 14 relating to the Of Counsel Committee and by renumbering the succeeding sections sequentially. The section to be deleted reads as follows:

> (14) Of Counsel Committee. A committee of at least nine members shall design and implement programs to enhance the competence and professionalism of lawyers through voluntary efforts of members of the Bar. These programs shall be designed to orient, counsel, educate, and advise fellow lawyers, educators, students, and persons in ancillary occupations regarding the practice of the profession and work related thereto.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 12, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of May, 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 12th day of June, 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 12th day of June, 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

APPEAL AND ERROR

APPEAL AND ERROR—Continued

§ 158 (NCI4th). Action amounting to plain error in criminal actions

Appellate review of the trial court's instructions on jury questions was waived where defendant did not object at trial and did not allege plain error. **State v. King,** 357.

§ 340 (NCI4th). Assignments of error generally; form and record references

Petitioner's assignments of error were sufficiently specific to meet appellate standards. **Associated Mechanical Contractors v. Payne**, 825.

§ 406 (NCI4th). Matters cognizable ex mero motu; capital cases

Although defendant failed to object at trial and failed to include the words "plain error" in his brief, the Supreme Court, in the exercise of its discretion under Appellate Rule 2 and precedent of the Court electing to review unpreserved assignments of error in capital cases, elected to consider under a plain error analysis defendant's contention that his right to a fair trial was violated by a colloquy between the trial court and a prospective juror. **State v. Gregory,** 580.

§ 451 (NCI4th). Supreme Court review of Court of Appeals generally

The Supreme Court will consider an issue that was properly presented in defendant's brief in the Court of Appeals but was not addressed by the Court of Appeals. **Newton v. New Hanover County Bd. of Education,** 554.

§ 504 (NCI4th). Invited error

Defendant cannot assign error to hearsay testimony which he elicited. **State v. Mitchell**, 797.

§ 506 (NCI4th). Error cured by verdict; criminal cases

Any errors in a first-degree murder prosecution in the denial of defendant's various motions to allow the jury to be informed regarding his parole eligibility, his motion for individual voir dire and requests to question several prospective jurors subsequent to their challenge for cause by the State, and in the instruction on a no answer to Issue Three were rendered moot because defendant received a sentence of life imprisonment rather than death. **State v. Wright,** 179.

APPEARANCE

§ 10 (NCI4th). Filing an answer; motion for leave to file answer

The attorney for plaintiffs' uninsured motorist carrier, an unnamed party, did not make a general appearance for defendant uninsured motorist when she filed an answer "in the name of the Defendant" and thereby preclude defendant from raising the defense of lack of personal jurisdiction based on insufficiency of service of process. **Grimsley v. Nelson,** 542.

ARSON AND OTHER BURNINGS

§ 32 (NCI4th). Sufficiency of particular evidence; ownership and occupancy; dwelling of another

The evidence was sufficient to show that the killing of the victim and the burning of his dwelling were so joined by time and circumstances as to be part of one continuous transaction and therefore supports a finding that the dwelling was "occupied" within the meaning of G.S. 14-58, and the evidence was thus sufficient to support defendant's conviction of first-degree arson. **State v. Jaynes,** 249.

ASSAULT AND BATTERY

§ 81 (NCI4th). Discharging barreled weapons or firearm into occupied property; sufficiency of evidence

There was sufficient evidence to find defendant guilty of discharging a firearm into occupied property where intent to shoot into the vehicles could be inferred from the fact that defendant fired a semiautomatic weapon into an area where he knew automobiles were parked and there was evidence that defendant knew people were exiting the club and present in the parking lot. **State v. James,** 589.

§ 82 (NCI4th). Discharging barreled weapons or firearm into occupied property; instructions

The trial court did not err in a prosecution for discharging a firearm into occupied property by using the pattern jury instruction, which informed the jury that it could find defendant guilty if defendant knew or had reasonable grounds to believe that the automobile might be occupied. **State v. James,** 589.

AUTOMOBILES AND OTHER VEHICLES

§ 460 (NCI4th). Liability of guest or passenger—imputed negligence; owner-passenger

The trial court erred by granting a directed verdict for defendant in an action arising from an automobile collision where plaintiff was the front seat passenger in a car driven by defendant, her son, who had a learner's permit and who was operating the car under her supervision. Although G.S. 20-11(b) establishes a presumption of the right to control on the part of the supervising adult, this presumption does not translate into an irrebuttable presumption of control so as to impute negligence or establish contributory negligence as a matter of law without regard for extrinsic circumstances or general negligence principles. **Stanfield v. Tilghman,** 389.

BURGLARY AND UNLAWFUL BREAKINGS

§ 57 (NCI4th). Sufficiency of evidence; first-degree burglary

There was no error in submitting first-degree burglary to the jury where there was evidence from which the jury could conclude that an entry into the dwelling house at night was encompassed within the instruction and advice defendant gave the principals. **State v. Marr,** 607.

§ 74 (NCI4th). Sufficiency of evidence; time of offense

The evidence was insufficient to support defendant's conviction of second-degree burglary where it failed to show that defendant broke into the victim's home during the nighttime. **State v. Rick,** 91.

§ 147 (NCI4th). Jury instructions; breaking and entering

The trial court did not commit plain error by instructing the jury in a first-degree burglary trial that "walking through an open door and opening the same would constitute a breaking and an entry" since the instruction required the jury to find both a breaking and an entering before convicting defendant. **State v. Jaynes,** 249.

§ 151 (NCI4th). Jury instructions; elements of burglary; felonious intent

The trial court did not commit plain error by originally instructing the jury that defendant could be found guilty of burglary if it found he entered the occupied dwelling with the intent to commit attempted larceny, a misdemeanor, rather than with

the intent to commit larceny, a felony, where the court thereafter gave the jury supplemental instructions in which it replaced "attempted larceny" with "larceny" in describing the intent element of burglary. **State v. Chandler**, 742.

COMMON LAW

§ 1 (NCI4th). Generally

The common law referred to in G.S. 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence; however, that statement is incomplete and may be misleading because the common law of England was applicable in North Carolina only to the extent it was deemed compatible with our way of living and only those parts of the English common law which had been in force and use in North Carolina and which were not contrary to the freedom and independence of North Carolina are to be applied. **Gwathmey v. State of North Carolina,** 287.

CONSPIRACY

§ 33 (NCI4th). Sufficiency of evidence; conspiracy to commit robbery or armed robbery

There was sufficient evidence of conspiracy to commit robbery with a dangerous weapon. **State v. Lamb,** 151.

CONSTITUTIONAL LAW

§ 37 (NCI4th). Delegation of legislative power to counties

Restrictions with respect to the delegation of power to an agency of the State do not apply to cities and counties. **Maready v. City of Winston-Salem**, 708.

§ 38 (NCI4th). Delegation of legislative power to municipal corporations

The statute which authorizes local governments to make economic development incentive grants to private corporations is not unconstitutional as impermissibly vague, ambiguous, and without reasonably objective standards. **Maready v. City of Winston-Salem**, 708.

§ 161 (NCI4th). Rights of persons accused of crime generally

The trial court's admission of an SBI agent's testimony in response to a question by the prosecutor that neither defendant nor his attorney had given the shoes worn by defendant on the night of the crime to law officers for comparison with shoeprints at the crime scene did not improperly allow the State to shift the burden of proof to defendant in violation of his right to due process. **State v. Jaynes,** 249.

§ 175 (NCI4th). Former jeopardy; reliance on one crime as aggravating factor in sentencing upon conviction of second crime

The trial court did not err during a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery. **State v. Buckner,** 198.

§ 189 (NCI4th). Former jeopardy; armed robbery and larceny

The armed robbery of a murder victim and larceny of the victim's automobile were separate takings rather than a continuous taking, and defendant's right against

CONSTITUTIONAL LAW—Continued

§ 352 (NCI4th). Self-incrimination generally

There was no plain error in a first-degree murder prosecution where defendant contended that the court allowed the prosecutor to elicit testimony concerning defendant's invocation of his right to remain silent, but the jury had been taken from the courtroom. **State v. Walls,** 1.

The trial court erred where defendant invoked his right to silence; the interrogation was terminated; defendant was charged; and an SBI agent initiated a conversation with defendant during processing less than fifteen minutes after the initial interrogation ended for the purpose of determining whether defendant had killed the victim and without readvising defendant of his *Miranda* rights. **State v. Murphy**, 813.

§ 370 (NCI4th). Prohibition on cruel and unusual punishment; death penalty generally

Defendant failed to show he is mentally retarded, and there is thus no merit to his contention that the death penalty was improperly imposed upon him because he is mentally retarded. **State v. Best,** 502.

The especially heinous, atrocious, or cruel aggravating circumstance in capital cases is not unconstitutionally vague. **State v. Kandies,** 419.

§ 371 (NCI4th). Death penalty; first degree murder

The North Carolina death penalty is not unconstitutional. **State v. DeCastro**, 667.

§ 372 (NCI4th). Prohibition on cruel and unusual punishment; death penalty; effect of prosecutorial discretion

The district attorney's decision to offer a defendant on trial for first-degree murder a plea bargain allowing him to plead guilty to second-degree murder upon learning that the sheriff's department had made cash payments to two of the State's witnesses was not an arbitrary or capricious decision which could render our capital sentencing scheme unconstitutional. **State v. Lineberger,** 599.

The trial court erred by ruling that it did not have the authority to accept a guilty plea to second-degree murder by a defendant on trial for first-degree murder unless the prosecutor announced that there was no evidence of first-degree murder or of an aggravating circumstance. **Ibid.**

COSTS

§ 37 (NCI4th). Attorney's fees in particular actions or proceedings

For purposes of N.C.G.S. § 6-19.1, which permits the prevailing party (other than the State) to recover attorney fees in a civil action brought by the State if the agency acted without "substantial justification," substantial justification should be construed as justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person. **Crowell Constructors, Inc. v. State ex rel. Cobey**, 838.

Crowell Constructors was not entitled to recover attorney fees under N.C.G.S. § 6-19.1 where DEHNR was justified to a degree that could satisfy a reasonable person in asserting its position or opinion. **Ibid.**

CRIMINAL LAW

CRIMINAL LAW—Continued

§ 129 (NCI4th). Prosecution's withdrawal from plea arrangement

Where the trial court's misapprehension of the law was the reason the district attorney failed to sign the transcript of plea, the case should be reviewed as if the offer of a plea bargain had been presented to and rejected by the trial court. **State v. Lineberger,** 599.

