# NORTH CAROLINA REPORTS

## VOLUME 343

SUPREME COURT OF NORTH CAROLINA


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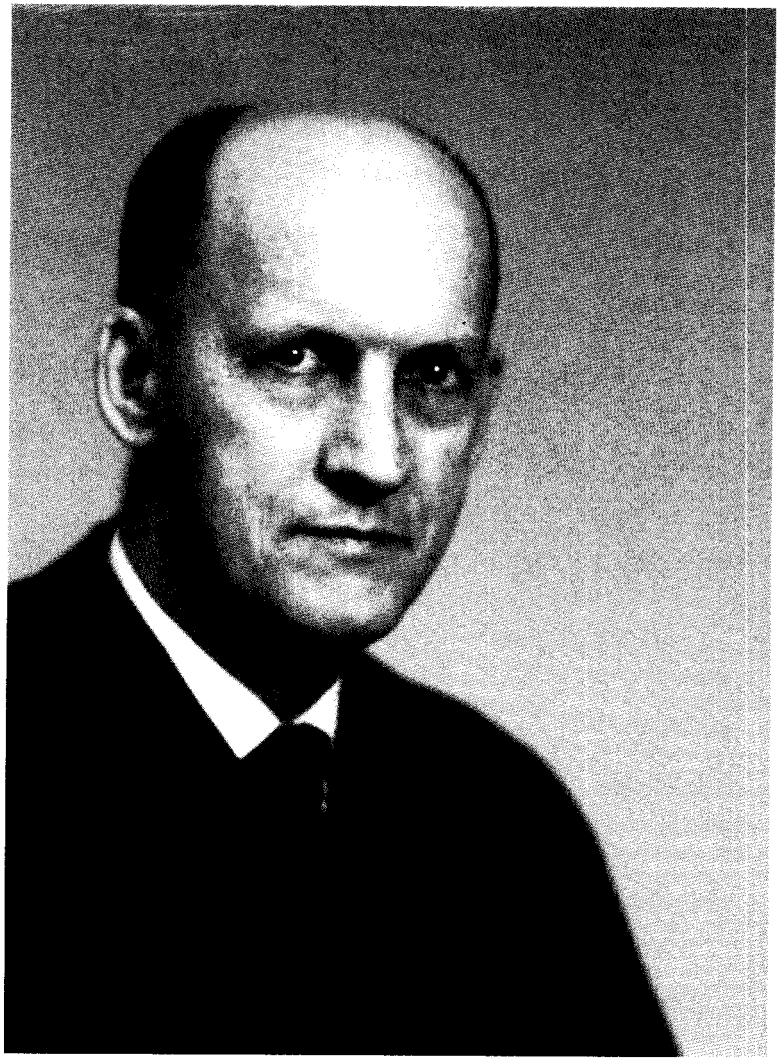

**J. FRANK HUSKINS**
**ASSOCIATE JUSTICE**
**5 FEBRUARY 1968 - 1 FEBRUARY 1982**

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# OF
# NORTH CAROLINA

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| 30 | CHARLES W. HIPPS | Waynesville |

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| DISTRICT | PUBLIC DEFENDER | ADDRESS |
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| 14 | ROBERT BROWN, JR. | Durham |
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| 28 | J. ROBERT HUFSTADER | Asheville |

# CASES REPORTED

# CASES REPORTED



## ORDER

# 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

## GENERAL STATUTES CITED AND CONSTRUED



## RULES OF EVIDENCE CITED AND CONSTRUED

## RULES OF EVIDENCE CITED AND CONSTRUED



## CONSTITUTION OF UNITED STATES CITED AND CONSTRUED



## CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED



## RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

# LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 19th day of July, 1996, and said persons have been issued certificates of this Board:

FRANK D. LAWRENCE III ..... Greenville
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 19th day of July, 1996.

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

---

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 9th day of August, 1996, and said persons have been issued certificates of this Board:

RALPH A. ERBAIO, JR. ..... Lake Carmel, New York
Applied from the State of New York

MARCIA E. FEMRITE ..... Birmingham, Michigan
Applied from the State of Michigan

JOHN WILLIAM JENSEN ..... Chapel Hill
Applied from the District of Columbia

JOSEPH A. JOHNSON ..... Fayetteville
Applied from the State of Michigan

GEORGE CURTIS OVERMAN, JR. ..... Poquoson, Virginia
Applied from the State of Virginia

JORDAN MARC SCHWARTZ ..... Fairfax, Virginia
Applied from the State of Virginia

G. KEVIN STEWMAN ..... North Babylon, New York
Applied from the State of New York

LAWRENCE EMIL CHAPANAR ..... Canton, Ohio
Applied from the State of Ohio

TIMOTHY JOHN HERBST ..... Huntersville
Applied from the State of New York

BRIAN PALMER MCCARTNEY ..... Niskayuna, New York
Applied from the State of New York

MICHAEL WINGATE OWEN ..... Indianapolis, Indiana
Applied from the State of Indiana

HELEN SALAMON PFITZNER ..... Mount Airy
Applied from the State of New York

ROBERT M. RICHARDS ..... San Antonio, Texas
Applied from the State of Texas

NANCY ANN TALAVERA ..... Charlotte
Applied from the State of Texas

DAVID J. THEISING ..... Indianapolis, Indiana
Applied from the State of Indiana

LUCY HARWELL ALLEN ..... Atlanta, Georgia
Applied from the State of Virginia

MICHAEL G. DOMONKOS ..... Brevard
Applied from the State of Michigan

RICHARD MICHAEL DURRER ..... Charlotte
Applied from the State of New York

ANNE MARIE HOWARD ..... Pineville
Applied from the District of Columbia

ROBERT J. HUME III ..... Ossining, New York
Applied from the State of New York

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J. PATRICK OVINGTON ..... Darien, Connecticut
Applied from the State of Connecticut

MIKAWATO REED RED ARROW ..... Freeport, New York
Applied from the State of New York

DAVID R. TREETER ..... Rock Hill, South Carolina
Applied from the State of Indiana

GAIL BLAIR VOGT ..... Melville, New York
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 29th day of August, 1996.

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

---

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 24th day of August, 1996 and said persons have been issued license certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

TIMOTHY J. ABERLE ..... Wilmington, Delaware
MARK TORRENCE ADERHOLD ..... Coats
JENNIFER SUSAN AHLERS ..... Charlotte
AINUDDIN AHMED ..... Greensboro
JOSEPH BASIL ALALA, III ..... Charlotte
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LEE JASON ALMAN ..... Raleigh
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PAUL ARNOLD STEFFENS . . . . . Charlotte
KIMBERLY PAIGE STEIN . . . . . Chapel Hill
BRENT WAYNE STEPHENS . . . . . Hillsborough
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GEOFFREY PATRICK SUDDRETH . . . . . Raleigh
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KAYLEY HATTLER TABER . . . . . Sanford
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DEREK TAYLOR . . . . . Morehead City
TRAVIS R. TAYLOR . . . . . Raleigh
BILL CARLTON TERRY, JR. . . . . Chapel Hill
SUSAN B. THIGPEN . . . . . Charlotte
ELIZABETH DANIELLE THOMPSON . . . . . Winston-Salem
ALAN ZIEGLER THORNBURG . . . . . Webster
PENNIE MILLER THROWER . . . . . Greensboro
DIANE S. TILLEY . . . . . Raleigh
JUDITH LYNNE TILLMAN . . . . . Durham

# LICENSED ATTORNEYS

SUZANNE CAMILLE TILLOTSON ..... Charlotte
HUGH HANNA TILSON, JR. ..... Raleigh
BRIAN TOMLIN ..... Greensboro
JOEL STANFORD TRILLING ..... Marshall
JULIE HUAIWEN TSAO ..... Raleigh
RICHARD JAMES TWOMEY ..... Raleigh
SCOTT MICHAEL TYLER ..... Charlotte
TAMLA YVETTE TYMUS ..... Charlotte
DAVID W. UPCHURCH ..... Tupelo, Mississippi
TANYA DENTON VAN ROEKEL ..... Cary
DAVID WILLIAM VENABLE ..... Morrisville
NAOKO WAKE ..... Lombard, Illinois
GWENDOLYN CAROL WALKER ..... Greensboro
JEFFREY EDWARD WALKER ..... Raleigh
PEGGY WALLACE ..... New Orleans, Louisiana
RICHARD ANTHONY WALLACE, JR. ..... Winsted, Connecticut
AMY REVIE WALLS ..... Charlotte
JERRY HOWARD WALTERS, JR. ..... Gastonia
RENEE BILLINGS WALTHALL ..... Raleigh
AMY PINNE WANG ..... Reidsville
HENRY BRYCE WARD, III ..... Charlotte
AMY ALSTON WELLS ..... Greenville
ROBERT A. WELLS ..... Greensboro
MARGARET ROSE WESTBROOK ..... Goldsboro
NATHAN CLARKE WHITAKER ..... Greensboro
MARTIN LYNN WHITE ..... Durham
LAURA MCREE WATTS WHITLEY ..... New Bern
WESLEY DARRELL WHITLEY ..... Denton
MARK ANDREW WHITSON ..... Newport, Rhode Island
STEPHANIE C. WIEBOLDT ..... Charlotte
CHARLES WALDMORE WIGGINTON ..... Clementon, New Jersey
BRIAN CLIFFORD WILKS ..... Durham
PATRICIA VAUGHAN WILLIAMS ..... Greensboro
KEVIN J. WILLIAMS ..... Winston-Salem
NATASHA L. WILLIAMS ..... Winston-Salem
MICHAEL LEE WILSON ..... Hickory
JAMES HUNTINGTON WOFFORD ..... Asheville
ROBERT ANDREW WOMBLE ..... Plymouth
SOFIE MICHELLE WONDERLY ..... Raleigh
LANCE ARCHER WOOTTON ..... Raleigh
ANNA ELENA WORLEY ..... Winston-Salem
AMY L. YONOWITZ ..... Chapel Hill
TARIQ ANWAR ZAIDI ..... Bristol, Tennessee
PETER ZORN ..... Winston-Salem
KIRK STEVEN ZUROSKY ..... Winston-Salem

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 30th day of August, 1996 and said persons have been issued license certificates.

# LICENSED ATTORNEYS

## JULY 1996 NORTH CAROLINA BAR EXAMINATION

CHARLOTTE-ANNE T. ALEXANDER ..... Greenville
TODD SERLS AMUNDSON ..... Virginia Beach, Virginia
JAMES HAROLD BENSON ..... Seneca, South Carolina
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RICHARD ALLYN DUNHAM ..... Pittsburgh, Pennsylvania
CHRISTOPHER S. ELLIOTTE ..... Hoover, Alabama
KEITH STEPHEN ERNST ..... Durham
CHARLES EDWARD FLOWERS III ..... Chapel Hill
KEVIN E. FLYNN ..... Cary
RALPH KENNEDY FRASIER, JR. ..... Durham
JOHN M. FRIGUGLIETTI JR. ..... Locust
MOLLY O'CONNOR GAVIGAN ..... Chapel Hill
JAMES SCOTT HALE ..... Henderson
VERONICA LEE HARVEY ..... Durham
REED J. HOLLANDER ..... Durham
JOHN C. HOVENDON ..... Durham
PETER A. JACOBUS ..... Carrboro
MICHAEL JOSEPH KING ..... Fayetteville
JOHN GAVIN KNIGHT ..... Winston-Salem
FREDDIE LANE, JR. ..... Raleigh
BRADFORD RICHARD LENOX ..... Durham
FRANCISCO J. LINARES ..... Charlotte
CHRIS LOEBSACK ..... Charlotte
MICHAEL MCCLAIN MARSHALL ..... Charlotte
STEPHEN WOOD MARTIN ..... Greenfield, Indiana
JAMES FRANKLIN MCCRACKIN ..... Myrtle Beach, South Carolina
MICHAEL JOSEPH MILLER ..... St. Louis, Missouri
FRED BRUTON MONROE ..... Chapel Hill
LUCRECIA RENEA MOORE ..... Winston-Salem
PAUL G. MURPHY ..... Charlotte
CARL B. NAGLE ..... Winston-Salem
JOHN THURSTON O'NEAL ..... Chapel Hill
JOHN BRYAN PLUMLEE ..... Chapel Hill
ERIC LOUIS REGISTER ..... Chapel Hill
SEAN CHRISTOPHER RICE ..... Chapel Hill
JENNIFER ALICIA ROBERSON ..... Raleigh
SHERI L. ROBERSON ..... Raleigh
RICHARD JAMES ROBERSON, JR. ..... Raleigh

CHRISTOPHER MATTHEW ROSHONG ..... Apex
CYNTHIA LYNN RUSSELL-ALBACH ..... Winston-Salem
BETH ANN SAKSA ..... Charlotte
SHAWN DAVID SCOTT ..... Athens, Georgia
RICHARD KEITH SHACKLEFORD ..... Wake Forest
BONNIE J. SHELDON ..... Asheville
ROBERT J. STOLZ ..... Ithaca, Michigan
CAROL J. SURRATT ..... Montgomery, Alabama
DANIEL W. SWEAT ..... Shelby
JOHN R. SWEETMAN ..... Raleigh
CARL DEWEY TAYLOR, JR. ..... Washington, District of Columbia
AMALIE LEWIS TUFFIN ..... Durham
KIMBERLY WALDRON ..... Sewell, New Jersey
BRADLEY JAMES WEIDEMANN ..... Winston-Salem
DEBORAH WILLIAMSON WITT ..... Columbia, South Carolina
ALICIA L. YOUNG ..... Carrboro
MELINDA MORRIS ZANONI ..... Charlotte
JAMES MICHAEL ZANONI ..... Charlotte
DAVID DEAN ZIMMERMAN ..... Raleigh

FEBRUARY 1996 NORTH CAROLINA BAR EXAMINATION

MICHELLE CHARLENE AUSTIN ..... Naples, Florida
BRIAN S. CROMWELL ..... Charlotte
JAMES ROBERT EASTHOM ..... Durham
ANDREW DOUGLAS FULTS ..... Newport Beach, California
KIMBERLY GLORIA HARPER ..... Charlotte
JOHN H. LOWERY III ..... Grindstone, Pennsylvania
RALPH A. PITTS ..... Charlotte
ROBERT W. PREVOST III ..... Monroe

Given over my hand and seal of the Board of Law Examiners this the 17th day of September, 1996.