§ 132 (NCI4th). Plea of guilty; offenses included

The trial court erred by ruling that it did not have the authority to accept a guilty plea to second-degree murder by a defendant on trial for first-degree murder unless the prosecutor announced that there was no evidence of first-degree murder or of an aggravating circumstance. **State v. Lineberger,** 599.

A district attorney who prosecutes a defendant for first-degree murder may accept a plea of guilty of second-degree murder or a lesser offense at any time prior to the jury's return of a verdict finding defendant guilty of first-degree murder. **Ibid.**

§ 240 (NCI4th). Continuance generally; review for abuse of discretion

While a motion to continue ordinarily is addressed to the discretion of the trial court, a motion which raises a constitutional issue is fully reviewable on appeal. **State v. Walls,** 1.

§ 261 (NCI4th). Continuance; insufficient time to prepare a defense generally

There was no error and no denial of effective assistance of counsel in a first-degree murder prosecution where the trial court denied defendant's motion for a continuance. **State v. Walls,** 1.

§ 270 (NCI4th). Continuance; medical, psychiatric, or psychological examination

The trial court did not err or abuse its discretion in a noncapital first-degree murder prosecution by denying defendant's request for a continuance so that another psychiatric evaluation could be performed taking into account recent allegations of childhood abuse. **State v. Jones,** 523.

§ 289 (NCI4th). Procedure on motion for continuance; showing grounds for motion; affidavit

There was no abuse of discretion in a noncapital first-degree murder trial where defense counsel discovered the day before trial that defendant's mother and her friends had allegedly abused defendant during his childhood and moved to continue, but did not support the motion by an affidavit and did not set forth any form of detailed proof indicating sufficient grounds for further delay. **State v. Jones,** 523.

§ 300 (NCI4th). Consolidation of particular offenses; multiple homicide counts

There was no error in the joinder of two first-degree murder charges where the facts incident to the two murders reveal a certain modus operandi and a temporal proximity sufficient to establish a transactional connection. **State v. Chapman,** 330.

§ 328 (NCI4th). Severance of offenses generally

The trial court did not err by denying defendant's pretrial motion to sever the offenses of common law robbery and first-degree murder to prevent prejudice to defendant on the ground there was insufficient evidence of the robbery. **State v. Mitchell,** 797.

CRIMINAL LAW—Continued

The trial court did not err by failing to intervene ex mero motu to prevent the prosecutor from making closing arguments in the guilt phase which defendant contended improperly commented on defendant's right not to testify at trial. **State v. Richardson**, 772.

§ 432 (NCI4th). Argument of counsel; appeals to prejudice, passion, and the like

A portion of the State's closing argument which defendant contends improperly appealed to the sympathy of the jury was firmly rooted in the evidence and was proper. **State v. Walls**, 1.

References in a prosecutor's closing argument in a first-degree murder sentencing hearing to defendant as "Jason," "Freddie Kruger," and "that devil" were not improper. **Ibid.**

§ 434 (NCI4th). Argument of counsel; defendant's prior convictions or criminal conduct

The prosecutor's closing argument in a murder trial concerning defendant's aggravated assault on another victim did not tell the jury to convict defendant of the murder because he had been convicted of the assault. **State v. Jones**, 457.

§ 436 (NCI4th). Argument of counsel; defendant's callousness, lack of remorse, or potential for future crime

The prosecutor's closing argument asking the jury whether it had seen any remorse from the defendant was not an improper comment on defendant's failure to testify but was a proper comment on defendant's demeanor. **State v. McNatt**, 173.

The prosecutor's comments in his jury argument in a capital sentencing proceeding regarding defendant's insincerity and lack of remorse shown by his failure to tell his version of what happened until he testified were permissible inferences from the evidence and not improper. **State v. Chandler**, 742.

§ 438 (NCI4th). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness

The prosecutor did not express a personal opinion that defendant was lying to the police but was commenting on evidence supporting a nonstatutory mitigating circumstance when he commented in his closing argument that "I suppose he would answer questions from the officers as long as he wasn't telling the truth about it and as long as he was saying . . . [he] didn't do anything." **State v. Best**, 502.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses generally

There was no prejudicial error in a first-degree murder prosecution where defendant was not allowed to repeat specific trial testimony during closing arguments. **State v. Buckner**, 198.

§ 441 (NCI4th). Argument of counsel; comment on character and credibility of expert witnesses

A reference in the prosecutor's closing argument in a first-degree murder sentencing hearing to defendant's expert witness as a "paid psychiatrist" was not objected to at trial and did not translate into an argument that the witness would testify to anything for money. **State v. Walls**, 1.

CRIMINAL LAW—Continued

Assuming the prosecutor improperly attacked the credibility of defendant's DNA expert by arguing to the jury that defendant chose an expert from Ohio rather than one from either of two laboratories in North Carolina, any error was cured by the trial court's actions. **State v. Best,** 502.

§ 442 (NCI4th). Argument of counsel; comment on jury's duty

There was no error in a first-degree murder capital sentencing hearing where defendant contended that the State's closing arguments urged the jury to find defendant guilty based on fear and unreasoned prejudice rather than upon the evidence presented. **State v. Walls,** 1.

It was not error for the prosecutor to argue in a capital sentencing proceeding that "you read the newspapers and magazines, and you watch TV, and you say, good gracious, look at this crime rate, it is out of hand, why don't they do something about it? . . . You are they." **State v. Jones,** 457.

§ 444 (NCI4th). Argument of counsel; counsel's personal beliefs; comment on defendant's guilt or innocence

The prosecutor's closing argument in a murder trial that the sheriff's department didn't go out and arrest the first live body they could find and put him in jail and charge him with the murder, that this case sat for over five years before defendant was arrested, and that "we have plenty to do without putting innocent people in jail" did not improperly tell the jury that defendant would not be in jail if he was not guilty. **State v. Jones,** 457.

§ 445 (NCI4th). Argument of counsel; counsel's personal beliefs other than comment on defendant's guilt or innocence

There was no error in a prosecution for the first-degree murder and first-degree rape of a four-year-old girl in the prosecutor's argument regarding what the mother of the victim said where there was no explicit testimony that the mother asked that question, but the argument in context was factually based. **State v. Kandies,** 419.

§ 446 (NCI4th). Argument of counsel; inflammatory comments, generally; significance or impact of case

Although a defendant in a first-degree murder sentencing hearing interprets a portion of the prosecutor's argument as informing the jury that it should respond to community pressure and impose the death penalty, the arguments were proper and merely informed the jury that its verdict could send a message to the people of the county that this murder was deserving of the highest penalty available. **State v. Walls,** 1.

§ 448 (NCI4th). Argument of counsel; victim's age or circumstances

A defendant in a first-degree murder sentencing hearing did not object at trial to the prosecutor's argument that the jury should return a sentence of death because of the characteristics of the victim and the feelings of his family, and the argument did not amount to gross impropriety requiring the trial court to act ex mero motu. **State v. Walls,** 1.

The prosecutor's argument in the sentencing hearing for the first-degree murder of a four-year-old girl regarding what the victim was thinking and feeling while defendant beat and raped her was not prejudicial error, if error at all, and the prosecutor's references to the victim's age merely emphasized the brutality of the crime as well as the depravity of defendant's acts. **State v. Kandies,** 419.

§ 450 (NCI4th). Argument of counsel; violent, dangerous, or depraved nature of offense or conduct

The trial court did not err in a capital sentencing hearing by not intervening ex mero motu when the prosecutor characterized defendant as an animal. **State v. Richardson**, 772.

§ 451 (NCI4th). Argument of counsel; comment on sentence or punishment generally

The objectives of the closing arguments in the guilt and sentencing phases of a capital prosecution are different and rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase. **State v. Kandies**, 419.

§ 452 (NCI4th). Argument of counsel; comment on aggravating or mitigating circumstances

The prosecutor's closing argument in a capital sentencing proceeding that defendant had three prior felony convictions did not improperly allow the jury to consider defendant's conviction for an assault that occurred after the murder as an aggravating circumstance where the prosecutor and court made clear that the assault which occurred prior to the murder was the only crime that would support the prior conviction of a violent felony aggravating circumstance. **State v. Jones**, 457.

The prosecutor's argument that members of the jury or the prosecutor could produce more mitigating circumstances than the defendant if called upon to do so did not ask the jurors to place themselves in the place of a litigant and was not improper. **Ibid.**

The prosecutor's closing argument about the legislature's provision of only one aggravating circumstance applicable to the facts of this case was not so grossly improper that the trial court should have intervened ex mero motu. **State v. Chandler**, 742.

§ 454 (NCI4th). Argument of counsel; comment on sentence or punishment; capital cases generally

The portion of a first-degree murder sentencing hearing closing argument during which the prosecutor remained silent for four minutes to illustrate the time the victim lay on the river bottom was proper. **State v. Walls**, 1.

There was no prejudicial error in a first-degree murder prosecution where the trial court did not allow defendant to argue that the jurors should evaluate the evidence in light of the severity of the sentence. **State v. Buckner**, 198.

There was no abuse of discretion in a first-degree murder sentencing hearing where the trial court overruled defendant's objections to prosecutorial arguments which he contended mischaracterized mitigating circumstances. **Ibid.**

There was no abuse of discretion in a first-degree murder sentencing hearing in the trial court not allowing defendant to tell the jury in his argument about the statutory aggravating factors that the State did not present. **Ibid.**

The trial court did not abuse its discretion in a first-degree murder sentencing hearing by not allowing defendant to argue that some of the people he had testified against would be waiting for him in prison. **Ibid.**

§ 455 (NCI4th). Argument of counsel; deterrent effect of death penalty

It was not error for the prosecutor to argue in a capital sentencing proceeding that the "only way you can guarantee that [defendant] won't get out of prison and kill

somebody else is to impose the same punishment on him that he imposed on [the victim]." **State v. Jones,** 457.

The prosecutor did not improperly urge the jury to vote for the death penalty to deter the violence and crime that plagues our society by comments about the rights of the victim and the responsibilities of jurors, and the prosecutor could properly argue for the death penalty because of its deterrent effect on the defendant personally. **State v. Chandler,** 742.

§ 456 (NCI4th). Argument of counsel; comment on judicial or executive review; capital cases generally

The jury in a first-degree murder sentencing hearing could not have understood the prosecutor's argument that "we're the masters of our destiny and we are responsible for the consequences of our actions" to relieve the jury of the responsibility to recommend a sentence. **State v. Walls,** 1.

§ 461 (NCI4th). Argument of counsel; comment on matters not in evidence

A comment by the prosecutor during her closing argument that it was "interesting how the State cannot get in what Morris told Lawrence" was improper where the court had ruled that the statement by Morris was inadmissible. **State v. Straing,** 623.