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

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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 19th day of July, 1996, and said persons have been issued certificates of this Board:

CHRISTOPHER DANIEL CONNOR ..... Chapel Hill
Applied from the State of Pennsylvania
DAVID W. YATES ..... Nashville, Tennessee
Applied from the State of Tennessee

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 4th day of October, 1996 and said persons have been issued license certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

WILLIAM A. ANTHONY III ..... Gastonia
SAMUEL W. COLEMAN IV ..... Charlotte

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 27th day of September, 1996 and said persons have been issued license certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

MICHAEL JOHN BYRNE ..... Chapel Hill
DEAN H. KATZ ..... Durham
KEVIN M. LAMASNEY ..... Bergenfield, New Jersey
MARK DANIEL LOCKLEAR ..... Maxton

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 27th day of September, 1996 and said person has been issued license certificate.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

REBECCA A. KING ..... Kansas City, Kansas

Given over my hand and seal of the Board of Law Examiners this the 7th day of October, 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 25th day of October, 1996 and said person has been issued license certificate.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

BLANEY EUGENE HINES ..... Asheville

Given over my hand and seal of the Board of Law Examiners this the 28th day of October, 1996.

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

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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 1st day of November, 1996 and said persons have been issued license certificates.

# LICENSED ATTORNEYS

## JULY 1996 NORTH CAROLINA BAR EXAMINATION

DONALD EARL CLARK, JR. . . . . Kernersville
WILLIAM EARLE HUBBARD . . . . . Raleigh
PAUL CRAIG POOLEY . . . . . Durham

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

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

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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 22nd day of November, 1996, and said persons have been issued certificates of this Board:

CHRISTOPHER MAR CELIO . . . . . East Hartford, Connecticut
Applied from the State of Connecticut
STEPHEN JEROME DARMODY . . . . . North Bethesda, Maryland
Applied from the District of Columbia
JAMES P. CARROLL . . . . . Charlotte
Applied from the District of Columbia
MICHAEL E. PEEPLES . . . . . New City, New York
Applied from the State of New York
BRADLEY M. RISINGER . . . . . Arlington, Virginia
Applied from the District of Columbia
E. ANDREW KEENEY . . . . . Corolla
Applied from the District of Columbia
THOMAS BRIAN KELLY . . . . . Virginia Beach, Virginia
Applied from the State of Virginia
LEONARD STEVEN SILVERMAN . . . . . Brooklyn, New York
Applied from the State of New York
CAROLYN M. LANDEVER . . . . . Arlington, Virginia
Applied from the District of Columbia
RODNEY E. ALEXANDER . . . . . Rocky Mount
Applied from the State of Texas
GEAROLD L. KNOWLES . . . . . Potomac, Maryland
Applied from the District of Columbia
MARY ELIZABETH KURZ . . . . . Cary
Applied from the State of Michigan
CURTIS O. MASSEY II . . . . . Durham
Applied from the State of Virginia
MONICA DERHAM ROLQUIN . . . . . Wilmington
Applied from the State of New York
W. COLEMAN ALLEN, JR. . . . . Richmond, Virginia
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 25th day of November, 1996.

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

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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 29th day of November, 1996, and said persons have been issued certificates of this Board:

DOUGLAS W. HARTIG ..... Clayton, Missouri
Applied from the State of Missouri
HENRY ADAM LABRUM ..... Charlotte
Applied from the State of New York
JOHN L. LOCKER, JR. ..... Charlotte
Applied from the State of Texas
JEFFREY RONALD MILLER ..... Wheeling, West Virginia
Applied from the State of West Virginia
PAUL GENE PORTER ..... Charlotte
Applied from the State of Missouri
DEAN BENTLEY ROBERSON ..... Charlotte
Applied from the District of Columbia
NEIL FLOYD SANDLER ..... Cornelius
Applied from the State of Illinois

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 6th day of December, 1996 and said persons have been issued license certificates.

JULY 1996 NORTH CAROLINA BAR EXAMINATION

WILLIAM ARTHUR AMANN ..... Charlotte
MICHAEL WALLACE BALLANCE ..... Kenly
ELLEN LARAINE BATZEL ..... Fletcher
JOHN NEVILLE BETTEX ..... Atlanta, Georgia
MARK CODY BURTON ..... Winston-Salem
DIANN LARUE CORBIN ..... Charlotte
CATHY A. CUBBON ..... Nashville, Tennessee
MICHAEL L. DUFFY ..... West Palm, Florida
AMY M. DUGAN ..... Clemmons
ROBERT M. FUHRER ..... Aliso Viejo, California
NANCY CHARLENE GREEN ..... Winston-Salem
LISA PAULETTE HARDING ..... Winston-Salem
BENJAMIN TOBIAS ISBELL ..... Durham
KATHY SCOTT JACOBS ..... Elon College
U. WILFRED NWAUWA ..... Knoxville, Tennessee
JAMES RODERICK O'NEILL ..... Winston-Salem

ROSILYN ELNORA SAMPSON ..... Garner
RICHARD STONE STARLING ..... Fredericksburg, Virginia
CAROLYN JENNINGS YANCEY ..... Durham

FEBRUARY 1996 NC BAR EXAMINATION

HEATHER DANDRIDGE MYLES ..... Richmond, Virginia

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

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STATE OF NORTH CAROLINA v. ROBBIE JAMES LYONS

No. 238A94

(Filed 4 April 1996)

**1. Jury § 260 (NCI4th)— peremptory challenges—*Batson* challenge—racially neutral reasons**

The State did not exercise its peremptory challenges to exclude three minority jurors from a prosecution for attempted armed robbery and first-degree murder on the basis of race in violation *Batson v. Kentucky*, 476 U.S. 79, where the prosecutor stated that prospective juror Segers failed to respond to his questions and that he believed that she was not unequivocal in her ability to impose the death penalty; that prospective juror Hairston seemed puzzled, had difficulty understanding questions and the issues of the case, and did not fit the prosecutor's profile of the type of juror he wanted on the jury; and that prospective juror Clavijo was excused due to her lack of roots in the community, coupled with her marital status and short employment history.

**Am Jur 2d, Criminal Law § 684; Jury § 244.**

**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.**

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

**2. Jury § 260 (NCI4th)— peremptory challenges—factors as totality**

There was no discriminatory intent in the State's use of peremptory challenges to excuse three jurors from a prosecution for attempted armed robbery and first-degree murder where the State accepted some white jurors with the same or similar backgrounds to minority jurors who were excused. Taking a single factor among several articulated by the prosecutor and attempting to match it to a passed juror exhibiting the same factor fails to address the factors as a totality which when considered together provide an image of a juror considered undesirable by the State.

**Am Jur 2d, Criminal Law § 684; Jury § 244.**

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

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

**3. Jury § 248 (NCI4th)— *Batson* challenge—finding—sufficient**

The trial court's finding on defendant's *Batson* claim in a prosecution for attempted armed robbery and first-degree murder was not deficient because it failed to determine whether defendant had proven purposeful discrimination where the court clearly found that the defendant failed to establish a *Batson* claim and specifically denied the defendant's challenge. Common sense dictates that the trial court determined that the defendant failed in his effort to show purposeful discrimination, even without specifically stating so for the record.

**Am Jur 2d, Criminal Law § 684; Jury § 244.**

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

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

**4. Evidence and Witnesses § 2239 (NCI4th)— capital sentencing—defendant's writings—use by psychologist—not admissible**

The trial court did not err in a capital sentencing hearing by preventing the jury from considering defendant's writings during its deliberations where defendant's psychologist testified that he had not used defendant's poems and writings to form his opinion as to defendant's specific psychiatric diagnosis, but that the writings lent a great deal of understanding to the life of defendant and were part of the ultimate opinion to which he testified. The trial court properly ruled that defense counsel could question the psychologist about the content of the writings provided they formed the specific basis for his opinion; however, the psychologist clearly testified that he had not used the writings to form his opinion as to the defendant's specific psychiatric diagnosis and the record is devoid of any evidence tending to show that these writings were actually written by the defendant.

**Am Jur 2d, Evidence § 1499; Expert and Opinion Evidence §§ 168, 173, 182.**

**Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR3d 146.**

**5. Criminal Law § 1360 (NCI4th)— capital sentencing—mitigating circumstances—impaired capacity—specific symptoms required**

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance that the capacity of defendant to conform his conduct to the requirements of the law was impaired where defendant's psychologist testified about bipolar disorder, antisocial personality disorder and substance abuse, but did not testify that defendant himself was subject to an inability to conform or impairment in conforming his conduct to the requirements of the law at the time he murdered his victim. It is not enough for a defense expert to proffer in general a definition of a disorder without any testimony as to the specific symptoms from which a particular defendant suffers.

**Am Jur 2d, Evidence § 1499; Expert and Opinion Evidence §§ 168, 173, 190; Trial §§ 835, 1270, 1271, 1278, 1285.**

**Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR3d 146.**

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

**6. Criminal Law § 682 (NCI4th)— capital sentencing—peremptory instructions—mental or emotional disturbance**

The trial court did not err in a capital sentencing hearing by refusing defendant's request for a peremptory instruction on the statutory mitigating circumstance that the offense was committed while the defendant was under the influence of a mental or emotional disturbance. The only evidence offered by defendant to support the submission of this mitigating circumstance was the testimony of defendant's psychologist, which revealed that defendant suffered from bipolar disorder and antisocial personality disorder, but there was no evidence in the record that defendant was under the influence of either disorder at the time the offense was committed.

**Am Jur 2d, Evidence § 1499; Expert and Opinion Evidence §§ 168, 173, 190; Trial §§ 835, 1270, 1271, 1278, 1285.**

**Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case. 17 ALR3d 146.**

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

**7. Evidence and Witnesses § 2171 (NCI4th)— capital sentencing hearing—defense psychologist—cross-examination—prior incarceration in S.C.**

The trial court did not err in a capital sentencing hearing by permitting the prosecutor to cross-examine defendant's psychologist regarding defendant's prior incarceration in South Carolina where the psychologist had used records from the South Carolina Department of Corrections as a basis for formulating his opinions. N.C.G.S. § 8C-1, Rule 705.

**Am Jur 2d, Trial § 626.**

**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.**

**8. Criminal Law § 1329 (NCI4th)— capital sentencing—Issue Four—outcome determinative—unanimity**

The trial court did not err by instructing the jury that it must unanimously agree on its answer to Issue Four on the Issues and Recommendation as to Punishment form. Any issue which is outcome determinative as to the sentence a defendant in a capital trial will receive must be answered unanimously by the jury; issues one, three, and four are outcome determinative.

**Am Jur 2d, Trial §§ 1437, 1759.**

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

**9. Criminal Law § 877 (NCI4th)— jury deliberations—jury not deadlocked—incomplete instructions on necessity of verdict**

There was no plain error in a capital sentencing proceeding where defendant contended that the trial court unduly emphasized the necessity for a verdict by its omission of subsections (2) and (3) of N.C.G.S. § 15A-1235(b), but the jury never indicated that it was deadlocked or that it was having difficulty reaching a unanimous decision. It has been held that it is not error for the trial court to give less than the full instruction set out in N.C.G.S. § 15A-1235 when the jury does not indicate that it is deadlocked or having difficulty reaching a unanimous verdict. The instruction given conveyed the essence of N.C.G.S. § 15A-1235(b) and it is clear that the instruction could not have had a prejudicial impact.

**Am Jur 2d, Trial § 1458.**

**Time jury may be kept together on disagreement in criminal case. 93 ALR2d 627.**

**10. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstances—previous conviction involving violence—sequence of convictions**

The trial court did not err in a capital sentencing hearing by instructing the jury to consider in support of the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence an armed robbery

committed on 2 April 1993 where he committed the present murder on 25 September 1993, he was convicted of the armed robbery on 6 October 1993, and his murder trial began on 24 April 1994. So long as the prior violent felony occurred before the date the capital defendant committed murder and the capital defendant is convicted of the violent felony at some point prior to the capital trial, then compliance with N.C.G.S. § 15A-2000(e)(3) has been achieved.

**Am Jur 2d, Trial § 841.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

**11. Jury § 141 (NCI4th)— first-degree murder—voir dire—parole eligibility**

The trial court did not err in a first-degree murder prosecution by denying defendant's request to question prospective jurors regarding their conceptions of parole eligibility.

**Am Jur 2d, Jury §§ 193, 194.**

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

**Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.**

**12. Criminal Law § 1326 (NCI4th)— first-degree murder—mitigating circumstances—defendant's burden—instructions—use of "satisfaction" and "satisfy"**

The trial court did not err in a capital sentencing hearing by using the terms "satisfaction" and "satisfy" to instruct the jury as to the defendant's burden of proof applicable to mitigating circumstances.

**Am Jur 2d, Trial §§ 841, 1291.**

**Supreme Court's views as to prejudicial effect in criminal case of erroneous instructions to jury involving burden of proof or presumptions. 92 L. Ed. 2d 862.**

**13. Criminal Law § 1363 (NCI4th)— capital sentencing—instructions—nonstatutory mitigating circumstances—value**

The trial court did not err in a first-degree murder prosecution by instructing the jurors that they could reject evidence of mitigation as to nonstatutory mitigating circumstances on the basis that the evidence had no mitigating value.