There was no error in the prosecution of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that defendant held the victim down and forcibly raped her while she cried and moaned; it would be reasonable for the jury to infer from the evidence that defendant physically restrained the victim while he forced himself upon her and that the victim cried out in fear and pain during the ordeal. **State v. Kandies,** 419.

There was no error in the prosecution of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that he spoke for the victim, who died to fulfill the sick desires of the defendant; it was not too speculative for the jury to infer that defendant committed these acts with an intent to satisfy his perverse desires. **Ibid.**

There was no error in the prosection of defendant for the first-degree murder and first-degree rape of a four-year-old child in the prosecutor's argument that a doctor had testified that the victim was raped; the prosecutor's characterization of the testimony and the actual testimony are entirely consistent. **Ibid.**

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's argument that no physical evidence connected the State's key witness to the scene. **State v. DeCastro,** 667.

§ 463 (NCI4th). Argument of counsel; comments supported by evidence

The prosecutor did not improperly argue to the jury that after the male victim received his fatal injuries, he was aware or was contemplating that his wife was being raped. **State v. Best,** 502.

§ 466 (NCI4th). Argument of counsel; comments regarding defense attorney

The prosecutor did not improperly argue in a capital trial that defense counsel lied to the jury when he referred to "that cock-and-bull mess that [defense counsel] have thrown up to you" where the argument was directed at the improbability of an argument by defense counsel. **State v. Best,** 502.

CRIMINAL LAW—Continued

§ 468 (NCI4th). Argument of counsel; miscellaneous

The prosecutor in a first-degree murder sentencing hearing did not improperly suggest to the jury in his closing argument that defendant was not entitled to constitutional protections. **State v. Walls,** 1.

There was no prejudicial error in the guilt phase of a first-degree murder prosecution where defendant contended that the combined effect of not being able to argue that the evidence be evaluated in light of the severity of the sentence and not being allowed to repeat specific trial testimony required a new trial. **State v. Buckner,** 198.

§ 471 (NCI4th). Conduct of counsel during trial; questioning of defendant, witnesses

Assuming the prosecutor was guilty of misconduct by asking defendant's DNA expert whether she knew she was the second DNA expert consulted by defendant, any error was cured by the trial court's instructions to the jury not to consider the question. **State v. Best,** 502.

§ 478 (NCI4th). Conduct affecting jury; communications with jurors generally; admonitions by court

The trial judge's instructions, after receiving a report from the jury foreman that one juror wanted to talk with the judge, did not impose an improper rule that required the assent of all jurors for a single juror to communicate with the court. **State v. Best,** 502.

The trial court did not abuse its discretion by calling one juror into the courtroom alone during a recess and instructing the juror outside the presence of the jury panel that the court could not answer questions she had submitted in a handwritten note to the bailiff about perceived discrepancies in the State's evidence. **State v. Mitchell,** 797.

§ 491 (NCI4th). Permitting jury to view scene or evidence out of court generally

The trial court did not err in a first-degree murder prosecution by granting the State's motion for a view of the restaurant where the murders occurred. **State v. French,** 863.

§ 496 (NCI4th). Conduct affecting jury; review of testimony

There was no plain error in a first-degree murder prosecution where the trial court refused to grant the jury's request to rehear certain testimony, including that of defendant. **State v. Buckner,** 198.

§ 501 (NCI4th). Deliberations; coercion of verdict; court's inquiry into numerical split of jury

The trial court's additional instructions to a deadlocked jury were not coercive because the court knew the jury was divided eleven to one in favor of conviction. **State v. Jones,** 457.

§ 544 (NCI4th). Mistrial; conduct involving prosecutor; examination of witnesses; reference to prior crimes

The trial court did not err by failing to declare a mistrial in this capital trial when the prosecutor on three occasions asked defense witnesses about unspecified convictions and charges against defendant in another county and the possible sentences

CRIMINAL LAW—Continued

The trial court's instructions that the State was required to prove as an element of each of the crimes of first-degree premeditated and deliberated murder, armed robbery, and first-degree kidnapping that "defendant, or someone with whom he was acting in concert" had the specific intent to commit the crime erroneously allowed the jury to convict defendant of those crimes on the theory of acting in concert without requiring the State to establish that defendant had the specific intent to commit those crimes. **State v. Straing,** 623.

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence generally

There was no error in an instruction on acting in concert where the court did not instruct the jury that it must find that defendant was actually or constructively present when the armed robbery was committed before defendant could be convicted. **State v. Lamb,** 151.

The trial court did not commit plain error in failing to instruct the jury that a defendant's actual or constructive presence at the scene of the crime is required before defendant may be convicted under the theory of acting in concert. **State v. Jaynes,** 249.

§ 796 (NCI4th). Instruction as to aiding and abetting generally

There was no plain error in a first-degree murder prosecution in the trial court's instructions on aiding and abetting where defendant argued that the trial court failed to instruct that a defendant cannot be guilty as an aider and abettor unless defendant had the requisite mens rea. **State v. Buckner,** 198.

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court erred in its instructions on aiding and abetting and acting in concert by failing to instruct that a defendant cannot be guilty under these theories unless he is actually or constructively present at the crime scene. **Ibid.**

§ 799 (NCI4th). Charge as to accessory before the fact generally

The trial court did not err in a prosecution for being an accessory before the fact to murder, arson, burglary, armed robbery, breaking or entering, and larceny where the court's instruction required the jury to find in each case that the defendant was an accessory before the fact. **State v. Marr,** 607.

§ 801 (NCI4th). Charge as to accessory before the fact; guilt of principal; causation traceable to accessory

There was no plain error in a prosecution for being an accessory before the fact to murder, burglary, arson, robbery and larceny in the instructions where defendant contended that the court did not instruct the jury that the crime had to be a part of a common plan or that defendant had the requisite mens rea for each crime charged. **State v. Marr,** 607.

The trial court's error in instructing the jury that an accessory is responsible for all of the incidental consequences which might reasonably be expected to result from the intended wrong was harmless. **Ibid.**

§ 810 (NCI4th). Instructions on defendant's failure to testify; particular instructions approved or found not prejudicial

The trial court did not err in a prosecution for discharging a firearm into occupied property and felony murder by instructing the jury that a defendant does not have to

take the stand or present evidence and that not taking the stand may also be a trial tactic. **State v. James,** 589.

§ 856 (NCI4th). Instruction on consequences of verdict or punishment; noncapital cases

The trial court did not err by denying defendant's request to instruct the jury that defendant would be sentenced to life in prison for his conviction of first-degree rape. **State v. Kandies,** 419.

§ 867 (NCI4th). Additional instructions after retirement of jury; generally; permissible reasons for giving additional instructions

There was no plain error in a noncapital first-degree murder prosecution where the trial court instructed the jury that any question addressed to the court had to be that of the entire panel rather than of an individual juror. **State v. King,** 357.

§ 872 (NCI4th). Jury's request for additional instructions

The trial judge's instructions, after receiving a report from the jury foreman that one juror wanted to talk with the judge, did not impose an improper rule that required the assent of all jurors for a single juror to communicate with the court. **State v. Best,** 502.

§ 878 (NCI4th). Additional instructions after retirement of jury; miscellaneous instructions not erroneous or prejudicial

The trial court's additional instructions to a deadlocked jury were not coercive because they included language not endorsed by G.S. 15A-1235(b)(1) that "the court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict." **State v. Jones,** 457.

The trial court's supplemental instructions to a deadlocked jury in a first-degree murder trial sufficiently addressed all of the concerns set out in G.S. 15A-1235(b)(2) and (b)(4) and thus did not coerce a verdict in violation of defendant's constitutional rights. **State v. Aikens,** 567.

§ 886 (NCI4th). Plain error rule

Appellate review of the trial court's instructions on jury questions was waived where defendant did not object at trial and did not allege plain error. **State v. King,** 357.

§ 1056 (NCI4th). Sentencing hearing; statement by defendant

There was no error in a first-degree murder prosecution in the denial of defendant's motion for allocution. **State v. Wright,** 179.

§ 1152 (NCI4th). Fair Sentencing Act; statutory aggravating factors; use of or armed with deadly weapon; generally

The trial court did not err when sentencing defendant for kidnapping under the version of the Fair Sentencing Act in effect at that time, N.C.G.S. § 15A-1340.1-.7 (1988), by finding in aggravation that defendant was armed at the time of the kidnapping. **State v. Richardson,** 772.

§ 1233 (NCI4th). Mitigating factors under Fair Sentencing Act; proof that limited mental capacity reduced culpability

The trial court did not err when sentencing defendant for discharging a firearm into occupied property and conspiracy to discharge a firearm into occupied property

CRIMINAL LAW—Continued

by not finding defendant's IQ of 83 a mitigating factor even though the State stipulated to defendant's limited intelligence and the jury found defendant's IQ to be a mitigating circumstance for first-degree murder. **State v. James,** 589.

§ 1284 (NCI4th). Habitual felon indictment

A separate habitual felon indictment is not required for each substantive felony indictment since the plain meaning of G.S. 14-7.3 is that the habitual felon indictment must be a separate document, not that a separate habitual felon indictment is required for each substantive felony charge. **State v. Patton,** 633.

§ 1299 (NCI4th). Capital punishment; effect of guilty plea

The trial court erred by ruling that it did not have the authority to accept a guilty plea to second-degree murder by a defendant on trial for first-degree murder unless the prosecutor announced that there was no evidence of first-degree murder or of an aggravating circumstance. **State v. Lineberger,** 599.

§ 1309 (NCI4th). Capital punishment; submission and competence of evidence generally

While the jury in a capital case must not be precluded from considering as a mitigating factor any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as basis for a sentence less than death, 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. Walls,** 1.

§ 1311 (NCI4th). Capital punishment; admission of evidence not presented or inadmissible at guilt phase of trial

Proposed evidence that a three-year-old murder victim fell into a river rather than being thrown by defendant was not admissible as mitigating evidence in the sentencing phase; residual doubt testimony is not admissible during the sentencing phase of a capital case. **State v. Walls,** 1.

Evidence from a witness who came forward after the guilt-innocence phase of a first-degree murder prosecution that the three-year-old victim was not thrown by defendant but fell into a river was not admissible in the sentencing phase for the purpose of impeaching the aggravating circumstances. **Ibid.**

Evidence in a capital sentencing proceeding that defendant was not guilty was not admissible under Green v. Georgia, 442 U.S. 95. **Ibid.**

§ 1313 (NCI4th). Capital punishment; evidence of nature of death penalty; potential for rehabilitation

The prosecutor's question in a capital sentencing proceeding during cross-examination of defendant's counselor while he was in a New York prison asking if she had an opinion as to whether defendant would be able, "if given some opportunity at some point, to abide by the law" did not improperly insinuate that defendant might later be released from prison on parole if given a life sentence. **State v. Carter,** 312.

§ 1314 (NCI4th). Capital punishment; submission of evidence; aggravating and mitigating circumstances

A district attorney who prosecutes a defendant for first-degree murder may accept a plea of guilty of second-degree murder or a lesser offense at any time prior to the jury's return of a verdict finding defendant guilty of first-degree murder, but once

a defendant has been determined to be guilty of first-degree murder either by plea or by jury verdict, the trial court must conduct a capital sentencing proceeding unless there is no evidence to support the finding of an aggravating circumstance. **State v. Lineberger,** 599.

§ 1316 (NCI4th). Capital punishment; submission and competence of evidence; prior criminal record or other crimes

There was no abuse of discretion in a first-degree murder prosecution where defendant contended that there was prosecutorial misconduct in the cross-examination of his psychiatrist. **State v. Walls,** 1.

§ 1318 (NCI4th). Capital punishment; instructions generally

The Endmund rule applies only in cases in which defendant was convicted of first-degree murder on the felony murder theory, and the trial court thus did not err by failing to require the jury in a capital sentencing proceeding to make a factual determination of defendant's state of mind concerning the murder where the jury convicted defendant upon the theory of premeditation and deliberation in addition to the felony murder theory. **State v. Robinson,** 74.

The trial court did not err in a capital sentencing hearing by refusing to instruct the jurors that they should prevent racial concerns from influencing their consideration of defendant's sentence. **State v. Richardson,** 772.

§ 1320 (NCI4th). Capital punishment; instructions; consideration of evidence

The trial court's instruction in a first-degree murder sentencing proceeding that all the evidence from the guilt-innocence phase "will be competent for your consideration in recommending punishment" did not improperly allow the jury to consider an assault by defendant after the murder as an aggravating circumstance for the murder. **State v. Jones,** 457.

There was no plain error in a first-degree murder prosecution where defendant contended that the court erred by not instructing the jury that it could not consider the same evidence in finding more than one aggravating circumstance. **State v. Kandies,** 419.

The trial court did not err in a sentencing hearing for two first-degree murders by allowing the jury to find and consider as to the killing of one victim that the killing was especially heinous, atrocious, or cruel and that the killing occurred during the course of conduct which included the commission by defendant of other crimes of violence against another person or persons. **State v. DeCastro,** 667.

§ 1322 (NCI4th). Capital punishment; instructions; parole eligibility

Where the jury in a capital sentencing proceeding sent a note to the trial court asking whether a life sentence carried with it a possibility of parole, the trial court did not err by instructing the jury that the possibility of parole should not be considered and that the jury should make its recommendation as if life imprisonment means imprisonment for life. **State v. Jones,** 457.

The trial court did not violate defendant's due process rights in a capital sentencing proceeding by failing to inform the jury that he was unlikely ever to be paroled. **State v. Best,** 502.

The trial court did not err in a capital sentencing hearing by answering a jury question as to whether life meant life in prison without the possibility of parole with the pattern jury instruction. **State v. DeCastro,** 667.

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§ 1323 (NCI4th). Capital punishment; instructions; aggravating and mitigating circumstances generally

The trial court instruction in a first-degree murder sentencing hearing with respect to nonstatutory mitigating circumstances did not offend the Eighth And Fourteenth Amendments by allowing the jury to refuse to consider mitigating evidence. **State v. Walls,** 1.

The trial court did not commit plain error in a first-degree murder capital sentencing hearing by instructing the jurors on their consideration of mitigating circumstances at Issue Three. **State v. Buckner,** 198.

The trial court erred by instructing the jury in a capital sentencing proceeding that it was for the jury to decide whether any statutory mitigating circumstances it found to exist had mitigating value. **State v. Jaynes,** 249.

It was not error for the trial court to charge the jury that in order to find a nonstatutory mitigating circumstance, it must find the facts supporting the circumstance to exist and that those facts have mitigating value. **State v. Best,** 502.

§ 1325 (NCI4th). Capital punishment; instructions; unanimous decision as to mitigating circumstances

The trial court did not err in a first-degree murder sentencing hearing by reinstructing the jurors that they "may" consider mitigating circumstances at Issues Three and Four, after the initial instruction informed the jurors that they "must" consider mitigating circumstances at that stage. **State v. Buckner,** 198.

The trial court did not err by failing to require the jury in a capital sentencing proceeding to consider any mitigating circumstances found in Issue Two when weighing the aggravating circumstances against the mitigating circumstances in Issues Three and Four. **State v. Best,** 502.

There was no plain error in a capital sentencing hearing by instructing the jury that it must be unanimous in its answers to Issue Three and Issue Four on the Issues and Recommendation as to Punishment form. **State v. DeCastro,** 667.

There was no plain error in a capital sentencing hearing where the jurors were instructed regarding Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it had mitigating value, and regarding Issue Three that they must weigh the aggravating circumstances against the mitigating circumstances if "the jury" found from the evidence one or more mitigating circumstances. **Ibid.**

The trial court did not err in a capital sentencing hearing by not instructing that the jury as a whole could consider any mitigating circumstance found by any one juror at Issue Four. **Ibid.**

§ 1326 (NCI4th). Capital punishment; instructions; aggravating and mitigating circumstances; burden of proof

There was no plain error in a first-degree murder capital sentencing hearing where the trial court instructed the jury that defendant has the burden of establishing mitigating circumstances by preponderance of the evidence. **State v. Buckner,** 198.

There was no error in a capital sentencing hearing where the trial court instructed the jury that defendant must "satisfy" the jury that a mitigating circumstance exists. **State v. DeCastro,** 667.

stance if it found that defendant had been convicted of common law robbery or voluntary manslaughter involving the use or threat of violence. **State v. DeCastro**, 667.

§ 1339 (NCI4th). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime

Defendant was not the victim of improper "double counting" by the trial court's submission as aggravating circumstances that the capital felony was committed while defendant was engaged in a robbery and also while defendant was engaged in a kidnapping. **State v. Robinson,** 74.

The trial court did not err during a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a robbery. **State v. Buckner,** 198.

§ 1340 (NCI4th). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime; effect of felony murder rule

The trial court properly submitted the aggravating circumstance that the murder was committed while defendant was engaged in robbery where defendant was convicted of first-degree felony murder and the armed robbery was not the felony supporting the felony murder conviction. **State v. Richardson**, 772.

The trial court did not err in a capital sentencing proceeding in its instruction on the continuous transaction doctrine. **Ibid**

There was no error in a capital sentencing hearing for two murders where the trial court submitted an aggravating circumstance that the murder of one victim was committed while defendant was engaged in the commission of a robbery. **State v. DeCastro**, 667.

§ 1341 (NCI4th). Capital punishment; particular aggravating circumstances; pecuniary gain

The State's evidence was sufficient to support the trial court's submission of the pecuniary gain aggravating circumstance where it tended to show that, although defendant said he initially asked the victim to lend him money, defendant then stabbed the victim when she refused to given him money and, after killing her, took the victim's money. **State v. Carter,** 312.

The pattern jury instruction on pecuniary gain is not unconstitutionally vague and overbroad. **State v. Chandler**, 742.

The trial court did not err in submitting the pecuniary gain aggravating circumstance after the jury failed to find defendant guilty of first-degree murder based on premeditation and deliberation but found him guilty under the felony murder rule. **Ibid.**

The trial court did not err by failing to instruct the jury that it could find the pecuniary gain aggravating circumstance only if it found that defendant intended or expected to obtain money or some other thing which the defendant valued in money. **Ibid.**

The trial court did not err in submitting the pecuniary gain circumstance to aggravate a felony murder for which burglary is the underlying felony. **Ibid.**

§ 1343 (NCI4th). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense

The trial court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance in a first-degree murder capital sentencing hearing were not unconstitutionally vague. **State v. Walls,** 1.

The especially heinous, atrocious, or cruel aggravating circumstance in capital cases is not unconstitutionally vague. **State v. Kandies,** 419.

The instruction on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing hearing was not constitutionally flawed. **State v. DeCastro**, 667.

§ 1344 (NCI4th). Capital punishment; submission of especially heinous, atrocious, or cruel offense to jury

The evidence in a capital sentencing proceeding was sufficient to show that the murder was physically agonizing or otherwise dehumanizing to the victim so as to support the trial court's submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. **State v. Robinson,** 74.

§ 1345 (NCI4th). Capital punishment; particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; evidence sufficient to support finding

The jury was properly permitted to find in a first-degree murder sentencing hearing that the murder of the four-year-old victim was committed while defendant engaged in the commission of first-degree rape and that the murder was especially heinous, atrocious or cruel; while the evidence of rape contributed to the combination of factors, ample independent evidence existed to justify the circumstance. **State v. Kandies,** 419.

§ 1347 (NCI4th). Capital punishment; particular aggravating circumstances; murder as course of conduct

The evidence was sufficient in a first-degree murder capital sentencing hearing to warrant the submission of the course of conduct aggravating circumstance to the jury. **State v. Walls,** 1.

The record in a prosecution for two first-degree murders supported the aggravating circumstance of course of conduct where the two victims were young women with drug habits, defendant knew both and had smoked crack with each, their bodies were disposed of in virtually the same fashion and within two blocks of each other, both victims suffered blunt force injuries to their heads, defendant was seen and had sex with one victim shortly before her death, defendant made incriminating statements to three people about having killed the other victim, and defendant had a foreboding attitude toward women when he was smoking crack. **State v. Chapman,** 330.

§ 1348 (NCI4th). *Capital punishment; consideration of mitigating circumstances;* definition

The trial court did not err in a first-degree murder sentencing hearing by defining mitigating circumstances as matters about a crime making a punishment less than death appropriate. **State v. Buckner,** 198.

The trial court did not err in a capital sentencing hearing in its instruction on the concept of mitigation. **State v. DeCastro**, 667.

§ 1349 (NCI4th). Capital punishment; submission of mitigating circumstance

There was no error in a first-degree murder capital sentencing hearing where defendant contended that the Eighth and Fourteenth Amendment requirements that the trial court submit for the jury's consideration any circumstance requested by defendant which is supported by the evidence and is capable of being understood as mitigating by a reasonable juror was violated by the trial court either refusing to sub-

CRIMINAL LAW—Continued

mit or combining the mitigating circumstances defendant requested. **State v. Walls,** 1.