**Am Jur 2d, Trial §§ 841, 1291.**

**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.**

**14. Jury § 226 (NCI4th)— first-degree murder—death qualification—rehabilitation**

The trial court did not err in a first-degree murder prosecution by denying defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal for cause.

**Am Jur 2d, Jury §§ 226, 228-233.**

**15. Criminal Law § 1329 (NCI4th)— capital sentencing—instructions—Issues Three and Four**

The trial court did not err in a first-degree murder prosecution in its instruction on Issues Three and Four on the Issues and Recommendation as to Punishment form.

**Am Jur 2d, Trial § 1441.**

**16. Jury § 103 (NCI4th)— first-degree murder—individual voir dire—denied**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for individual *voir dire*.

**Am Jur 2d, Jury §§ 193, 194, 198.**

**17. Jury § 93 (NCI4th)— first-degree murder—voir dire**

The trial court did not err in a first-degree murder prosecution by restricting defendant's *voir dire*; control of jury selection rests within the sound discretion of the trial court.

**Am Jur 2d, Jury §§ 193, 194, 202.**

**18. Criminal Law § 415 (NCI4th)— first-degree murder—prosecutor's arguments**

The trial court did not err during a first-degree murder prosecution by not intervening *ex mero motu* to prevent five generalized instances of alleged improper arguments made by the prosecutor during closing arguments.

**Am Jur 2d, Trial §§ 491, 493, 496.**

**Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case. 38 ALR2d 1396.**

**19. Criminal Law § 1373 (NCI4th)— death penalty—not disproportionate**

A sentence of death for first-degree murder was not excessive or disproportionate where the record fully supports the aggravating circumstance found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, each case where the North Carolina Supreme Court has found a sentence of death disproportionate is distinguishable from this case, this case is more similar to certain cases in which the death sentence has been found proportionate than those in which the court has found the death sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment, and, based on the nature of the crime, it cannot be concluded as a matter of law that the jury's recommendation was excessive or disproportionate.

**Am Jur 2d, Criminal Law § 628.**

**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.**

Justice WHICHARD concurring.

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 Freeman, J., at the 25 April 1994 Criminal Session of Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 November 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.*

LAKE, Justice.

The defendant was indicted on 31 January 1994 for attempted robbery with a dangerous weapon and for the first-degree murder of Stephen Wilson Stafford. The defendant was tried capitally, and the jury found the defendant guilty of attempted robbery with a dangerous weapon and guilty of first-degree felony murder. Following a capital sentencing hearing pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. For the reasons discussed herein, we conclude that the jury selection and the guilt/innocence and sentencing phases of defendant's trial were free from prejudicial error, and that the sentence of death is not disproportionate.

Stephen Stafford, the victim, owned a small business known as Sam's Curb Market (hereinafter referred to as "Sam's") in Winston-Salem, North Carolina. At trial, the State presented evidence tending to show that on 25 September 1993, Stafford was shot and killed in his place of business. Victoria Lytle witnessed the shooting.

Lytle testified that early in the afternoon of 25 September 1993, she drove to Sam's and parked directly in front of the market. As Lytle got out of her car, she noticed two men across the street. Lytle went into the store, collected her purchases, and then remembered that she needed some diet soda. Lytle went to the store's cooler. At that time, one of the men, Derick Hall, entered the store. As Lytle approached the counter, Hall told her to go ahead of him and pay for her items, but Lytle told him to go ahead of her instead. While waiting for Hall to pay for his purchases, Lytle noticed the defendant standing outside and looking into the store. Lytle then paid for her purchases, said goodbye to the victim and left the store.

Lytle further testified that she heard three gunshots as she closed her car door. At the time the shots were fired, Lytle was approximately three feet from the store. Lytle stated that upon hearing the shots she looked up and saw a flash. She then heard the victim moan and saw him fall forward over the counter and then backward to the floor. Lytle testified that immediately after she heard the shots and

saw the victim fall, she saw the defendant run out of the store with a gun in his hand.

Derick Hall, the defendant's accomplice, testified for the State that he had a long-barreled .22-caliber gun on the morning of Mr. Stafford's murder. Hall stated that when he and the defendant went to Sam's, the defendant had possession of the gun. Hall testified that as he and the defendant approached Sam's, the defendant told him that he needed money and was going to rob the store. Hall did not believe the defendant was serious. After Victoria Lytle left the store, the defendant entered and told the victim to freeze and turn around. Hall also obeyed the command in order to demonstrate that he had no part in the robbery. Hall testified that he then heard five shots, and when he turned around, the defendant was gone and the victim was lying on the floor. Hall further testified that the victim was grunting in an effort to speak and that the victim reached up and pushed the burglar alarm before collapsing back on the floor. The next evening, Hall voluntarily turned himself in to the police.

Dr. Patrick Lantz, a forensic pathologist, performed an autopsy on the victim's body on 26 September 1993. Dr. Lantz testified that one bullet entered the victim's left hand and was recovered from the victim's wrist. This wound was consistent with the victim's having grasped the gun and would not in itself have been fatal. Two more bullet fragments were discovered in the victim's upper arm. These bullet fragments fractured the humerus and caused considerable splintering of the bone. This wound would similarly not have been fatal in the short term. Finally, Dr. Lantz testified that the victim had been shot in the back and that bullet went into the victim's chest through the lung and aorta. Dr. Lantz testified that this bullet wound caused the victim to bleed to death.

Special Agent Ronald Marrs, an expert in the field of firearms identification, testified that two of the bullets recovered from the victim's body were .22-caliber. The two fragments were too deformed to yield a result. Although made by different manufacturers, the bullets were all consistent with having been fired from a .22-caliber weapon.

The defendant offered no evidence during the guilt/innocence phase of the trial.

At the penalty phase of the trial, the State presented evidence supporting the submission of the aggravating circumstance that the defendant had previously been convicted of a felony involving the use

or threat of violence to the person. This evidence tended to show that the defendant had been convicted of two prior felonies, one of which was an armed robbery, and one of which was a common law robbery.

The defendant's evidence consisted of testimony from Dr. Gary Hoover, an expert in the field of psychology. Dr. Hoover testified that he conducted a forensic psychological evaluation of the defendant which included interviews with eleven individuals and records from nine sources covering defendant's history as far back as age eight. Dr. Hoover also interviewed the defendant twice at Central Prison. Dr. Hoover diagnosed defendant as suffering from bipolar disorder, antisocial personality disorder and substance abuse.

JURY SELECTION/GUILT PHASE

**[1]** In his first assignment of error, the only issue in the guilt/innocence phase of the trial not treated as a preservation issue, the defendant contends that the State exercised its peremptory challenges to exclude three minority jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges to exclude a juror solely on account of his or her race. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. The Supreme Court established a three-part test to determine if a prosecutor has impermissibly excluded a juror based on race. First, *the defendant must* establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88; *State v. Robinson*, 330 N.C. 1, 15, 409 S.E.2d 288, 296 (1991). If the defendant succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for each challenged strike. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88; *State v. Wiggins*, 334 N.C. 18, 31, 431 S.E.2d 755, 763 (1993). Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

In the case *sub judice*, the prosecutor, at the trial court's request, offered race-neutral explanations for each peremptory challenge to which the defendant objected. Because the purpose of the *prima facie* case is to shift the burden of going forward to the State, the State's offer of race-neutral explanations renders it unnecessary to address whether the defendant met his initial burden of establishing

a *prima facie* case of discrimination. *Id.* We proceed, therefore, as if the *prima facie* case had been established and turn our attention to the State's reasons for peremptorily challenging prospective jurors Segers, Hairston and Clavijo.

With regard to prospective juror Segers, the prosecutor provided the following explanation:

> Judge, we felt that Ms. Segers in her response to the death penalty questions, she stated that the death penalty was simply an option and that [we] felt that she was not absolutely unequivocal on her ability to impose the death penalty. That she leaned her body language that she was leaning away from the entire jury selection process. . . . [H]er body language was the worst of any of the jurors as she was leaning away trying to get as far away from the table as possible.
>
> Then she had no responses to the group questions when we would ask questions of the group. That she would just remain silent and not participate in the selection.

With regard to prospective juror Hairston, the prosecutor explained:

> Your Honor, we noted that on Ms. Hairston's juror questionnaire that she was . . . a nurse. That . . . we did not want those folks with an absolute nurturing type of personality. We also note that she didn't understand on literally every question that we asked that all other eleven jurors answered almost immediately [and] she was evasive in her answers. She had difficulty following the questions and that she repeatedly asked me to repeat the questions. That at the first time that I talked about whether one could sign their name on the death penalty verdict, she looked shocked . . . .
>
> That when we tried to explain things to her, she looked puzzled and she couldn't apparently understand when I talked about some of the issues that some of the other jurors were able to grasp.

Finally, with regard to prospective juror Clavijo, the prosecutor explained:

> Judge, we felt that she—on her questionnaire she put that she had only been employed for four months and that she had only lived in this county for four months. That she was single. That she

had not voted in an election since 1989. We felt that she didn't have a sufficient stake in the community to warrant for the State sitting on a death penalty case.

In order to rebut a *prima facie* case of discrimination, the prosecution must articulate legitimate reasons which are clear, reasonable and related to the particular case to be tried. *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). The prosecutor's explanation need not, however, rise to the level justifying a challenge for cause. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. Furthermore, if not racially motivated, the prosecutor may exercise peremptory challenges on the basis of legitimate hunches and past experience. *Robinson*, 330 N.C. at 17, 409 S.E.2d at 297.

The prosecutor stated that prospective juror Segers failed to respond to his questions and that he believed that she was not unequivocal in her ability to impose the death penalty. The prosecutor stated that prospective juror Hairston seemed puzzled and had difficulty understanding his questions and the issues of the case. Moreover, prospective juror Hairston did not fit the prosecutor's profile of the type of juror he wanted on the jury. The prosecutor stated that prospective juror Clavijo was excused due to her lack of roots in the community, coupled with her marital status and short employment history. Although none of these reasons would justify an excusal for cause, each reason is clear, reasonably specific and related to the particular case to be tried. The prosecutor is not required to provide an explanation that is persuasive, or even plausible. *Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839 (1995). "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406.

**[2]** The defendant argues that discriminatory intent is shown by the fact that the State accepted some white jurors with the same or similar backgrounds to minority jurors who were excluded. For example, the defendant argues that the State accepted three jurors who were nurses yet excused prospective juror Hairston presumably because she was a nurse. Although it is proper for the trial court to consider whether similarly situated white veniremen are accepted as jurors, the defendant in this case takes a single factor among several articulated by the prosecutor and attempts to match it to a passed juror

exhibiting the same factor. This approach "fails to address the factors as a totality which when considered together provide an image of a juror considered . . . undesirable by the State." *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990). When considered in this light, we believe that the State has met its burden of coming forward with neutral, nonracial explanations for each peremptory challenge.

**[3]** Finally, the defendant argues that the trial court's finding was deficient because it failed to determine whether the defendant had proven purposeful discrimination, the third step in a *Batson* challenge. We disagree. Following the prosecutor's explanations, the trial court made the following finding:

> Well, the Court will find that based on the questions asked and the jurors interviewed, the defendant has failed to establish a *prima facie* pattern of discriminatory use of challenges on behalf of the district attorney but out of an abundance of caution the Court has asked the district attorney to articulate reasons and the district attorney has articulated valid reasonable and satisfactory reasons for his use of challenges which are totally aside from race and the Court will deny the challenge under *Batson*.

The trial court clearly found that the defendant failed to establish a *Batson* claim and specifically denied the defendant's challenge. Common sense, therefore, dictates that the trial court determined that the defendant failed in his effort to show purposeful discrimination, even without specifically stating so for the record. This assignment of error is therefore overruled.

SENTENCING PHASE

**[4]** In his next assignment of error, the defendant contends that the trial court deprived him of his constitutional right to produce relevant mitigating evidence under the Eighth Amendment to the United States Constitution and the United States Supreme Court's opinion in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978). Specifically, the defendant argues that the trial court erred by preventing the jury from considering writings of the defendant during its deliberations in the sentencing phase of the trial.

At the sentencing phase, defendant called Dr. Gary Hoover, a psychologist, to the stand. Defense counsel asked Dr. Hoover to identify a series of poems and writings allegedly written by the defendant. After the State objected to the admission of these writings, defense counsel attempted, with the trial court's permission, to lay a founda-

tion for their introduction. Dr. Hoover testified that he had not used the writings to form his opinion as to the defendant's specific psychiatric diagnoses, but that the writings lent "a great deal of understanding to the life of [the defendant]" and were part of the "ultimate" opinion to which he had testified. The trial court decided to allow the writings into evidence but would not permit them to be read to or passed to the jury, or used during closing arguments. The trial court did specifically rule, however, that if Dr. Hoover had used some part of the writings as a specific basis for his opinion, then defense counsel could present that to the jury.

We conclude that the defendant has not been deprived of any constitutional rights by this ruling. The trial court properly ruled that defense counsel could question Dr. Hoover about the content of the writings provided they formed the specific basis for his opinion. Defense counsel chose not to do so for good reason. Dr. Hoover testified that the defendant's writings were helpful to him in understanding the defendant's life and forming his "ultimate" opinion. However, Dr. Hoover also clearly testified that he had not used the writings to form his opinion as to the defendant's specific psychiatric diagnoses. The record fails to show any instance in which Dr. Hoover offered an "ultimate" opinion other than or different from the specific diagnoses of bipolar disorder and antisocial personality disorder.

Furthermore, a careful review of the record reveals that the writings were neither pertinent nor dependable as required by this Court's decision in *State v. Rose*, 339 N.C. 172, 200, 451 S.E.2d 211, 227 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995). The writings were either unsigned or signed by someone using the name "Lord Insane." Dr. Hoover did not testify in what context he saw the writings or under what circumstances he was given the writings. Moreover, Dr. Hoover never testified as to how he knew that the writings were actually defendant's. The record is simply devoid of any evidence tending to show that these writings were actually written by the defendant. Accordingly, this assignment of error is overruled.