§ 1355 (NCI4th). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

There was no error in a first-degree murder sentencing hearing in the submission of the mitigating circumstance of no significance previous criminal activity over defendant's objection where defendant elected to present through his psychiatrist evidence of his previous criminal activities. **State v. Walls,** 1.

The trial court did not err in the sentencing phase of a first-degree murder prosecution by submitting the statutory mitigating circumstance of no significance history of prior criminal activity. What is of import in determining whether a rational jury could reasonably find this mitigating circumstance is the nature and age of the prior criminal activities rather than the mere number. **Ibid.**

There was no error in a first-degree murder sentencing hearing in submitting over defendant's objection the statutory mitigating circumstance of no significant history of prior criminal activity. **State v. Buckner,** 198.

§ 1358 (NCI4th). Capital punishment; particular mitigating circumstances; mental or emotional disturbance; intoxication

Defendant's alleged voluntary alcohol use on the night of a murder does not support the mental or emotional disturbance mitigating circumstance. **State v. Chandler,** 742.

§ 1361 (NCI4th). Capital punishment; particular mitigating circumstances; impaired capacity of defendant; intoxication

The trial court did not err by failing to submit the impaired capacity mitigating circumstance to the jury in a capital sentencing proceeding where there was testimony that defendant drank some amount of liquor prior to the crime but no evidence of the effect that the liquor had on defendant's ability to understand and control his actions. **State v. Jones,** 457.

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired based on alcohol consumption where defendant requested only the nonstatutory mitigating circumstance that defendant was under the influence of alcohol. The mere consumption of alcohol is not enough to warrant submission of the G.S. 15A-2000(f)(6) circumstance. **State v. DeCastro,** 667.

§ 1362 (NCI4th). Capital punishment; particular mitigating circumstances; age of defendant

The trial court did not err in a capital sentencing hearing by not submitting the age of defendant at the time of the crime as a mitigating circumstance where defendant was twenty-three, came from a stable background, and had performed competently in school until dropping out in the tenth grade. **State v. Richardson,** 772.

There was no prejudicial error in a capital sentencing hearing where defendant contended that the court erred by instructing the jury that it could determine whether defendant's age had mitigating value but did not submit the statutory circumstance. **State v. DeCastro,** 667.

CRIMINAL LAW—Continued

§ 1363 (NCI4th). Capital punishment; other mitigating circumstances arising from the evidence

The trial court did not err in a first-degree murder capital sentencing hearing by not intervening ex mero motu to prevent the prosecutor from arguing that the jurors could consider a particular mitigator if the evidence supported it and the jurors deemed it to have mitigating value. **State v. Walls,** 1.

There was no prejudicial error in a capital sentencing proceeding where the trial court refused to submit as a nonstatutory mitigating circumstance that defendant had shown a moral core indicating a potential for rehabilitation by confessing at the prompting of a detective, but submitted the mitigating circumstance that defendant confessed to the crime and one or more jurors found that circumstance to exist and to have mitigating value. **State v. Richardson,** 772.

The trial court did not err in a capital sentencing hearing in the supplemental instruction given in response to the jury question "Was 13 based on proven evidence or anything that we feel like could arise from the evidence that have [sic] mitigating value?" where 13 was the catchall mitigating circumstance. **State v. DeCastro,** 667.

The trial court did not err in a capital sentencing hearing by instructing the jury as to nonstatutory mitigating circumstances that it must first determine the existence of the circumstance and then whether it had mitigating value. **Ibid.**

There was no plain error in a first-degree murder sentencing hearing where the trial court instructed the jury that to find a nonstatutory mitigating circumstance, it had to find the circumstance and that it had mitigating value. **State v. Buckner,** 198.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death was not disproportionate where it was imposed for a first-degree murder committed while defendant was engaged in an armed robbery and first-degree kidnapping. **State v. Robinson,** 74.

A sentence of death was not disproportionate in a first-degree murder prosecution. **State v. Walls,** 1; **State v. Buckner,** 198; **State v. Kandies,** 419; **State v. Richardson,** 772.

There was nothing in the record to support the contention of a defendant convicted of two first-degree murders that the finding of both aggravating circumstances and no mitigating circumstances was evidence of the jury's strong emotional or passionate prejudice toward defendant. **State v. Chapman,** 330.

A sentence of death for two first-degree murders was not disproportionate where the jury found the aggravating circumstances of course of conduct and a previous felony conviction involving violence. **Ibid.**

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where he killed the seventy-one-year-old victim for fifteen dollars to enable him to buy crack cocaine. **State v. Carter,** 312.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant intentionally shot the victim in his own home during a robbery and left him to die. **State v. Jones,** 457.

Sentences of death imposed upon defendant for two first-degree murders were not disproportionate where defendant beat and stabbed the elderly victims in their home to facilitate a robbery. **State v. Best,** 502.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant killed the ninety-year-old victim when he broke into and entered her home at night with the intent to steal. **State v. Chandler,** 742.

The evidence supported the aggravating circumstances found in a capital sentencing hearing, the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentences were not excessive or disproportionate. **State v. DeCastro**, 667.

DEEDS

§ 87 (NCI4th). Restrictive covenants relating to type of residence

A restrictive covenant making an architectural review committee the sole arbiter of plans for any construction in a subdivision is enforceable in the absence of evidence that the committee acted arbitrarily or in bad faith in the exercise of its powers. **Raintree Homeowners Assn. v. Bleimann,** 159.

The evidence was insufficient to show that the architectural review committee of plaintiff homeowners association acted arbitrarily or in bad faith when reviewing and denying defendants' request for approval of plans to replace wood clapboard siding on their home with vinyl siding. **Ibid.**

EVIDENCE AND WITNESSES

§ 52 (NCI4th). Burden of proof; criminal cases generally

The trial court's admission of an SBI agent's testimony in response to a question by the prosecutor that neither defendant nor his attorney had given the shoes worn by defendant on the night of the crime to law officers for comparison with shoeprints at the crime scene did not improperly allow the State to shift the burden of proof to defendant in violation of his right to due process. **State v. Jaynes,** 249.

§ 90 (NCI4th). Grounds for exclusion of relevant evidence; prejudice as outweighing probative value

Testimony by two defense witnesses, a police officer and a poolroom owner, was properly excluded from a murder trial on the ground that the probative value thereof was substantially outweighed by the danger of unfair prejudice. **State v. McCray,** 123.

§ 110 (NCI4th). Similar transactions; habit

Assuming testimony by the daughter of two robbery-murder victims that her father kept an envelope in his wallet containing $1,000 from an insurance settlement and her mother kept in an envelope $800 from the sale of a car was not admissible to prove habit, admission of the testimony did not amount to plain error. **State v. Best,** 502.

§ 117 (NCI4th). Evidence pointing directly to guilt of another

The trial court properly refused to permit a witness to testify in a murder trial that an eyewitness's description of the assailant more accurately fit her son than her grandson, the defendant, since the testimony did not directly point to the guilt of a third party. **State v. McCray,** 123.

The trial court did not err by excluding testimony in a murder trial that a man named Prioleau was at one time a suspect in the police investigation and that his fingerprints had been submitted with other evidence to an SBI crime laboratory. **State v. Burke,** 113.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

waited three years to tell a deputy sheriff that defendant committed the murder because she was afraid of defendant and wanted to keep defendant in prison. **State v. Jones,** 457.

§ 623 (NCI4th). Suppression of evidence; pretrial motion

The trial court did not err by summarily denying defendant's motion to suppress an inculpatory letter he wrote to his accomplice while incarcerated on the ground it was improperly solicited by the accomplice acting as an agent of the State where the court had denied defendant's pretrial motion to suppress other letters written by defendant to his accomplice, the grounds for the motion were the same as to all letters and had previously been ruled upon, and defendant was given a full opportunity to present any evidence in support of his grounds for suppression of the letters during the pretrial hearing. **State v. Jaynes,** 249.

§ 675 (NCI4th). When objection or motion to strike must be made generally

Defendant's motion to strike a witness's in-court identification of defendant was not timely, and defendant waived objection to the identification, where defendant made no objection to the prosecutor's question and no motion to strike at the time the witness identified defendant but objected only after further questions were asked. **State v. McCray,** 123.

§ 699 (NCI4th). Evidence admissible for restrictive purpose; necessity of request that use of evidence be restricted

Assuming the trial court erred by failing to instruct the jury to consider for corroboration only an officer's testimony that a murder victim's sister told him she could not locate a green drawstring bag among the victim's stored belongings, this error was not plain error. **State v. Mitchell,** 797.

§ 728 (NCI4th). Prejudicial error in the admission of evidence; ownership or possession of firearms or other weapons

There was no plain error in a prosecution for murder, robbery, and conspiracy where defendant was asked on cross-examination whether a sawed-off shotgun found during a raid on his home was used in his drug dealings. **State v. Lamb,** 151.

§ 742 (NCI4th). Prejudicial error in the admission of evidence; miscellaneous evidence in criminal cases; error not prejudicial

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court admitted evidence that, following an altercation between the victim and defendant four years before the shooting, the victim's wife had asked for surveillance at their house by the sheriff's department and that a slow-moving vehicle had passed their house. **State v. King,** 357.

§ 873 (NCI4th). Hearsay evidence; statements not offered to prove truth of matter asserted; to explain conduct or actions taken by a witness

In a murder prosecution wherein two girls testified that defendant was one of the two shooters, testimony that, prior to the shooting, Corey Best had threatened the girls if he found them again in the vicinity where the shooting occurred was not inadmissible hearsay where it was offered to explain why the girls had left the scene before the shooting and thus could not identify defendant as one of the shooters. **State v. Burke,** 151.

EVIDENCE AND WITNESSES—Continued

The trial court did not err in a prosecution for murder, robbery, and conspiracy by admitting testimony that an accomplice had told the witness the morning after the murder and robbery that he thought the victim had more money than they had found, that she should say she did not know anything about the shooting if anyone asked, and that she would go to jail and lose her children if she did not do so. **State v. Lamb,** 151.

§ 906 (NCI4th). Hearsay evidence; testimony as to what someone else had said

An officer's testimony regarding what a robbery-murder victim's sister told him about the victim putting Christmas money into envelopes was hearsay, but the admission of this testimony was not plain error. **State v. Mitchell**, 797.

§ 945 (NCI4th). Exceptions to hearsay rule; excited utterances; statements made at time crime was occurring

The trial court did not err in a first-degree murder prosecution arising from multiple shootings in a restaurant in admitting the testimony of six witnesses who were present and who testified as to the reactions of people at the scene which they had observed. **State v. French**, 863.