**[5]** In his third assignment of error, the defendant contends that the trial court erred by failing to submit the statutory mitigating circumstance that "[t]he capacity of the defendant . . . to conform his conduct to the requirements of the law was impaired." N.C.G.S. § 15A-2000(f)(6) (Supp. 1995).

The defendant's psychologist, Dr. Hoover, testified that the defendant suffered from bipolar disorder, antisocial personality dis-

order and substance abuse. With regard to antisocial personality disorder, Dr. Hoover testified as follows:

> Essentially the anti-social personality disorder exists in an individual who is unable to conform his or her behavior to societies' expectations and they behave in an anti-social and often illegal ways. The term "anti-social" itself does not necessarily connote illegal behavior but often we find with anti-social personalities that they do engage in illegal behavior. The term "anti-social" simply means that the individual is not able to conform their behavior to the general expectations of society . . . .

Dr. Hoover's testimony is the only evidence which defendant contends supports the submission of the (f)(6) mitigator.

A close reading of Dr. Hoover's testimony, however, reveals that when asked about the defendant's antisocial personality disorder, Dr. Hoover responded by describing only its general symptoms. Dr. Hoover spoke of the disorder "in an individual" affecting "his or her" ability to conform. Dr. Hoover went on to say of these individuals that "they" behave in antisocial ways. Dr. Hoover never testified that *the defendant* was unable to conform his conduct to the requirements of the law or that the defendant was suffering from antisocial personality disorder *at the time of the murder*. In other words, it is apparent that Dr. Hoover did not testify that the defendant himself was subject to an inability to conform or impairment in conforming his conduct to the requirements of the law at the time he murdered the victim. It is not enough for a defense expert to proffer in general a definition of a disorder without any testimony as to the specific symptoms from which a particular defendant suffers. We therefore find no error in the trial court's failure to submit the (f)(6) mitigating circumstance. This assignment of error is overruled.

**[6]** In his fourth assignment of error, the defendant contends that the trial court erred by refusing the defendant's request for a peremptory instruction on the statutory mitigating circumstance that the offense was committed while the defendant was under the influence of a mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2).

A capital defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontradicted evidence. *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). A peremptory instruction tells the jury to answer the inquiry in the manner indicated by the trial court *if it finds* that the fact exists as all the

evidence tends to show. *Id.* at 75, 257 S.E.2d at 617. However, even where all of the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury is still free to reject the circumstance if it does not find the evidence credible or convincing. *State v. Rouse*, 339 N.C. 59, 107, 451 S.E.2d 543, 570 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995).

In the case *sub judice*, Dr. Hoover's testimony is the only evidence offered by the defendant to support the submission of this mitigating circumstance. However, Dr. Hoover did not testify that the defendant was under the influence of either bipolar disorder or antisocial personality disorder at the time of the murder. Dr. Hoover's uncontradicted testimony merely revealed that the defendant suffered from bipolar disorder and from antisocial personality disorder. There is simply no evidence in the record that the defendant was under the influence of either disorder at the time the offense was committed. Therefore, the submission of a peremptory instruction was not required, and we find no error in the trial court's failure to so instruct. This assignment of error is overruled.

**[7]** In his fifth assignment of error, the defendant contends that the trial court erred by permitting the prosecutor to cross-examine Dr. Hoover regarding the defendant's prior incarceration in South Carolina.

During the prosecutor's cross-examination of Dr. Hoover, the following exchange took place:

Q. What other records did you receive?

A. South Carolina Department of Corrections.

Q. Okay. And about what age are we talking about on those?

A. Same time span.

Q. Twenty to twenty-two?

A. Yes. That age range.

Q. Did those records indicate that he spent any time in South Carolina Department of Corrections?

A. Yes. They do.

Q. Did you use those records as a basis for formulating some of your theories and your opinion here today?

A. Yes.

Q. So you're well aware of his run-ins with the law down there in South Carolina?

A. Yes. I am.

. . . .

Q. Are you familiar with the attack on the prison guard down there?

A. Yes, sir.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. Are you familiar with the prison—the attack on the prison guard down there?

A. Yes. Yes, I am.

Q. And you're familiar with the incident when he was able to take a—some type of an item or handmade knife and push it through a riot shield during a disturbance down there in the South Carolina Department of Corrections?

[DEFENSE COUNSEL]: Objection.

THE COURT: I'll sustain that.

Q. Are you familiar with his criminal record down there involving the assault on the officer down there?

[DEFENSE COUNSEL]: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Yes.

Defendant specifically argues that the trial court should have sustained his objections because evidence of the assault on the prison guard was not elicited by the State for impeachment purposes or to counter mitigating evidence. Instead, the defendant argues that the evidence was used as a *de facto* aggravating circumstance by persuading the jury that the defendant would be a dangerous prisoner if given a life sentence. We conclude that the prosecutor properly questioned the defendant's expert witness regarding the underlying data used to form his opinions.

Rule 705 of the North Carolina Rules of Evidence provides in pertinent part:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. *The expert may in any event be required to disclose the underlying facts or data on cross examination.*

N.C.G.S. § 8C-1, Rule 705 (1992) (emphasis added).

In the case *sub judice*, Dr. Hoover testified on direct examination that he had obtained records from nine sources as part of his forensic psychological evaluation of the defendant. Dr. Hoover also testified that symptoms of the defendant's bipolar disorder included episodic run-ins with the law. On cross-examination, Dr. Hoover testified that he used records from the South Carolina Department of Corrections as a basis for formulating his opinions. Evidence regarding defendant's behavior while incarcerated in South Carolina was contained in those records. Therefore, pursuant to Rule 705, it was proper for the prosecutor, during cross-examination, to question Dr. Hoover regarding those records, as they were used to formulate his opinion that defendant was suffering from bipolar disorder. The trial court's rulings were in all respects proper. This assignment of error is accordingly overruled.

**[8]** In his sixth assignment of error, the defendant argues that the trial court erred by instructing the jury that it must unanimously agree on its answer to Issue Four on the "Issues and Recommendation as to Punishment" form.

This Court has recently addressed the issue of unanimity as to Issues Three and Four in *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 482, (1996). In *McCarver*, this Court held that "any issue which is outcome determinative as to the sentence a defendant in a capital trial will receive . . . must be answered unanimously by the jury." *Id.* at 390, 462 S.E.2d at 39. Issues One, Three and Four are outcome determinative. *Id.* Accordingly, we conclude that the trial court did not err by instructing the jury that it must be unanimous in its answer on Issue Four of the "Issues and Recommendation as to Punishment" form.

**[9]** In a related assignment of error, the defendant contends that the trial court unduly emphasized the necessity for a verdict by its failure to properly instruct the jury in accord with N.C.G.S. § 15A-1235(b). Section 15A-1235(b) provides:

> 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.

N.C.G.S. § 15A-1235(b) (1988).

In the case *sub judice*, the following exchange occurred after the jury questioned the trial court regarding the necessity of a unanimous response to Issue Four on the "Issues and Recommendation as to Punishment" form:

> THE COURT: Now let me ask you, I assume—are you making progress now or do you feel like—you don't feel like you're hopelessly —
>
> FOREMAN: —I think that all of us are to a point that, you know, we just need to go back but I think everybody's mind is pretty close to the final decision factor.
>
> THE COURT: So you are still deliberating and discussing it and moving forward?
>
> FOREMAN: We have been up until this point.
>
> THE COURT: Let me say a few things to you that you probably have heard before and then I'll let you go back.

> I want to emphasize the fact to you 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. However, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict. So I will let you resume your deliberations at this time. If you will, step back and see if you can reach a verdict, please.

Relying on *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), the defendant argues that the trial court committed reversible error by omitting the substance of subsections (2) and (3) of N.C.G.S. § 15A-1235(b). In *Williams*, this Court stated that when a trial court concludes that a jury may be deadlocked and gives any of the instructions included in N.C.G.S. § 15A-1235(b), the trial court must give all of the instructions listed. *Id.* at 327, 338 S.E.2d at 85.

We find no error in the trial court's paraphrase of this instruction. In *Williams*, the jury specifically announced to the trial court that the jury was unable to reach a verdict. Under such circumstances, it was error not to give the full instruction set out in N.C.G.S. § 15A-1235. *Id.* Here, however, the jury never indicated that it was deadlocked or that it was having difficulty reaching a unanimous decision. The jury foreman stated that the jury was "pretty close" to a final decision and that up until its break for the question regarding Issue Four, the jury was discussing the issues and moving forward. This Court has held that it is not error for the trial court to give less than the full instruction set out in N.C.G.S. § 15A-1235 when the jury does not indicate that it is deadlocked or having difficulty reaching a unanimous verdict. *State v. Williams*, 339 N.C. 1, 39-40, 452 S.E.2d 245, 268 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995).

Furthermore, we note that the defendant failed to object to the trial court's instruction. Our review is therefore limited to a determination of whether the omission constituted "plain error." Assuming, *arguendo*, that the trial court erred, we cannot say that the error was so fundamental or prejudicial that it amounted to plain error. The trial court instructed the jurors that they had a duty to "reason the matter over together as reasonable men and women" to reach a verdict, but only if it could be done *without the surrender of each juror's honest convictions*. This portion of the trial court's instruction conveyed to

the jurors that they were not to sacrifice their individual beliefs in order to reach a verdict. In other words, the instruction conveyed the essence of N.C.G.S. § 15A-1235(b). It is clear, therefore, that the instruction could not have had a prejudicial impact. This assignment of error is overruled.

**[10]** In his last assignment of error, the defendant contends that the trial court erred by instructing the jury to consider a conviction, which occurred after the commission of this offense, as evidence supporting the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance.

The sole aggravating circumstance submitted to the jury in the case *sub judice* was whether 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). The prosecutor submitted two prior felony convictions, one of which was an armed robbery, in support of this aggravating circumstance. Defendant committed the armed robbery on 2 April 1993. Defendant committed the present murder on 25 September 1993. Defendant was convicted of the armed robbery on 6 October 1993. The defendant's trial for the murder of Mr. Stafford began on 25 April 1994. Defendant argues that because the conviction for armed robbery was entered eleven days after he murdered the victim in this case, it was inadmissible as support for the (e)(3) aggravating circumstance. Defendant insists that the legislature's concern was with the date of conviction, not the date of the crime itself.

In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court held that the "previously convicted" language used by the legislature in subsection (e)(3) refers to criminal activity conducted prior to the events out of which the charge of murder arose. *Id.* at 23, 257 S.E.2d at 584. The emphasis is on the date of the prior violent felony, not the date of conviction. Therefore, it is our holding that so long as the prior violent felony occurred before the date the capital defendant committed murder and the capital defendant is convicted of the violent felony at some point prior to the capital trial, then compliance with the terms of subsection (e)(3) has been achieved. We accordingly overrule defendant's assignment of error.

PRESERVATION ISSUES

**[11-15]** The defendant raises five issues which he concedes have been decided against him by this Court: (1) the trial court erred by denying defendant's request to question prospective jurors regarding their conceptions of parole eligibility, (2) the trial court erred by

using the inherently ambiguous terms "satisfaction" and "satisfy" to instruct the jury as to the defendant's burden of proof applicable to mitigating circumstances, (3) the trial court erred by instructing the jurors that they could reject evidence of mitigation as to nonstatutory mitigating circumstances on the basis that the evidence had no mitigating value, (4) the trial court erred by denying the defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal for cause, and (5) the trial court erred in its instruction regarding Issues Three and Four on the "Issues and Recommendation as to Punishment" form. We have considered the defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule each of these assignments of error.

The defendant raises three additional issues which are not conceded but which defendant nevertheless treats as preservation issues.

**[16,17]** First, the defendant argues that the trial court erred by denying defendant's motion for individual *voir dire*. Second, the defendant argues that the trial court erred by restricting his ability to conduct an adequate jury *voir dire*. Defendant recognizes that control of jury selection rests within the sound discretion of the trial court. *See State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). We have reviewed defendant's arguments and find no compelling reason to overrule the trial court's rulings. Each of these assignments of error is overruled.

**[18]** Finally, the defendant argues that the trial court erred by not intervening *ex mero motu* to prevent five generalized instances of alleged improper arguments made by the prosecutor during closing arguments in the penalty phase of trial. The defendant cites no authority in support of his position. We note that this Court has routinely allowed prosecutors wide latitude during their closing arguments. *See State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995). We have reviewed each asserted instance of improper argument and find no basis to conclude that the trial court erred by not intervening *ex mero motu*. This assignment of error is overruled.

We also note that the defendant raises fifty-nine additional assignments of error in his *pro se* supplemental brief. With two exceptions, this brief is merely a restatement of the original assignments of error contained in the record on appeal. Each "issue" is presented without argument or supporting authority. Furthermore, defendant is appar-

ently unaware that many of these additional "issues" have already been argued in the brief filed by his appellate counsel. Nevertheless, we have reviewed each of the additional issues that have not already been addressed and find them to be without merit. Therefore, we overrule these assignments of error as well.

PROPORTIONALITY REVIEW

**[19]** Having found no error in either the guilt/innocence or sentencing phase, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstance found by the jury; (2) whether passion, prejudice or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After thoroughly reviewing the record, transcript 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 factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We defined the pool of cases for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995), and we compare the instant case to others in the pool that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994).

In the case *sub judice*, the jury found the defendant guilty of first-degree murder under the theory of felony murder. The jury found as

an 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). The jury found one statutory mitigating circumstance, that the offense was "committed while defendant was mentally or emotionally disturbed." N.C.G.S. § 15A-2000(f)(2). The jury also found as nonstatutory mitigating circumstances that (1) the defendant was emotionally abused as a child, (2) the defendant was abandoned by his mother as a child, (3) the defendant's current psychological disorders are related to his mother's abuse of drugs, and (4) the defendant has a long history of alcohol and drug abuse. The jury also found the statutory catchall mitigating circumstance. N.C.G.S. § 15A-2000(f)(9).

In our proportionality review, it is proper to compare the present case to those 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. 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 solely upon felony murder. The victim died of cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. The jury found the existence of numerous mitigating circumstances including that the defendant had no significant history of prior criminal activity; that he was under the influence of mental or emotional disturbance; that he confessed and cooperated upon arrest; and that he voluntarily consented to a search of his motel room, car, home and storage bin. Finally, this defendant pled guilty during trial and acknowledged his wrongdoing before the jury. This Court determined that the death sentence was disproportionate based not only on the defendant's conduct at trial, but also in part on the fact that the defendant was only trying to rob the victim because he fired at the victim's legs and not at a more vital part of the victim's body. *Id.* at 329, 372 S.E.2d at 523. In the present case, the defendant has a significant criminal history, including at least two prior convictions for violent felonies. Further, the defendant failed to show any remorse for his actions, failed to plead guilty and failed to acknowledge his wrongdoing before the jury. Finally, the defendant shot the victim numerous times at close range in vital areas of the victim's

body. It is a testament to the violence of this crime that the repetitive gunshots caused the victim to spin around until he was shot in the back. Unlike the defendant in *Benson*, this defendant clearly wanted his victim dead.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant and a group of coconspirators robbed the victim's place of business. No evidence showed who the "ringleader" of the group was. This Court vacated the sentence of death based on the fact that the defendant was only a teenager, and it did not appear that defendant Stokes was more deserving of death than an accomplice, who was considerably older and received only a life sentence. *Id.* at 21, 352 S.E.2d at 664. In the present case, the defendant was the "ringleader" and the shooter. Defendant Stokes was only seventeen years old at the time of the crime. Unlike in *Stokes*, the jury in the present case failed to find that the defendant's age was a mitigating circumstance. Finally, there was no indication that defendant Stokes had the kind of criminal history that the defendant here has accumulated.

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 victim was killed during an argument in a parking lot. There was also evidence suggesting that the victim was not the intended target of the defendant. The sole aggravating circumstance found was that the murder was part of a course of conduct. This Court determined that this shooting did "not contain the viciousness and the cruelty present" in other death cases that involved only the course of conduct aggravating circumstance. The case *sub judice* is distinguishable in that the victim was clearly the defendant's target. The defendant violently shot the victim and kept shooting until finally shooting the victim in the back.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant stabbed the victim twice in the chest during the commission of a robbery and burglary. This Court noted, however, that it was the defendant's accomplice who "finished" the victim by stabbing him several more times. *Id.* at 688, 325 S.E.2d at 193. The present case is clearly distinguishable in that it was the defendant who mercilessly "finished" the victim.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the defendant shot a police officer during a struggle near the defendant's car. This Court vacated the sentence of death based upon the speculative nature of the evidence, the lack of motive and the absence of any

simultaneous offenses, together with three mitigating circumstances tending to show the defendant's lack of past criminal activity and his being gainfully employed. *Id.* at 479, 319 S.E.2d at 172. In the present case, the evidence was anything but speculative. The defendant's motive for killing the victim was clear. Finally, the defendant's history shows numerous incarcerations; assaults while incarcerated; and at least two previous violent felonies, including another armed robbery.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant also went into the hospital to secure medical help for the victim, voluntarily spoke with police officers and admitted to shooting the victim. In the present case, by contrast, after rendering the victim helpless after shooting him once, the defendant literally held the victim's life in his hands. Instead of seeking aid for the victim, or simply leaving the scene, the defendant chose to ensure the victim's death by shooting the victim several additional times. Further, the defendant certainly showed no remorse and did not seek medical help for the victim.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant flagged down the victim as the victim passed in his truck. Later, the victim's body was found in the truck. He had been shot twice in the head, and his wallet was missing. The defendant was convicted of first-degree murder, kidnapping and robbery with a dangerous weapon. This Court vacated the kidnapping and armed robbery convictions because of the insufficiency of the evidence and vacated the death sentence because there was no evidence regarding what had occurred after the defendant left with the victim. In contrast, the evidence in the case *sub judice* is precise as to the attempted armed robbery and the murder. It is equally clear that the defendant, when faced with an uncooperative victim, simply began to shoot the victim and continued to do so until the victim was no longer in his way.

Furthermore, we reiterate that the jury in the case *sub judice* found as an aggravating circumstance that the defendant had previously been convicted of a violent felony. The jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate. *See State v. Harris*, 338 N.C. 129, 449 S.E.2d 371 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 752 (1995). We have recently noted that none of the

cases in which the sentence was found to be disproportionate has included this aggravating circumstance. *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994).

For the foregoing reasons, we conclude that each case where this Court has found a sentence of death disproportionate is distinguishable from the case *sub judice*.

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 this Court considers all of the cases in the pool when engaging in our duty of proportionality review, we have repeatedly stated 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 those in which we have found the sentence of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Finally, we noted in *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), that similarity of cases is not the last word on the subject of proportionality. *Id.* at 287, 446 S.E.2d at 325. Similarity "merely serves as an initial point of inquiry." *Id.*; *see also State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47. The issue of whether the death penalty is proportionate in a particular case ultimately rests "on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances." *Daniels*, 337 N.C. at 287, 446 S.E.2d at 325.

Based on the nature of this crime, and particularly the distinguishing features noted above, we cannot conclude as a matter of law that the jury's recommendation or the sentence of death was excessive or disproportionate. We hold that the defendant received a fair trial and sentencing proceeding, free of prejudicial error.

NO ERROR.

Justice WHICHARD concurring.

On the issue presented by defendant's sixth assignment of error, I joined in Justice Frye's dissenting opinions 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 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879, (1996). I continue to believe those dissenting opinions were correct. A majority of this Court ruled to the contrary, however, and the United States Supreme Court has since denied certiorari in those cases. I thus now consider myself bound by the majority position and will no longer dissent or concur in the result in cases presenting the issue of unanimity as to Issues Three and Four.

Justice FRYE joins in this concurring opinion.

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STATE OF NORTH CAROLINA v. ERNEST A. KING

No. 69A94

(Filed 4 April 1996)

**1. Assault and Battery § 26 (NCI4th)— aggravated assault—intent—acting individually or in concert—sufficiency of evidence**

The evidence was sufficient to allow the jury to reasonably conclude that defendant, individually or in concert with another, intended to and did shoot an assault victim so as to support the trial court's submission to the jury of the charge of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant threatened to make Peaks a "ghost" because Peaks had robbed a "lieutenant" in defendant's drug organization; defendant and his accomplice approached Peaks as Peaks was trying to open the back door of a blue car with tinted windows; defendant and his accomplice shot at Peaks and then shot at the blue car; the accomplice fired two .38-caliber handguns, and defendant admitted that he was armed with and fired the entire clip from his 9-millimeter handgun; the victim, who had been shot several times, was found lying in the front seat of the blue car; and a fired 9-millimeter bullet was discovered on the front passenger floorboard of the car near the victim.

**Am Jur 2d, Assault and Battery §§ 92 et seq.**

**2. Evidence and Witnesses § 222 (NCI4th)— high-speed chase four months after crimes—evidence of flight**

The trial court in a murder and assault trial did not err by admitting evidence concerning a high-speed car chase of defendant by a police officer four months after the crimes as evidence of flight and by instructing the jury that it could consider evidence of flight in determining defendant's guilt since (1) there was evidence that defendant fled from Durham to New York after shooting the victims in order to avoid arrest; (2) the four intervening months between the shootings and the car chase did not rob this evidence of its relevance and probative value to show defendant's consciousness of guilt; (3) there is no requirement that defendant be aware of the initiation of formal charges against him for evidence of flight to be admissible upon the question of guilt; (4) the fact that an inference may be drawn that defendant was eluding arrest for more recent offenses does not make the instruction on flight erroneous in this case; and (5) evidence that defendant committed other crimes during the high-speed chase did not render evidence of the chase inadmissible.

**Am Jur 2d, Evidence §§ 532-535.**

**3. Evidence and Witnesses § 2518 (NCI4th)— no possession of weapon by victim—absence of personal knowledge—testimony incompetent but not prejudicial**

Although testimony by a murder victim's sister that the victim did not possess a handgun at the time he was killed because he had pawned his gun two days earlier was relevant to rebut defendant's claim of self-defense, this testimony was a mere conclusion and incompetent because there was no showing that the witness had personal knowledge that the victim did not possess a gun on the day he was killed. However, the admission of this testimony was not prejudicial error where all the testimony at trial tended to show that no weapon was discovered on or around the victim, and the victim's sister had an obvious bias in so testifying. N.C.G.S. § 8C-1, Rule 602.

**Am Jur 2d, Witnesses §§ 178-180.**

**4. Evidence and Witnesses § 357 (NCI4th)— murder trial—details of drug dealings—admissibility to show motive**

Where evidence was presented in a murder trial that the victim had robbed one of defendant's drug "lieutenants" and that

defendant had stated that "nobody was going to take nothing" from him, testimony concerning the details of defendant's drug dealings, including the quantities and street prices of drugs sold, was not improper character evidence but was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show defendant's motive for shooting the victim by showing how much money defendant or his drug organization may have lost from the robbery. If testimony concerning the names, ages and places of birth of defendant's drug dealers was not probative of defendant's motive, such testimony was not prejudicial in light of the overall physical and testimonial evidence presented in the case and the trial court's instruction that evidence of defendant's previous criminal conduct was not evidence of defendant's guilt of the murder.

**Am Jur 2d, Evidence §§ 435, 436.**

**Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed. 781.**

**5. Criminal Law § 555 (NCI4th)— improper testimony—motion for mistrial—sufficiency of curative instructions**

The trial court did not err in the denial of defendant's motion for a mistrial in a murder prosecution when a witness testified that defendant told him that he had already beaten a murder charge in New York and had done "a year on it" where the trial court sustained defendant's objection, allowed a motion to strike, and instructed the jury that "you won't consider that at this time." While it would have been better for the trial court not to have included the words "at this time" in the curative instruction, any prejudice to defendant from this testimony was cured by the curative instruction and the trial court's subsequent instruction that evidence of defendant's previous criminal conduct was not evidence of defendant's guilt in this case.

**Am Jur 2d, Trial §§ 1478-1485.**

**6. Appeal and Error § 150 (NCI4th)— self-incrimination—assertion by defense witness—violation of defendant's rights—failure to preserve issue for appeal**

Defendant failed to preserve for appellate review an issue as to whether his constitutional rights were violated by the trial court's rulings disallowing a defense witness's assertion of his

right against self-incrimination for certain questions and by alleged prosecutorial misconduct in posing questions to the witness when the State knew the witness would invoke his right against self-incrimination in response to those questions where counsel for the witness interposed several objections to safeguard the witness's right againt self-incrimination; defense counsel's remarks to the court focused exclusively on protecting the witness's rights and did not inform the court that defendant contended that the prosecutor's questions and the trial court's rulings placed defendant's rights to a fair trial and due process in jeopardy; defendant failed to move for a mistrial; and defendant failed to request that the jury be instructed that it was not to draw any adverse inferences against defendant based on the witness's assertion of his privilege against self-incrimination.

**Am Jur 2d, Appellate Review § 614.**

**7. Evidence and Witnesses § 2983 (NCI4th)— impeachment of defense witness—prior conviction—scope of inquiry—factual elements of crime**

The prosecutor's question to a defense witness as to whether he had been convicted "for kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches" did not exceed the scope of proper inquiry under N.C.G.S. § 8C-1, Rule 609(d) since the question related to the factual elements of the crime rather than the tangential circumstances of the crime. Even if the question did exceed the proper scope of inquiry, this error was not prejudicial in light of the overwhelming evidence of defendant's guilt.

**Am Jur 2d, Witnesses §§ 862-866, 910-916.**

**Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules. 13 ALR4th 796.**

**Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime. 39 ALR Fed. 570.**

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 Allen (J.B., Jr.), J., at the 13 September 1993 Mixed Session of

Superior Court, Durham 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 conviction was allowed by this Court 7 June 1994. Heard in the Supreme Court 10 April 1995.

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

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

LAKE, Justice.

Defendant was tried noncapitally for the first-degree murder of Meredith Mark Peaks and for the assault with a deadly weapon with intent to kill inflicting serious injury upon Earl Green. The jury returned verdicts of guilty of first-degree murder and guilty of assault with a deadly weapon inflicting serious injury. Judge Allen sentenced defendant to life imprisonment for the murder and ten years for the assault, the sentences to run consecutively. We find no prejudicial error and, accordingly, uphold defendant's convictions.

The evidence presented at trial tended to show that defendant, Ernest A. King, also known by the nickname, "O," operated a drug-selling organization in Durham near the Commerce Street Housing Project in the early part of 1992. Eric Shaw sold cocaine for defendant and testified for the State as an eyewitness. According to Shaw, defendant regularly carried a 9-millimeter handgun which he kept tucked in the front of his pants. Another of defendant's workers, "Face," carried two .38-caliber handguns; one he tucked in the side of his pants, and one he carried in his hand.

The victim, Meredith Mark Peaks, was known as a "stick-up" man who robbed drug dealers of their cash and drugs. On occasion, Shaw had been involved with Peaks in such activities. Shaw explained that a few days before Peaks' murder, Peaks robbed one of defendant's workers, Merk. When Merk told defendant about the robbery, Shaw heard defendant remark that "nobody was going to take nothing" from him.