§ 959 (NCI4th). Exceptions to hearsay rule; state of mind

The trial court erred by excluding hearsay statements made by two murder victims to two witnesses, but not communicated to defendant, that the victims wanted to fight defendant and intended to "get" him since the statements were admissible under the state of mind exception to the hearsay rule and were relevant to support defendant's contention that the victims were the aggressors in the fatal confrontation and that defendant acted in self-defense. **State v. Ransome**, 847.

§ 1009 (NCI4th). Residual exception to hearsay rule; equivalent guarantees of trustworthiness

There was no error in a prosecution for two first-degree murders where a fire inspector was allowed to read to the jury a statement from a vagrant who could not be located at the time of the trial and who had been living in a vacant house where one of the victims was found. **State v. Chapman,** 330.

§ 1240 (NCI4th). Confessions and other inculpatory statements; at police station

The trial court did not err in a first-degree murder prosecution by admitting a defendant's statement that some of the money he had was his where the statement was not the result of an interrogation but in response to a question from a detective to an SBI agent and in the general course of turning over defendant's clothing and property in exchange for an inmate jumpsuit. **State v. DeCastro**, 667.

§ 1246 (NCI4th). Confessions and other inculpatory statements; warnings as to rights; where defendant is a juvenile

Failure of officers to inform a juvenile that his parents and attorney were actually present in the police station before taking his confession did not render the confession involuntary as a matter of law. **State v. Gibson,** 142.

Where a juvenile tried as an adult for first-degree murder failed to attack the admissibility of his confession at trial on grounds he was not informed prior to waiving his rights that he could be tried as an adult and that he was not rewarned of his juvenile rights, he may not do so for the first time on appeal. **State v. Aikens,** 567.

EVIDENCE AND WITNESSES—Continued

§ 1248 (NCI4th). Confessions and other inculpatory statements; necessity that warnings as to rights be repeated; particular situations

The trial court erred where defendant invoked his right to silence; the interrogation was terminated; defendant was charged; and an SBI agent initiated a conversation with defendant during processing less than fifteen minutes after the initial interrogation ended for the purpose of determining whether defendant had killed the victim and without readvising defendant of his *Miranda* rights. **State v. Murphy**, 882.

§ 1256 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; particular conduct as police initiation of conversation or interrogation

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss statements made to a detective where defendant contended that the statements were a result of a custodial interrogation after he had invoked his right to remain silent. **State v. Walls,** 1.

The trial court properly suppressed incriminating statements made by defendant on the ground that defendant did not initiate the dialogue with officers after defendant requested an attorney where an officer unsuccessfully attempted to contact an attorney requested by defendant, defendant requested and was allowed to talk with his brother, officers then asked defendant if he was ready to talk with them, and defendant answered affirmatively and then made the incriminating statements. **State v. Munsey**, 882.

§ 1259 (NCI4th). Confessions and other inculpatory statements; what constitutes invocation of right to remain silent; extent of invocation

A defendant sufficiently invoked his right to silence where there were clear indicators that he wished to terminate the interrogation and invoke his right, he had similarly indicated a desire to end two prior interrogations, and the fact that he was immediately taken to be booked makes it clear that the officers understood that defendant was terminating the interrogation and invoking his right to remain silent. **State v. Murphy**, 813.

§ 1261 (NCI4th). Confessions and other inculpatory statements; right to presence of parent, guardian, or custodian generally

Failure of officers to inform a juvenile that his parents and attorney were actually present in the police station before taking his confession did not render the confession involuntary as a matter of law. **State v. Gibson,** 142.

§ 1274 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; defendant's mental capacity

There was no error in a first-degree murder prosecution where an officer was allowed to give his opinion regarding defendant's mental capabilities at the time he confessed but defendant was not allowed to introduce evidence regarding his mental capabilities. **State v. Jones,** 523.

§ 1298 (NCI4th). Confessions and other inculpatory statements; nervousness or other emotional disturbance

There was no error in a first-degree murder prosecution in the admission of defendant's incriminating statements where defendant drank an organophosphate pesticide and told a friend shortly before losing consciousness that he had killed his

EVIDENCE AND WITNESSES—Continued

§ 1469 (NCI4th). Physical evidence; weapons or similar devices generally

A .44-caliber handgun, two boxes of .44-caliber ammunition, and three shells and a spent cartridge in the gun, which were found in a dumpster four days after a murder, were relevant because they tended to link defendant to the crime through his fingerprints on one box of ammunition and his own testimony. **State v. Burke,** 113.

§ 1473 (NCI4th). Admission of weapons or similar devices used in or otherwise related to crime; necessity of time reference to show relevancy

The trial court did not err in a first-degree murder prosecution by admitting into evidence a kitchen knife found approximately three months after the murders and some distance from the crime scene along the path of flight which officers were able to follow from the scene of the crime to the spot where defendant was found. **State v. DeCastro,** 667.

§ 1505 (NCI4th). Evidence related to crime victim; pocketbooks, bags, and the like

The trial court did not err when it denied defendant's motion in limine to exclude from defendant's robbery and murder trial all evidence regarding a green and white drawstring bag since the jury could find from the evidence presented at the motion hearing that the bag was still at the victim's house before she was killed and that a bag seen in defendant's possession on the night of the murder was the victim's bag. **State v. Mitchell,** 797.

§ 1694 (NCI4th). Photographs of homicide victim, generally; location and appearance of victim's body

The trial court did not err in a prosecution for the first-degree murder and first-degree rape of a four-year-old girl by admitting a number of crime scene and autopsy photographs of the black plastic bag in which the body was found, the position of the body and bag after the bag was opened, pictures of various bloodstains around the house, and autopsy photographs. **State v. Kandies,** 419.

§ 1731 (NCI4th). Videotape; homicide victim's body

The trial court did not abuse its discretion in a prosecution for the first-degree rape and murder of a four-year-old girl by admitting a twenty-minute videotape which portrayed the discovery of the victim's body, including ninety seconds that focused on the bloodied head and body. **State v Kandies,** 419.

The trial court did not err in a first-degree murder prosecution in showing a crime scene videotape to the jury where the crime scene was Luigi's restaurant in Fayetteville and the videotape included several segments in which victims were moved from the positions in which they were found to show their wounds. **State v. French,** 863.

§ 1783 (NCI4th). Lie detector and related tests; admissibility; effect of stipulation

Any error in the admission of testimony that a polygraph operator said defendant was not guilty of the crime before the court instructed the jury not to consider any testimony about the polygraph test was favorable to defendant and not prejudicial. **State v. Jones,** 457.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

or sentencing concessions were made to either witness prior to testimony by the witness in defendant's trial. **State v. Jaynes,** 249.

§ 2555 (NCI4th). Qualifications of witnesses; persons with hearing and speech disabilities

There was no plain error in a noncapital first-degree murder prosecution where the judge, court reporter, and defense counsel found it difficult to understand a witness due to her accent and the judge allowed the prosecution to ask leading questions to alleviate the problem. **State v. Jones,** 523.

§ 2750.1 (NCI4th). Scope of examination when defendant opens door

There was no prejudicial error in a first-degree murder prosecution where defendant contended that the prosecutor elicited improper character evidence regarding defendant through defendant's brother but the door had been opened on direct examination through questions regarding specific instances of misconduct toward defendant's wives. **State v. Walls,** 1.

§ 2808 (NCI4th). Leading questions; similar evidence in the record

There was no plain error or abuse of discretion in allowing leading questions in a first-degree murder prosecution where defendant did not object to the questions or answers and a proper foundation was laid for the introduction of the facts incorporated in the questions. **State v. Jones,** 523.

§ 2817 (NCI4th). Leading questions; questions directing attention to subject matter at hand

The trial court did not abuse its discretion in permitting the prosecutor to ask a number of allegedly leading questions during direct examination of State's witnesses where most of the questions simply directed the witness toward the particular matter being addressed without suggesting the desired answer. **State v. Mitchell,** 797.

§ 2874 (NCI4th). Scope and the extent of cross-examination; discretion of court

The trial court did not abuse its discretion in sustaining objections to two questions on cross-examination where defendant contended that sustaining those objections prevented him from adversely confronting the most important witness against him. **State v. Walls,** 1.

§ 2908 (NCI4th). Redirect examination when defendant "opens door" on cross-examination

There was no prejudicial error in a first-degree murder prosecution where an officer testified on redirect examination that defendant had told a third party that he had murdered the victim; the defendant did not open the door on cross-examination by eliciting testimony that there were no eyewitnesses who could have identified defendant as the killer. However, the jury would have reached the same verdict without the admission of the hearsay statement. **State v. Jones,** 523.

§ 2950 (NCI4th). Basis for impeachment; bias, prejudice, interest, or motive generally

Where an intern at the N.C. Resource Center had helped defendant prepare his defense, the State was entitled to cross-examine the intern about the nature and function of the Resource Center to show bias, motive, or interest. **State v. Best,** 502.

with no provocation, firing three shots, other testimony showed that defendant went into the bar looking for the victim, defendant stated after the shooting, "I told you I'd kill you," and ill will had existed between the parties since the 1989 beating of defendant by the victim. **State v. King,** 357.

§ 253 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; nature and execution of crime; severity of injuries, along with other evidence

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution. **State v. Jahn,** 176.

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution. **State v. Jones,** 628.

§ 255 (NCI4th). Sufficiency of evidence; first-degree murder; malice, premeditation, and deliberation; where defendant continued to inflict injuries after victim felled

The evidence was sufficient to support submission of an issue as to defendant's guilt of premeditated and deliberate first-degree murder where defendant shot the victim from a truck, shot the victim several more times while chasing him through the woods, and then shot him in the head a number of times at close range while he was helpless on the ground. **State v. Gibson,** 142.

§ 256 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; evidence concerning planning and execution of crime

There was sufficient evidence of premeditation and deliberation in a noncapital first-degree murder prosecution arising from a confrontation between defendant and the victim. **State v. Holt,** 395.

§ 260 (NCI4th). Sufficiency of evidence; murder by ambush or lying in wait

The evidence was sufficient to support defendant's conviction of first-degree murder of his girlfriend's stepfather on the theory of lying in wait. **State v. Aikens,** 567.

§ 266 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; robbery generally

Evidence that defendant committed a robbery-murder by using a rifle as a club rather than by firing it was sufficient to support defendant's conviction of felony murder in accordance with the court's instruction on the underlying felony of armed robbery that the jury must find that defendant obtained property "by endangering or threatening the life of the [victim] with [a] firearm." **State v. McNatt,** 173.

§ 277 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; robbery; other evidence

There was sufficient evidence of the underlying felony of common law robbery to support defendant's conviction of first-degree murder under the felony murder rule where the jury could find that defendant took a drawstring bag and a shoebox containing money from the victim's home. **State v. Mitchell,** 797.