On 20 February 1992, Shaw and defendant's other workers were selling drugs for defendant when Shaw heard Peaks yell out, "None of these m———-f——— are going to do nothing to Mark Peaks." Defendant asked who had yelled and was told that it was Peaks. Defendant replied, "I'm going to make him a ghost." According to

Shaw, that meant defendant was going to kill Peaks. Defendant instructed Shaw to shoot Peaks in the legs if he came towards him so Peaks could not get away. As Peaks reached to open the back door of a blue car with tinted windows, defendant and "Face" approached. Peaks faced defendant and asked, "What's up?" Defendant responded, "F—- that s—-," and he and "Face" began to shoot at Peaks and then at the car. After defendant finished shooting, he turned to walk away, but went back to Peaks, leaned over and shot him once more saying, "Now you're a ghost." With that, defendant got into a car and drove away.

Officer Richard Smith, the first officer at the scene, arrived only minutes after the shooting. Approximately 150 to 200 yards from Commerce Street, Officer Smith found a black male, later identified as Peaks, lying facedown in a parking lot to the left rear of a blue car. Peaks had suffered nine gunshot wounds to the head, chest, arm and legs. There were bullet holes in the windshield of the car, and several shell casings and bullet fragments were found near Peaks' body. Officer S.T. Brame arrived at the scene just after Officer Smith. As the officers were securing the scene, the horn of the blue car sounded, and Officer Smith saw a foot fall out of the car. Officer Smith discovered Earl Green lying across the front seat of the car. He had been shot in the penis, both upper legs and the left knee. A police identification technician discovered a fired 9-millimeter bullet on the front, passenger floorboard of the car. No weapons of any kind were found around the car, on Mark Peaks or on Earl Green.

Of the bullets recovered from the scene, it was determined that five 9-millimeter bullets were fired from the same gun. Two .38-caliber bullets were fired from another gun, and three .38-caliber bullets were fired from a third gun. Thus, one 9-millimeter handgun and two .38-caliber handguns had fired these bullets.

Defendant was arrested in Virginia and was extradited to North Carolina on 10 July 1992 to face the charges against him.

Defendant presented evidence and testified on his own behalf that he was from Brooklyn, New York, and moved to Durham in the early part of 1992. Defendant testified that on 20 February 1992, he saw Peaks sitting on the trunk of a blue car. Another stocky male was standing next to Peaks. Defendant did not know Peaks and did not recognize the other male, but defendant had heard Peaks' name many times. As defendant walked by, he observed Peaks carefully because of "the type of business [defendant] was into." Peaks asked defendant

for a light, and defendant told Peaks he did not smoke. Defendant became suspicious of the conversation because, as defendant explained, "The type of things that I was involved with I know you have to be cautious every day and I have been hurt before. I have hurt people before." Defendant had just decided to put some distance between himself and Peaks when he heard Peaks say, "Don't move." Peaks shot at defendant and defendant ducked behind the blue car. Defendant fired the entire clip of his 9-millimeter handgun at Peaks; defendant did not reload because he did not have another clip with him. Defendant could not tell where the stocky male with Peaks had gone. After the shooting, defendant ran away on foot. He left Durham later that night and drove to New York, by himself, to get the gun out of North Carolina.

Defendant further admitted that he brought cocaine from New York to Durham to sell every one and one half to three weeks. He never sold this cocaine himself; rather, he "fronted" cocaine to his workers, who sold the drug and brought the money back to him. Defendant denied that Eric Shaw sold drugs for him. Defendant also explained that Merk "was not a street level dealer[;] Merk was more what you would call a lieutenant." Merk's job was to collect money from the workers when defendant was not around. Defendant admitted he had heard of Peaks' reputation as a robber, but denied that any of his workers had been robbed. Defendant also testified that if one of his workers was robbed, he would not feel compelled to do anything about it.

Defendant brings forward seven assignments of error.

**[1]** Defendant first argues it was error for the trial court to deny his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury based on the insufficiency of the evidence. The jury convicted defendant of assault with a deadly weapon inflicting serious injury. Defendant contends his conviction must now be set aside because no substantial evidence demonstrates defendant, individually or in concert with another, shot Earl Green; and no substantial evidence demonstrates defendant, individually or in concert with another, intended to shoot Earl Green. Based upon our review of the record, we conclude the evidence in these respects was sufficient for the jury's consideration and determination.

The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: "(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5)

not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). This Court has concluded the following regarding the theory of acting in concert:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

*State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

The law concerning motions to dismiss is well settled. "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). Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal. *Id.* at 99, 261 S.E.2d at 117.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, the testimony of eyewitness Eric Shaw tended to show that defendant threatened to make Mark Peaks a "ghost" because Peaks had robbed Merk, a "lieutenant" in defendant's drug organization. On 20 February 1992, Peaks went to the housing project, and defendant instructed Eric Shaw to shoot Peaks in the legs so Peaks could not run away. Defendant and "Face" approached Peaks as Peaks was trying to open the back door of a blue car with tinted windows. Defendant and "Face" shot at Peaks, and then they shot at the blue car. While Shaw testified he did not see anyone else at the car, he believed that someone may have been inside the blue car because Peaks was trying to open the back door.

The police arrived at the scene only minutes after the shots were fired. They heard the car horn sound and found Earl Green lying in

the front seat. He had been shot several times, twice in the upper legs and once in the left knee. The emergency medical technician assigned to Green noticed bullet holes in the car windshield, and a fired 9-millimeter bullet was discovered on the front, passenger floorboard of the car. Shaw testified, and defendant admitted, he carried a 9-millimeter handgun. Further, Shaw testified "Face" carried two .38-caliber handguns. The bullets recovered at the crime scene indicated that three guns had fired them: one 9-millimeter handgun and two .38-caliber handguns.

Defendant himself admitted that a stocky male was with Peaks when defendant and "Face" approached the car. Further, Herbert Blue, who met defendant in Central Prison after the shooting, testified that defendant asked him how Earl Green was doing.

From the totality of the evidence, we conclude that a jury could reasonably infer and find as fact that Earl Green was in the driver's seat inside the blue car when defendant and "Face" began to shoot Peaks. Seeing Green inside the car, defendant and "Face" shot at the car, hitting Green in the legs, the same place defendant had earlier instructed Shaw to shoot Peaks. Defendant, by his own admission as well as the testimony of Shaw, was armed with and fired the entire clip from his 9-millimeter handgun that night. A fired 9-millimeter bullet was discovered on the front, passenger floorboard of the car near Green. We conclude this evidence was sufficient to allow a jury to reasonably conclude defendant, individually or in concert with another, intended to shoot, and did shoot, Earl Green. This assignment of error is overruled.

**[2]** Defendant next contends the trial court erred in admitting evidence concerning a high-speed car chase between defendant and Officer Steve Campbell as evidence of flight and in instructing the jury that it could consider evidence of flight in determining defendant's guilt. We do not agree.

At trial, the State presented evidence that on 2 July 1992, Officer Campbell responded to a radio call for assistance to stop a 1985 Audi. Officer Campbell followed the Audi at speeds of over one hundred miles per hour. As the Audi approached a sharp turn, it hit a car and a telephone pole, became airborne, landed on top of another car and crashed into the side of a house. Officer Campbell saw a male, whom he later identified at trial as defendant, run from the Audi and into some woods. Officer Campbell chased defendant through these woods on foot but without success. Defendant was arrested in

Virginia and was extradited to North Carolina on 10 July 1992. The trial court overruled defendant's objection to the admission of the testimony and allowed the State to offer Officer Campbell's testimony to the jury as evidence of flight.

Evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt. *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973). "[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "[T]he relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *Levan*, 326 N.C. at 165, 388 S.E.2d at 434.

According to defendant, Officer Campbell's testimony should not have been received as evidence of flight because it was irrelevant and amounted to inadmissible "other crimes" evidence prohibited by Rule of Evidence 404. Defendant makes several arguments in support of this position. First, defendant claims that the State failed to produce any evidence that defendant fled after the shooting on 20 February 1992. Based on our review of the record, we conclude that the record does contain evidence from which a jury could reasonably find that defendant fled after shooting Peaks and Green in order to avoid arrest. Defendant himself volunteered the following testimony during his cross-examination at trial:

> Q. Did you see [Peaks] fall on his front or his back?
>
> A. I can't say how he fell because I didn't look back. I just kept running.
>
> Q. Where did you go?
>
> A. I ran through the projects across Liberty Square to some more apartments and jumped over the fence and ran up a hill . . . . And then [I] went to the back of the Channel 11 news room. . . . I took . . . whatever the name of the street is to Fargo Street.
>
> Q. Was anybody with you?
>
> A. No. I was by myself on feet [sic].
>
> Q. Okay. Now, what did you do with the gun?

A. The gun is in New York.

Q. What is the gun doing in New York?

A. I wanted to get rid of it. I wanted to get it out of the [S]tate of North Carolina.

Q. Okay. How did you get the gun to New York?

A. Car. Drove it.

Q. You drove it up there?

A. Yes.

Q. Was anybody with you?

A. No. I was by myself. I left the city that night.

Q. You went to New York?

A. Yes.

Q. How long did you stay in New York?

A. About a good week you know.

Thus, by defendant's own admission, he fled from Durham to New York and stayed "a good week" in order to hide his 9-millimeter handgun. On this evidence alone, the trial court's instruction on flight was justified, as the evidence tends to demonstrate defendant "left the scene of the murder and took steps to avoid apprehension." *Levan*, 326 N.C. at 165, 388 S.E.2d at 434.

Second, defendant proposes that in light of the four intervening months between the date of the shooting on 20 February 1992 and the date of the car chase on 2 July 1992, the car chase is irrelevant to the shooting and cannot reasonably justify an inference that defendant fled to avoid arrest for the shooting. Relevant evidence is that evidence which makes any fact "of consequence to the . . . action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). As a general rule, relevant evidence is admissible, N.C.G.S. § 8C-1, Rule 402 (1992); however, relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice," N.C.G.S. § 8C-1, Rule 403 (1992).

In *State v. McDougald*, 336 N.C. 451, 444 S.E.2d 211 (1994), the defendant was arrested on 5 April 1991 and escaped from the Hoke

County Jail on 19 August 1991. This Court held that evidence of defendant McDougald's escape from jail, four months after his arrest, was both relevant and probative to show flight, as it tended to show defendant's consciousness of guilt. *Id.* at 457, 444 S.E.2d at 214. We find *McDougald* controlling on this issue in the present case and conclude likewise that the four intervening months between the shooting and the high-speed chase from police did not rob the evidence of the car chase of its relevance and probative value to show defendant's consciousness of guilt.

Third, defendant contends that at the time of the car chase, he did not know he was wanted for the murder of Peaks and the assault of Green; thus, the car chase cannot indicate his consciousness of guilt for the offenses. This Court has not required, and we decline to rule now, that a defendant be aware of the initiation of formal charges against him before evidence of flight is admissible to bear upon the question of guilt. To do so would ignore our explicit recognition of the fact that evidence of flight is competent on the question of guilt because it is " 'a guilty *conscience* [which] influences conduct.' " *State v. Jones*, 292 N.C. 513, 525, 234 S.E.2d 555, 562 (1977) (emphasis added) (quoting *State v. Steele*, 190 N.C. 506, 511, 130 S.E. 308, 312 (1925)). Further, "[t]he cases in which evidence of flight has been declared competent when the flight occurred before arrest . . . are legion." *State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982). Because a guilty conscience, completely apart from the initiation of formal charges, influences conduct, we reject defendant's contention in this regard.

Fourth, defendant proposes that because he had committed other, more serious offenses after 20 February 1992, the car chase could not have been indicative of his consciousness of guilt for the murder of Peaks and the assault of Green. Rather, defendant appears to argue that his flight from police indicates his consciousness of guilt for the other, more recent offenses. This Court has held that "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *Irick*, 291 N.C. at 494, 231 S.E.2d at 842. While it may be true that defendant had committed other offenses, even more serious ones, between the time of the shooting and the car chase and an inference may be drawn that defendant was eluding arrest for the more recent offenses, simply because such an inference

can be drawn does not make the instruction as to flight erroneous in this case. The record reveals there was competent evidence of flight, and based on such evidence, the trial court correctly instructed the jury as to flight.

Finally, defendant contends that evidence of the car chase was improper because it contained evidence defendant sped through the streets at speeds of over one hundred miles an hour, ran into two cars, knocked down telephone poles and crashed into a house, thus amounting to "other crimes" evidence prohibited by Rule of Evidence 404. This Court, however, has stated that "[e]ven though the evidence of flight may disclose the commission of a separate crime by defendant, it is nonetheless admissible." *State v. Jones*, 292 N.C. 513, 526, 234 S.E.2d 555, 562. So it is with the present case.

We conclude that evidence of the car chase was properly received as evidence of flight and was sufficient to support the trial court's instruction on flight. Accordingly, this assignment of error is overruled.

**[3]** In his next assignment of error, defendant argues it was error for the trial court to admit the allegedly incompetent testimony of Tammy Peaks, the victim's sister.

In order to rebut defendant's claim of self-defense, the State sought to present the testimony of the victim's sister, Tammy Peaks, that the victim did not possess a gun at the time he was killed because he had pawned his gun two days earlier. Defendant objected and a *voir dire* was held during which Tammy Peaks testified that the victim carried a .357-caliber handgun. She further stated that he did not have a handgun on the day of the shooting because she went with him to pawn the gun on 18 February 1992 at a grocery store on Geer Street. The trial court overruled defendant's objection, and Tammy Peaks offered essentially this same testimony before the jury.