§ 278 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; arson

The evidence was sufficient to show that the killing of the victim and the burning of his dwelling were so joined by time and circumstances as to be part of one contin-

uous transaction and therefore supports a finding that the dwelling was "occupied" within the meaning of G.S. 14-58, and the evidence was thus sufficient to support defendant's conviction of first-degree arson and the trial court's submission of felony murder to the jury predicated on the felony of first-degree arson. **State v. Jaynes,** 249.

§ 380 (NCI4th). Sufficiency of evidence to establish self-defense; proof or absence of necessity

A defendant on trial for first-degree murder was not entitled to an instruction on self-defense because defendant could not have subjectively believed it necessary to kill the victim in order to save himself from death or great bodily harm, and no such belief could have been objectively reasonable. **State v. Williams,** 869.

§ 393 (NCI4th). Sufficiency of evidence to establish defenses; intoxication

The trial court did not err in a first-degree murder prosecution by denying defendant's request for an instruction on voluntary intoxication. **State v. Walls,** 1.

§ 482 (NCI4th). Instructions; premeditation and deliberation generally

The trial court did not err in a first-degree murder prosecution by giving the pattern jury instruction on premeditation and deliberation rather than the instructions requested by defendant. **State v. Jones,** 628.

§ 486 (NCI4th). Effect of failure to instruct on felony murder where instruction given on premeditation and deliberation

A conviction for first-degree murder based on premeditation and deliberation was not an acquittal of felony murder where the evidence was insufficient to convict based on premeditation and deliberation, there was evidence that defendant was an accessory before the fact to first-degree murder, and the court did not charge on felony murder. **State v. Marr,** 607.

§ 493.1 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; grossly excessive force

The trial court did not commit plain error in a first-degree murder prosecution by instructing the jury that evidence of the use of grossly excessive force could be used to infer premeditation and deliberation. **State v. Buckner,** 198.

§ 497 (NCI4th). Instructions; felony murder rule generally

To the extent the trial court's instructions on the elements of felony murder may have required redundant findings by the jury before it rendered a guilty verdict, they amounted to error favorable to defendant or, at worse, harmless error. **State v. Robinson,** 74.

§ 508 (NCI4th). Felony murder rule; instructions on lesser included offenses of underlying felony

The trial court did not err in a first-degree murder prosecution in which defendant was convicted of felony murder based on armed robbery by not charging the jury on the lesser included offenses of common law robbery and misdemeanor larceny where the State introduced substantial evidence of defendant's guilt of robbery with a dangerous weapon under an acting in concert theory. **State v. Brewton,** 875.

HOMICIDE—Continued

§ 553 (NCI4th). Instructions; lesser included offenses; necessity for instruction on second-degree murder

A defendant in a first-degree murder prosecution was not entitled to an instruction on second-degree murder where each element of first-degree murder was positively supported by the evidence and there was no evidence to negate the elements of first-degree murder other than defendant's denial that he committed the crime. **State v. Walls,** 1.

§ 555 (NCI4th). Instructions; second-degree murder as lesser-included offense; effect of evidence indicating lack of premeditation and deliberation

Defendant's statement to the police that he handed a shotgun to a codefendant just before the killing and did not pull the trigger himself, which the State introduced in his first-degree murder trial, was insufficient to constitute affirmative evidence tending to negate premeditation and deliberation and require the trial court to submit second-degree murder to the jury. **State v. Robinson,** 74.

§ 573 (NCI4th). Instructions; involuntary manslaughter as lesser-included offense of higher degrees of homicide; where malice could be implied from intentional act of defendant

There was no error in a first-degree murder trial which arose from defendant firing an assault rifle into a club building and parking lot where the court did not instruct the jury on the lesser-included offense of involuntary manslaughter. **State v. James,** 589.

§ 583 (NCI4th). Instruction as to acting in concert generally

The trial court's instructions that the State was required to prove as an element of each of the crimes of first-degree premeditated and deliberated murder, armed robbery, and first-degree kidnapping that "defendant, or someone with whom he was acting in concert" had the specific intent to commit the crime erroneously allowed the jury to convict defendant of those crimes on the theory of acting in concert without requiring the State to establish that defendant had the specific intent to commit those crimes. **State v. Straing,** 623.

§ 663 (NCI4th). Instructions; effect of voluntary intoxication

The trial court did not err by failing to instruct the jury on voluntary intoxication in a prosecution for murder by lying in wait since voluntary intoxication is irrelevant to such a charge. **State v. Aikens,** 567.

§ 697 (NCI4th). Punishment in capital cases

The Endmund rule applies only in cases in which defendant was convicted of first-degree murder on the felony murder theory, and the trial court thus did not err by failing to require the jury in a capital sentencing proceeding to make a factual determination of defendant's state of mind concerning the murder where the jury convicted defendant upon the theory of premeditation and deliberation in addition to the felony murder theory. **State v. Robinson, 74.**

§ 706 (NCI4th). Cure of error in instruction by conviction; harmless error; alleged error in regard to voluntary manslaughter instruction

There was no prejudicial error in a noncapital prosecution for first-degree murder where the trial court denied defendant's request for an instruction on voluntary

HOMICIDE—Continued

manslaughter, the trial court instructed the jury on first- and second-degree murder, and the jury found defendant guilty of first-degree murder. **State v. Holt,** 395.

§ 727 (NCI4th). Propriety of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger

Where defendant was convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony did not merge with the murder conviction. **State v. Robinson,** 74.

HUSBAND AND WIFE

§ 9 (NCI4th). Doctrine of necessaries; liability for cost of spouse's medical care

The separation exception to the necessaries doctrine previously applied in the courts of this state is modified so that the spouse seeking to benefit from the separation exception must show that the provider of necessary services had actual notice of the separation at the time the services were rendered, and fault for the separation is not a factor to be considered in applying the separation exception. **Forsyth Memorial Hospital v. Chisholm,** 616.

Defendant wife was liable under the necessaries doctrine for medical services rendered to her husband by plaintiff hospital where defendant and her husband were married but living separate and apart when the services were provided, defendant carried her husband to the hospital and admitted him, but defendant did not put the hospital on notice of their separation at the time she admitted him to the hospital. **Ibid.**

INDIGENT PERSONS

§ 5 (NCI4th). Determination of indigency

The trial court correctly ruled that defendant was not indigent and refused to change the status of defendant's privately retained counsel to appointed counsel even though the court provided funds for an investigator and experts where defendant's retained counsels' general notice of appearance meant that they were required to represent defendant through the entry of final judgment, defense counsel acknowledged that they were in the case whether compensated or not and never moved to withdraw, and defense counsel continued their zealous representation of defendant throughout the case. **State v. Richardson,** 772.

§ 25 (NCI4th). Assistant or additional counsel

A defendant tried noncapitally for first-degree murder had neither a statutory nor a constitutional right to the appointment of a second counsel to represent him. **State v. Burke,** 113.

INJUNCTIONS

§ 43 (NCI4th). Modification, dissolution, or vacation of temporary orders or preliminary injunctions; damages

In an action arising from the 1990 general election in which plaintiffs had obtained a temporary restraining order keeping the polls in Guilford County open past the scheduled closing time, the Court of Appeals correctly affirmed the denial of a motion to vacate the temporary restraining order but incorrectly remanded for a

The trial court did not err during jury selection for a first-degree murder prosecution by sustaining objections to certain defense questions pertaining to jurors' views on capital punishment because the questions were an improper attempt to stake out the jurors. **State v. Kandies,** 419.

§ 151 (NCI4th). Voir dire examination; propriety of particular questions; jurors' beliefs as to capital punishment or imposition of death penalty

There was no error in jury selection in a first-degree murder prosecution where defendant was not allowed to ask a prospective juror three questions which were all variations on the theme of whether the prospective juror's belief in the death penalty was so strong that he could not consider life imprisonment. **State v. Walls,** 1.

§ 153 (NCI4th). Voir dire examination; whether jurors could vote for death penalty verdict

There was no prejudicial error in a first-degree murder prosecution where the prosecutor asked prospective jurors whether they could return a sentence of death if they found that an aggravating factor existed, that the aggravating factors outweigh the mitigating factors, and that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. **State v. Buckner,** 198.

§ 192 (NCI4th). Waiver of right to challenge for cause; effect of refusal to permit challenges for cause where jurors were excused by peremptory challenges

Defendant did not preserve his right to appeal the denial of his challenge for cause of a prospective juror whom he peremptorily challenged where defendant did not renew his challenge for cause after exhausting his peremptory challenges. **State v. Jones,** 457.

§ 203 (NCI4th). Challenges for cause; preconceived opinions; where juror indicated ability to be fair and impartial

The trial court did not err in denying defendant's challenge for cause of a juror who stated clearly and unequivocally that he could set aside his opinion on defendant's guilt and reach a decision based solely on the evidence presented at trial. **State v. Jaynes,** 249.

The trial court did not err by denying defendant's challenge for cause of a prospective juror where the court could have concluded from the juror's voir dire testimony that, although he did not agree with the presumption of innocence, he would follow the law as given to him by the court. **State v. Jones,** 457.

The trial court in a capital trial did not err by denying defendant's challenge for cause of a prospective juror who stated several times that she would be upset by seeing pictures of the victim's body where the juror also stated unequivocally that she would require the State to prove the defendant's guilt beyond a reasonable doubt. **Ibid.**

§ 215 (NCI4th). Propriety of seating juror who expressed belief in capital punishment

There was no error in jury selection in a first-degree murder prosecution where the trial court did not excuse for cause a juror who defendant contended could not fairly consider a life sentence. **State v. Walls,** 1.

The trial court did not err during jury selection in a first-degree murder prosecution by failing to excuse a juror for cause where the juror initially responded that life imprisonment for first-degree murder was not fair to the public but subsequently said that he could put aside his prejudice. **State v. Kandies,** 419.

§ 217 (NCI4th). Exclusion of veniremen based on opposition to capital punishment generally

The trial court did not err in a first-degree murder prosecution by excusing for cause four prospective jurors who allegedly gave equivocal answers to questions concerning the death penalty but three were ultimately unequivocal and the fourth said that she did not believe she could vote to impose the death penalty. **State v. Walls,** 1.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

There was no error in jury selection in a first-degree murder prosecution where defendant argued that the denial of his pretrial motion to conduct a searching and thorough voir dire of prospective jurors concerning mitigating circumstances created an environment in which he was not permitted to rehabilitate four prospective jurors. **State v. Walls,** 1.

§ 235 (NCI4th). Propriety of death qualifying jury

The trial court did not err in a first-degree murder prosecution by allowing death qualification of the jury. **State v. DeCastro,** 667.

§ 248 (NCI4th). Use of peremptory challenge to exclude on basis of race generally

Both the federal and state constitutions prohibit peremptorily challenging prospective jurors solely on the basis of their race. **State v. Kandies,** 419.

§ 251 (NCI4th). Use of peremptory challenge to exclude on basis of race; effect of failure to object to alleged improper use of challenge

Where defendant did not object to any of the State's peremptory challenges on the ground of discrimination against women or against African-American women, he cannot raise the question for the first time on appeal. **State v. Best,** 502.

§ 256 (NCI4th). What constitutes prima facie case of racially motivated peremptory challenges

The trial court did not err by allowing the prosecution to exercise a peremptory strike against an African-American prospective juror where defendant argued that a pattern of strikes against African-American jurors could not be shown the first time the State struck such a juror. **State v. Richardson,** 742.

§ 257 (NCI4th). Use of peremptory challenge to exclude prospective jurors on basis of race; sufficiency of evidence to establish prima facie case

There was no error in a first-degree murder prosecution where defendant contended that the State exercised its peremptory challenges in a racially discriminatory manner. **State v. Walls,** 1.

A first-degree murder defendant who contended that his prosecutor consistently excludes African-Americans from jury service failed to show that the prosecutor, as a matter of practice, exercised peremptory challenges on the basis of race alone. **Ibid.**

LABOR AND EMPLOYMENT—Continued

§ 34 (NCI4th). Occupational Safety and Health Act; enforcement; penalties

The record as a whole supported the Safety and Health Review Board's determination that petitioner's safety/training violation with respect to OSHA trenching standards was "serious." **Associated Mechanical Contractors v. Payne**, 825.

LARCENY

§ 25 (NCI4th). Relationship to other crimes; robbery

A judgment on a felonious larceny conviction was arrested where defendant was also found guilty of robbery with a dangerous weapon. **State v. Buckner,** 198.

§ 41 (NCI4th). Propriety of separate larceny convictions arising out of same circumstances or chain of events

Judgment was arrested on three of the original four convictions for larceny arising from the looting of the victim's mobile home and separate shop and the theft of his cars where the taking of the various items was all part of the same transaction. **State v. Marr,** 607.

§ 52 (NCI4th). Indictment; specificity required; what constitutes sufficient description of property

It is not necessary in an attempted larceny indictment to specify the particular goods and chattels the defendant intended to steal. **State v. Chandler**, 742.

MUNICIPAL CORPORATIONS

§ 157 (NCI4th). Construction of exceptions to open meetings law

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the Open Meetings Law by meeting in closed sessions to discuss the amount of economic development incentives to offer private corporations pursuant to G.S. 158-7.1 and by reaching a group decision in private. **Maready v. City of Winston-Salem**, 708.

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the "full and accurate minutes" requirement of the Open Meetings Law because the minutes of two closed sessions pertaining to economic development grants only stated "discussions" where no action was taken at the closed meetings. **Ibid.**

§ 183 (NCI4th). Public utilities and services; right to refuse to provide service

Where plaintiffs and a county entered into a consent judgment giving plaintiffs the right of access to a sewer line to be installed on their property subject to their "obtaining tap-on privileges from the appropriate governing bodies," and the county transferred its interest in the sewer easement to defendant city, the city could require plaintiff to connect to the city water system in order to obtain access to the sewer line. **Walton v. City of Raleigh**, 879.

§ 222 (NCI4th). Construction of contracts

Where plaintiffs and a county entered into a consent judgment giving plaintiffs the right of access to a sewer line to be installed on their property subject to their "obtaining tap-on privileges from the appropriate governing bodies," and the county transferred its interest in the sewer easement to defendant city, the city could require

plaintiff to connect to the city water system in order to obtain access to the sewer line. **Walton v. City of Raleigh**, 879.

NEGLIGENCE

§ 42 (NCI4th). Premises liability; construction and condition of stairways and steps

Plaintiff police officer's evidence was sufficient for the jury on the issue of defendant board of education's negligence in failing to warn of or repair the condition of a stairway on school premises where the officer went to a high school field house in response to a silent burglar alarm and fell and was injured while attempting to descend an exterior metal stairway. **Newton v. New Hanover County Bd. of Education,** 554.

§ 51 (NCI4th). Premises liability; duties owed to invitees; particular illustrations of who is invitee

A landowner's duty of care toward a police officer who enters the premises in response to a silent burglar alarm is the same as the duty owed to an invitee. **Newton v. New Hanover County Bd. of Education,** 554.

§ 109 (NCI4th). Premises liability; contributory negligence

Plaintiff police officer who went to a high school field house in response to a silent alarm was not contributorily negligent as a matter of law when he fell while descending a dangerous stairway outside the field house because he had attended the school and had been in the field house while he was a student and since he had completed high school. **Newton v. New Hanover County Bd. of Education,** 554.

§ 140 (NCI4th). Premises liability; notice or knowledge of condition; inspection

A Court of Appeals decision that in slip and fall cases involving injury to an invitee in which defendant moves for summary judgment, it is appropriate to place upon defendant the initial burden of gathering information about whether, when, and by whom the premises were last inspected prior to plaintiff's injury is reversed based upon the authority of Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57. **Trexler v. K-Mart Corp.,** 637.

RAPE AND ALLIED OFFENSES

§ 90 (NCI4th). Sufficiency of evidence; force and against will of victim, generally; lack of consent

The State's evidence was sufficient for the jury in a prosecution for first-degree rape of a murder victim where a DNA expert testified that semen taken from the victim's vagina was not from her husband, the jury could find the penetration was not consensual from evidence of defensive and other wounds on the victim, and defendant's identity as the perpetrator was established by his fingerprint on a knife found near the body. **State v. Best,** 502.

§ 122 (NCI4th). Sufficiency of evidence; attempt; second-degree rape

The evidence was insufficient to support defendant's conviction of attempted second-degree rape where the sole evidence regarding a sexual act was that defendant could not be ruled out as a partial contributor to a semen stain found on a murder victim's jeans. **State v. Rick,** 91.

ROBBERY

§ 76 (NCI4th). Sufficiency of evidence; to show felonious intent; intent to unlawfully deprive owner of property

The trial court did not err by refusing to dismiss an armed robbery charge because defendant had stated that he did not notice the credit cards on which the charge was based until after he had killed the victim and was driving her car back to the mall, so that he possessed the credit cards for some time before he intended to steal them. **State v. Richardson**, 772.

§ 79 (NCI4th). Sufficiency of evidence; to show use or threatened use of firearms or other dangerous weapon

Evidence that defendant committed a robbery-murder by using a rifle as a club rather than by firing it was sufficient to support defendant's conviction of felony murder in accordance with the court's instruction on the underlying felony of armed robbery that the jury must find that defendant obtained property "by endangering or threatening the life of the [victim] with [a] firearm." **State v. McNatt,** 173.

SEARCHES AND SEIZURES

§ 14 (NCI4th). Residential dwellings; curtilage of home

There was no error in a prosecution for trafficking in cocaine and other related offenses where a detective advised a supervisor of the sanitation department that the police wanted a sanitation worker to collect the trash at defendant's residence and turn it over to the police; the person who normally collected defendant's garbage agreed and collected the garbage from the back of defendant's residence; the collection was routine in every way except that defendant's garbage was deposited into a separate container and turned over to the police; and a search of the garbage uncovered cocaine residue, which was used in applying for a search warrant. **State v. Hauser,** 382.

STATE

§ 9 (NCI4th). Open Meetings Law

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the Open Meetings Law by meeting in closed sessions to discuss the amount of economic development incentives to offer private corporations pursuant to G.S. 158-7.1 and by reaching a group decision in private. **Maready v. City of Winston-Salem**, 708.

The Winston-Salem Board of Aldermen and the Forsyth County Board of Commissioners did not violate the "full and accurate minutes" requirement of the Open Meetings Law because the minutes of two closed sessions pertaining to economic development grants only stated "discussions" where no action was taken at the closed meetings. **Ibid.**

STATUTES

§ 24 (NCI4th). General rules of construction; basic principles

The statement of a legislative enactment contained in the Session Laws controls over the statement codified in the General Statutes. **Custom Molders, Inc. v. American yard Products, Inc.,** 133.

TAXATION

§ 4 (NCI4th). Particular purposes as public

The statute authorizing local government units to expend public moneys for economic development incentive grants to private corporations does not violate the public purpose clause of the North Carolina Constitution. **Maready v. City of Winston-Salem**, 708.

§ 173 (NCI4th). Excise taxes on particular products and conveyances; soft drink tax

Plaintiff was not entitled to a refund of taxes paid under protest pursuant to the Soft Drink Tax Act where the taxes were assessed against plaintiff for sales of specific concentrated juice products. **John R. Sexton & Co. v. Justus**, 374.

TRIAL

§ 146 (NCI4th). Determination of extent of stipulation

The trial court did not err in an action involving the title to marshlands by expanding one complaint to add an allegation inconsistent with stipulated fact where the trial court properly concluded that plaintiff did not intend to admit anything other than what the deed said and did not intend to waive any rights concerning her claim to the marshland. **Gwathmey v. State of North Carolina**, 287.

UNFAIR COMPETITION

§ 53 (NCI4th). Attorney's fees incurred as a result of appellate review

Where the Supreme Court held that the trial court erred by denying plaintiff's motion for postjudgment interest on the treble damages portion of its judgment for an unfair and deceptive practice, plaintiff is now the prevailing party, and the trial court has the discretion to award plaintiff reasonable attorney fees incurred to pursue its motion in the trial court and its appeal in the appellate courts. **Custom Molders, Inc. v. American Yard Products, Inc.**, 133.

WATERS AND WATERCOURSES

§ 55 (NCI4th). Navigability defined; test for navigability

The lunar tides test for determining navigability was never part of the English common law applied in North Carolina before or after the revolution, is therefore not a part of the common law of North Carolina, and is inapplicable to the conditions of waters within the state. **Gwathmey v. State of North Carolina**, 287.

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is that if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact, and therefore is navigable in law even if it has not been used for such purpose. **Ibid.**

An action seeking determination of the quality of plaintiffs' titles to marshland originally obtained from the State was remanded where the trial court may have decided the issue of navigability in fact solely on the basis of whether the waters at issue were actually being used for or had historically been used for navigation. **Ibid.**

§ 56 (NCI4th). Title and rights in navigable waters, beds, banks, and shores

No constitutional provision throughout the history of North Carolina has expressly or impliedly precluded the General Assembly from conveying lands beneath

WORD AND PHRASE INDEX

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