Under Rule of Evidence 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [she] has personal knowledge of the matter." N.C.G.S. § 8C-1, Rule 602 (1992). We note initially that Tammy Peaks' testimony that the victim pawned his .357-caliber handgun two days before he was killed was relevant to rebut defendant's claim of self-defense. However, we agree with defendant that the record does not reveal that Tammy Peaks had personal knowledge that the victim did not possess a gun the day he was killed. No evidence demonstrates that Tammy Peaks

was with, or talked with, her brother, the victim, on 20 February 1992. During the two days, it is possible that the victim reacquired his gun, or got another gun. Thus, Tammy Peaks' testimony that the victim did not possess a gun the day he was killed was a mere conclusion and was incompetent, as there was no showing that she had personal knowledge of such a fact. *See State v. Wilson*, 338 N.C. 244, 449 S.E.2d 391 (1994). However, based upon this record, we conclude this error was not prejudicial. All the testimony at trial tends to show that no weapon of any kind was discovered on or around Mark Peaks or Earl Green. Further, Tammy Peaks, as the sister of the victim, had an obvious bias. The trial court instructed the jury that it was the sole judge of the credibility of each witness and that bias was a factor it could weigh in determining whether to believe all, part or none of a witness' testimony. There is no reasonable possibility that had the testimony not been received, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is therefore overruled.

**[4]** Defendant next argues that the admission of testimony from Eric Shaw regarding defendant's drug dealing activities was error pursuant to Rule of Evidence 404(b).

During the direct examination of eyewitness Eric Shaw, Shaw testified he was acquainted with the defendant "through drugs." Defendant objected and a lengthy *voir dire* was held. After the *voir dire*, the trial court made findings of fact and concluded that Shaw's testimony concerning the details of defendant's drug dealings was relevant and admissible under the motive and intent exceptions to the prohibition against character evidence contained within Rule of Evidence 404(b). Additionally, the trial court concluded that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. Before this Court, defendant candidly concedes that some information regarding his drug operation, such as when it existed and from where it was operated, was admissible under the Rule 404(b) exception of motive. However, defendant contends that Shaw was improperly allowed to testify to the names of defendant's drug dealers; their ages and places of birth; the drug operation's hours; the amount, quantities and street prices of cocaine sold; and the manner in which defendant oversaw his drug organization. This testimony, defendant argues, amounted to improper character evidence and did not meet any of the enumerated exceptions contained in Rule 404(b).

Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive." N.C.G.S. § 8C-1, Rule 404(b) (1992). This Court has emphasized that Rule 404(b) is a "rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show . . . defendant has the propensity . . . to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

On the facts of this case, we agree with the State that the disputed evidence was relevant to show defendant's motive for Peaks' murder. The record reveals the State's theory at trial was that defendant, a transplanted New York drug dealer, murdered Peaks to avenge Peaks' robbery of one of defendant's "lieutenants." Evidence was presented that Peaks had robbed one of defendant's drug "lieutenants," and defendant had stated that "nobody was going to take nothing" from him. Given that this case was inextricably tied to the drug trade in light of defendant's admitted occupation and Peaks' reputation, how much money defendant's workers made from the sale of cocaine and turned over to defendant was relevant to show how much money defendant or his drug organization may have lost as a result of Peaks' robbery, thus demonstrating defendant's motive to kill Peaks. *See State v. Ligon*, 332 N.C. 224, 420 S.E.2d 136 (1992) (evidence that defendant dealt drugs properly admitted to show motive under Rule of Evidence 404(b) where State contended the victim was shot when he tried to steal cocaine from defendant). While testimony concerning the names of all defendant's drug dealers and their ages and places of birth may not have been probative of defendant's motive, in light of the overall physical and testimonial evidence presented in this case, there is no reasonable possibility a different result would have been reached at trial absent this slight information. N.C.G.S. § 15A-1443(a). We also note that the trial court cautioned the jury that evidence of defendant's previous criminal conduct was "not evidence of the defendant's guilt in this case. You may not convict him on the present charge because of something he may have done in the past." This assignment of error is overruled.

**[5]** Defendant's next argument concerns the trial court's allegedly erroneous denial of defendant's motion for a mistrial based on a witness' testimony that defendant had previously "beaten" a murder charge.

Herbert Blue, testifying for the State, stated that defendant told Blue "he had already beat[en] one murder case in New York" and that defendant had done "a year on it." Defendant objected, moved to strike and asked for a curative instruction. The trial court sustained the objection, allowed the motion to strike and instructed the jury as follows: "[L]adies and gentlemen, you won't consider that at this time." After Blue's testimony, defendant asked to be heard outside the presence of the jury and moved for a mistrial. The trial court denied the motion.

The trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion. *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable. *Id.* at 138, 423 S.E.2d at 772. Further, "[w]hen the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). Defendant contends, however, that the trial court's instruction left the prejudice to defendant uncured in that the instruction was vague and indefinite because it was not addressed to the jury, did not explain what the jury was not to consider, and implied that the jury could consider the evidence at a later time.

In considering the context of the entire exchange, including the objection, motions to strike and for curative instructions, and the trial court's ruling thereon in favor of defendant, we believe the jurors certainly understood that the trial court was addressing its instruction to them and that they were not to consider Blue's statement. *See State v. Locke*, 333 N.C. 118, 423 S.E.2d 467 (1992) (trial court's curative instruction informing the jury only to "disregard," coupled with sustaining the defendant's objection, was sufficient to cure any prejudice). While in the instant case it would have been better for the trial court not to have included the words "at this time" in the curative instruction, we note that the trial court further cautioned the jury during jury instructions that evidence of defendant's previous criminal conduct was "not evidence of the defendant's guilt in this case. You

may not convict him on the present charge because of something he may have done in the past." Our system of trial by jury is "based upon the assumption that the trial jurors are men [and women] of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938). We conclude that the trial court's curative instruction, taken in conjunction with the trial court's later instruction, was sufficient to cure any prejudice which inured to defendant and that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. This assignment of error is overruled.

**[6]** Defendant next argues that he is entitled to a new trial because of the trial court's erroneous rulings disallowing defense witness Mark Jones' assertion of his Fifth Amendment right against self-incrimination and because of the State's alleged prosecutorial misconduct in posing questions to Jones when the State knew Jones would invoke his Fifth Amendment privilege in response.

Before defendant offered the testimony of Jones, defendant informed the trial court that Jones was in Central Prison awaiting a capital first-degree murder trial. Jones' attorney, Mark Edwards, who was present in court, asked the trial court's permission to allow him to interpose objections where appropriate in order to safeguard Jones' Fifth Amendment right against self-incrimination. The trial court allowed Edwards' request. Outside the presence of the jury, the trial court ascertained that Jones had spoken with his attorney and that he understood his Fifth Amendment privilege and that he still wished to testify.

Before the jury, Jones testified for the defense on direct examination that he knew Eric Shaw from prison. To Jones' knowledge, Shaw had never sold drugs for the defendant, and Shaw and Peaks were good friends. Further, Jones testified on direct examination that Shaw had admitted to him that Shaw was not an eyewitness to Peaks' murder as he had claimed when he testified for the State. Shaw told Jones that he was going to get the defendant and boasted that had Shaw been present the night of Peaks' murder, Peaks would not have been killed. The State's cross-examination of Jones transpired in part as follows:

> Q. Well, isn't it true in the past you owed some New York boys money for drugs?

MR. EDWARDS: Your honor, I object and I advise him not to answer the question.

COURT: I think this is a proper cross examination question due to the evidence that has come out and I will instruct you to answer that question.

MR. EDWARDS: Judge, I would ask if we can approach the bench please.

COURT: I will let the jury go out and be heard on the record.

. . . .

MR. EDWARDS: I think the line of inquiry the State is going into now . . . regards [its] theory of prosecution on the murder case. I believe that the theory is that Mr. Jones owed Deca money and that was part of the reason or part of the motive for what happened . . . . I'm afraid we're getting into the area of the facts of [Jones'] particular case.

COURT: As an officer of the Court I want you to tell me what is the basis of that question on cross examination?

. . . .

[PROSECUTOR]: Mark Jones owed New York people money for drugs. . . . My contention would be that if he owes what are classified as the New York boys for drugs that that is relevant in terms of his motivation to lie for other New York boys that are part of that very broad group.

The trial court ordered Jones to answer the question, and the jury was brought back into the courtroom. The prosecutor asked Jones again if he owed any money to New York boys for drugs. Jones refused to answer the question, and the trial court sent the jury out of the courtroom again. The trial court instructed Jones once more that he had to answer the question or be held in contempt. The jury was summoned back to the courtroom, and the prosecutor again asked the question; Jones continued to refuse to answer. The jury was taken out of the courtroom again, and the trial court found Jones in contempt. The trial court also admonished spectators in the courtroom who were laughing that the court would not tolerate such behavior.

With the jury once more in the courtroom, the prosecutor delved into a new area of cross-examination by asking Jones if Jones had a reputation for robbing drug dealers. Jones refused to answer this

question, and the trial court sent the jury out and ordered Jones to answer the question. In front of the jury, Jones again refused. The jury was sent out once more, and the trial court found Jones in contempt for the second time.

Defendant argues before this Court that the trial court's rulings were improper as a matter of law and that the prosecutor engaged in prosecutorial misconduct by repeatedly asking Jones questions when the prosecutor knew Jones would continue to assert his Fifth Amendment right against self-incrimination. Defendant claims the proceedings were turned into a circus as evidenced by the fact that the jury was sent out of the courtroom seven times during Jones' testimony and that spectators in the courtroom were laughing. The State responds that defendant has failed to properly preserve this issue for appellate review. We agree with the State in this regard.

The Fifth Amendment right against compulsory self-incrimination was made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964). "Under the Fifth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution, a witness cannot be compelled to give self-incriminating evidence." *State v. Ray*, 336 N.C. 463, 468, 444 S.E.2d 918, 922 (1994). When a witness invokes the Fifth Amendment privilege, the trial court is to "determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating." *State v. Eason*, 328 N.C. 409, 418, 402 S.E.2d 809, 813 (1991). However, when the witness who invokes the Fifth Amendment is a witness for the defense and the defendant fails to object at trial to the witness' invocation of the Fifth Amendment, this Court has refused to require the trial court, upon its own motion, to conduct a *voir dire* to determine whether there is a proper basis for the witness' Fifth Amendment invocation. *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

The record reveals that during the course of Jones' cross-examination, Jones' attorney, Mr. Edwards, interposed several objections to safeguard Jones' right against self-incrimination. However, defendant's attorney addressed the trial court only once, and that was at the trial court's invitation:

> COURT: Do you want to be heard, Mr. Cotter?
>
> [DEFENSE COUNSEL]: Yes, sir. As you know[,] the kind of information that this young man doesn't have to answer is not only

> information that directly involves him in some wrongdoing but anything that can lead up to that. It sounds to me like these questions are more for . . . discovery purposes [for Jones' trial]. . . . I would ask, Your Honor, not to make him answer questions that lead to incriminating information because that's what the rule states.

It is clear from these remarks that defense counsel's comments were not interposed for the purpose of protecting *defendant's* rights, constitutional or otherwise. Defendant's counsel did not articulate how requiring Jones to answer allegedly improper questions, or how Jones' continued invocation of his right, would damage defendant. Indeed, defendant was not mentioned in this one exchange between defense counsel and the trial court. Rather, defense counsel's remark was focused exclusively on protecting Jones' Fifth Amendment rights. Certainly, had defendant believed his rights to a fair trial and due process were violated, as he now argues, by the trial court's rulings requiring Jones to answer the cross-examination questions and by the alleged prosecutorial misconduct, defendant easily could have moved for a mistrial as he had earlier in the trial. He did not so move. We also note that had defendant believed it necessary, he could have requested that the jury be instructed that Jones was merely exercising a legitimate constitutional right and that the jury was not to draw any adverse inferences against defendant based on Jones' assertion of his privilege against self-incrimination. Again, defendant elected not to choose this option. Because defendant never made the trial court aware that the manner in which the questions were proffered and that the trial court's rulings were in some manner objectionable to *him*, thereby placing *his* rights to a fair trial and due process in jeopardy, he cannot advance this claim now, for the first time, on appeal. *See* N.C. R. App. P. 10(b)(1). "The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). "[T]he law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Accordingly, this assignment of error is overruled.

**[7]** In his last assignment of error, defendant contends that defense witness Jones was improperly impeached. The State asked Jones the following question on cross-examination: "Isn't it true that on

October 9th of last year Judge Titus . . . gave you a 90-day sentence for kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches?" Defendant argues that because the question included the specifics of the crime, that is, kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches," the impeachment question exceeded the scope of proper inquiry under Rule of Evidence 609(a).

The credibility of a witness may be attacked on cross-examination by "evidence that [the witness] has been convicted of a crime punishable by more than 60 days confinement." N.C.G.S. § 8C-1, Rule 609(a) (1992). In *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), this Court, faced with conflicting lines of authority concerning the proper scope of inquiry regarding impeachment under Rule 609(a), reaffirmed the rule set out in *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977), a pre-Rules case, "prohibiting the State from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." *Lynch*, 334 N.C. at 410, 432 S.E.2d at 353. Under this rule, this Court held that the questions posed by the State in *Lynch* concerning exactly what type of weapon defendant Lynch used in five of his prior convictions exceeded the scope of proper inquiry and warranted a new trial. Additionally, the Court distinguished the improper questions posed in *Lynch* from the questions posed in *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984) (a pre-Rules case), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), by reasoning that "[t]he questions asked of the defendant in *Murray* related to the factual elements of the prior offenses and were descriptive of the particular crimes of which the defendant had been convicted. The questions did not relate to tangential circumstances of the offenses involved, as did the questions here." *Lynch*, 334 N.C. at 409, 432 S.E.2d at 352.

We conclude that the State's single question related to the factual elements of the crime rather than the tangential circumstances of the crime. Under *Lynch*, the State was entitled to inquire about the name of the crime for which Jones was convicted. Had the prosecutor referred to the crime by name, he would have asked if Jones had been convicted of assault inflicting serious injury. Instead, the State simply asked about the factual elements of the crime, whether Jones had been convicted of "kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches." Even assuming, *arguendo*, that

the question in this instance did exceed the proper scope of inquiry, any error was not prejudicial. The record reveals that this question was asked only one time and that it was not asked of the defendant as were the questions in *Lynch*, but rather was asked only of a defense witness. *See Lynch*, 334 N.C. at 406-08, 432 S.E.2d at 351-52. In light of the overwhelming evidence of defendant's guilt, there is no reasonable possibility a different result would have been reached at trial absent the alleged error. N.C.G.S. § 15A-1443(a). This assignment of error is overruled.

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

NO ERROR.

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JOHN ANDERSON TAYLOR, JR. v. DULCIA G. TAYLOR

No. 191A95

(Filed 4 April 1996)

**Divorce and Separation § 551 (NCI4th)— child custody and support—attorney fees—consideration of estate of other party**

The trial court, when ruling on a motion for attorney's fees in a child custody and support action, correctly determined that defendant had sufficient means to defray the cost of the action without considering the estate of the other party where both the custody and support actions were before the trial court at the times the case was called for trial (although the parties quickly settled the issue of custody) so that the action is properly characterized as one for custody and support, and the record reveals that defendant had a monthly income of $3,959, that her income exceeded her expenses (excluding attorney fees) by $477, and that her estate was valued at approximately $1.2 million. In enacting N.C.G.S. § 50-13.6, the legislature recognized a distinction between an action for support only and an action for custody and support; the language of the statute does not require that a trial court consider the relative estates of the parties in determining whether to award attorney's fees in child custody and support actions. Although the determination of whether a party is a dependent spouse or a supporting spouse for alimony requires a

comparison of the parties' estates, the parties are not required to allege or prove that one spouse is a dependent spouse and the other a supporting spouse in child custody and support actions.

**Am Jur 2d, Divorce and Separation §§ 231, 597, 1061.**

**Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order. 57 ALR4th 710.**

Chief Justice MITCHELL dissenting.

Justices WHICHARD and PARKER join in this dissenting opinion.

Justice WHICHARD dissenting.

Chief Justice MITCHELL and Justice PARKER join in this dissenting opinion.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-31 from the decision of a divided panel of the Court of Appeals, 118 N.C. App. 356, 455 S.E.2d 442 (1995), reversing the trial court's order entered by Davis (Chester C.), J., on 24 January 1994 in District Court, Forsyth County, and remanding for further proceedings. Heard in the Supreme Court 11 December 1995.

*Petree Stockton, L.L.P., by Lynn P. Burleson; and Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff-appellant.*

*Robinson Maready Lawing & Comerford, L.L.P., by Norwood Robinson and C. Ray Grantham, Jr., for defendant-appellee.*

FRYE, Justice.

The sole question on this appeal is whether a trial court, in ruling on a motion for attorney's fees in a child custody and support action, may determine that a party has sufficient means to defray the cost of the action without considering the estate of the other party. We answer in the affirmative and reverse the Court of Appeals' decision to the contrary.

The following facts and circumstances are pertinent to this appeal. John Anderson Taylor, Jr. (plaintiff) and Dulcia G. Taylor (defendant) were married on 30 December 1981 and separated on or about 7 May 1990. Two children were born of the marriage. Pursuant to a separation and property settlement agreement entered into by

the parties on 22 March 1991, defendant received the marital home valued at $200,000, the furniture contained in the marital home, and a distributive award of $1,036,307. Plaintiff was responsible for the monthly mortgage payments on the home in the amount of $1,436.65. Also, pursuant to the separation and property settlement agreement, the parties entered into a shared legal custody arrangement for their two children, with primary physical custody being with defendant.

On 10 May 1991, plaintiff filed a verified complaint for absolute divorce; and on 10 June 1991, defendant filed an answer and counterclaim, seeking primary physical custody of their two children, child support, and the costs of the action. Judge Margaret L. Sharpe granted the parties an absolute divorce on 18 July 1991; and on 6 December 1991, Judge R. Kason Keiger signed an interim child support order consented to by the parties and decreeing that

> in lieu of a child support order in a sum certain . . . [p]laintiff will insure that funds are made available from applicable trusts or otherwise to continue to pay the children's educational expenses . . . until such time as a final determination is made as to the issues of custody and child support.

Hearings on the issues of child support, child custody, and attorney's fees took place in August and October of 1993. In an order signed 23 January 1994 and filed 24 January 1994, Judge Chester C. Davis found as fact that "[d]efendant's answer and counterclaim . . . did request attorney's fees on August 20, 1993"; that "defendant has paid $13,305.55 to her attorneys in this child support action and that $85,895.56 is still owed the attorneys for services rendered"; that "after deducting the expenses of a loan incurred by the defendant, she has a reasonably liquid estate of $666,581, a home now having an approximate value of $350,000, two cars, and furniture all of which have an approximate total value of 1.1 million dollars"; that "the defendant is an interested party"; that "the defendant was acting in good faith"; and that "defendant ha[s] sufficient means to defray the expenses of this lawsuit."

The trial court then concluded as a matter of law, *inter alia*, that based on its findings of fact, "[d]efendant has sufficient means to defer [sic] the expense of this litigation and therefore, that defendant is not entitled to attorneys' fees." Based on these findings and conclusions, the trial court ordered, *inter alia*, that "[d]efendant shall have and recover no attorneys' fees from plaintiff."

Both plaintiff and defendant appealed to the Court of Appeals from the order entered 24 January 1994 in District Court, Forsyth County. The Court of Appeals reversed the order for retroactive and prospective child support and remanded those issues to the trial court for reconsideration. However, the panel divided as to the issue of attorney's fees. Concluding that the trial court erred in deciding that defendant was not entitled to an award of attorney's fees based solely on defendant's financial condition, the majority of the panel remanded the order denying an award of attorney's fees to the trial court for consideration of the relative estates of the parties.

Judge Lewis dissented as to the decision of the majority of the panel on the issue of attorney's fees. Judge Lewis disagreed with the majority's conclusion that the trial court was required in this case to consider the relative estates of the parties in determining whether the party seeking attorney's fees had insufficient means to defray the expense of the suit. He also disagreed that requiring this defendant to pay her own attorney's fees constitutes an unreasonable depletion of her estate.

Plaintiff appeals to this Court based on Judge Lewis' dissenting opinion. On this appeal, plaintiff argues that the Court of Appeals erred in rejecting the trial court's determination that defendant had sufficient means to defray her litigation expenses because (1) the evidence established that defendant's monthly income exceeds her monthly expenses; and (2) it is not unreasonable for defendant to pay her litigation costs from her estate, which is substantial and primarily liquid. Therefore, plaintiff contends that the majority of the panel of the Court of Appeals is legally incorrect in requiring trial courts as a matter of law to consider the relative estates of the parties in determining whether the party seeking attorney's fees in a child custody and support action has insufficient means to defray the expense of the suit.

The relevant statute, N.C.G.S. § 50-13.6, provides in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circum-

stances existing at the time of the institution of the action or proceeding.

N.C.G.S. § 50-13.6 (1991). We have interpreted this provision as requiring that before attorney's fees can be taxed in an action for custody or in an action for custody and support, the facts required by the statute—that the party seeking the award is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit—must be both alleged and proved. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980). A party has insufficient means to defray the expense of the suit when he or she is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Id.* at 474, 263 S.E.2d at 725. If the action is one for support only, an additional finding must be made that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." *Id.* at 472-73, 263 S.E.2d at 724. "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Id.* at 472, 263 S.E.2d at 724.

The instant action is properly characterized as one for "custody and support" because both the custody and support actions were before the trial court in August and October of 1993, the times the case was called for trial. *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992). "This is so despite the fact that the parties 'quickly settled' the issue of custody." *Id.* Therefore, the trial judge, pursuant to the first sentence of N.C.G.S. § 50-13.6, had the discretion to award attorney's fees to defendant upon findings that (1) defendant was an interested party acting in good faith, and (2) defendant had insufficient means to defray the expense of the suit.

The trial judge made findings pursuant to N.C.G.S. § 50-13.6 for a child custody and support suit. The trial court found that defendant was an interested party and that she was acting in good faith, and plaintiff does not challenge these findings. However, after considering the testimony on defendant's financial condition, the trial court found that defendant had sufficient means to defray the expense of the action. Defendant contends, essentially, that the trial court cannot make this determination without considering the relative estates of the parties. Plaintiff, on the other hand, contends that such a determination can be made without a comparison of the estates of the parties. We agree with plaintiff.

The record reveals that defendant had a monthly income of $3,959; expenses for the children of $596; and expenses for herself, excluding attorney's fees, of $2,886. Thus, defendant's monthly income exceeded her monthly expenses, excluding attorney's fees, by $477. The record also reveals that at the time the parties entered into the separation and property settlement agreement, defendant had no debts and her estate was valued at approximately $1.2 million.

The record further reveals that at the time of the hearing in this matter, defendant had hired four attorneys. Defendant paid the first attorney $5000. The total bill for service rendered by her second attorney was $6770, of which $950 remained due. Defendant further paid $13,305.55 to her other two attorneys and still owed $85,895.56 for services rendered by them. The record also shows that approximately $6000 in deposition and hearing transcripts costs incurred by defendant were taxed to plaintiff.

The evidence supported the trial court's finding that defendant had the means to defray her litigation expenses. Defendant's estate, which is primarily liquid, was sufficient to pay these expenses; and no unreasonable depletion of her estate would be required to pay them. The trial court's findings of fact thus support the conclusion that an award of attorney's fees was not necessary to make it possible for defendant to employ adequate counsel to enable her, as litigant, to meet plaintiff in the suit. *Hudson*, 299 N.C. at 474, 263 S.E.2d at 725; *see also Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972) (award of attorney's fees in alimony *pendente lite*, child custody, and support action reversed despite fact that husband's estate was much larger than wife's estate); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (order denying attorney's fees reversed in child custody and support action where evidence showed that mother's income from her law practice was not sufficient to pay her litigation expenses and that her monthly expenses exceeded her gross income); *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991) (award of attorney's fees in child custody and support action affirmed where plaintiff's reasonable expenses exceeded her income); *Cobb v. Cobb*, 79 N.C. App. 592, 339 S.E.2d 825 (1986) (award of attorney's fees in alimony, child custody, and support action affirmed where plaintiff currently had no liquid assets; her actual current income had not met her living expenses; and plaintiff would be forced to sell her only remaining asset, the former marital residence, in order to pay her attorney's fees).

Defendant relies on this Court's decision in *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980). Defendant argues that *Clark* is controlling on this issue and that *Clark* requires that the trial court consider the relative estates of the parties in determining whether a party has sufficient means to defray the cost of litigation. However, we conclude that *Clark* is not controlling in this case. *Clark* involves the issue of the amount of attorney's fees, not the threshold question of whether any attorney's fees should have been awarded. Further, *Clark* is based on an award of attorney's fees in an alimony action under N.C.G.S. § 50-16.3(a), which requires a determination that one spouse is a supporting spouse and the other a dependent spouse. This determination usually requires a comparison of the parties' estates. N.C.G.S. § 50-13.6, the statute involved in the instant case, does not include this requirement.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 196, 347 S.E.2d 814, 817 (1986). To determine this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish. *Id.* In the instant case, the language of the statute does not require that a trial court consider the relative estates of the parties in determining whether to award attorney's fees in child custody and support actions.

The rationale of Justice Whichard's dissenting opinion seems to be that, even though N.C.G.S. § 50-13.6 contains no requirement that a trial court compare the relative estates of the parties in determining whether to award attorney's fees in child custody and support actions, we should read this requirement into the statute in order that the rule might be the same for alimony and child custody and support actions. However, we believe that this change, if it is to be made, is one for legislative attention.

We again note that the legislature, in enacting N.C.G.S. § 50-13.6, set different standards in actions for support and in actions for custody and support. In an action for custody and support, the statute requires that the party seeking the award of attorney's fees allege and prove that he or she is an interested party acting in good faith and without sufficient means to defray the expense of the suit. *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723. However, if the action is one for support only, the party seeking support must also allege and prove that "the party ordered to furnish support has refused to provide sup-

port which is adequate under the circumstances existing at the time of the institution of the action or proceeding." *Id.* at 472-73, 263 S.E.2d at 724. Thus, in enacting § 50-13.6, the legislature recognized a distinction between an action for support only and an action for custody and support.

We further note that an award of attorney's fees in an alimony action under N.C.G.S. §§ 50-16.3 and 50-16.4 requires a determination that one spouse is a supporting spouse and the other a dependent spouse. N.C.G.S. § 50-16.3 provides in pertinent part:

> (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:
>
> (1) It shall appear from all the evidence presented . . . that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and
>
> (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.
>
> Furthermore, N.C.G.S. § 50-16.4 provides in pertinent part:
>
> At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may . . . enter an order for reasonable counsel fees for the benefit of such spouse. . . .

We conclude that the determination of whether a party is a dependent spouse or a supporting spouse requires a comparison of the parties' estates. We do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action requires a comparison of the relative estates of the parties.

N.C.G.S. § 50-13.6, the controlling statute on award of attorney's fees in child custody and support actions, does not require a determination that one spouse is a dependent spouse and the other a supporting spouse. Since N.C.G.S. § 50-13.6 does not require the parties to allege or prove that one spouse is a dependent spouse and the other a supporting spouse, there is no need to compare the parties' relative estates when considering whether to award attorney's fees in child custody and support actions.

Additionally, in the custody and support action, one parent seeks support for the child or children from the other parent, whose relationship may extend from that of a formal marital or long-term familial relationship to that of the casual acquaintance. On the other hand, the typical alimony case involves a spouse seeking to dissolve a relationship in which the dependent spouse has in some way contributed to the building of the estate of the supporting spouse from whom alimony and attorney's fees are sought. Thus, the dependent spouse is seeking alimony and attorney's fees from the estate to which he or she has contributed in some way during the familial relationship that is now being dissolved.

The General Assembly may have recognized these distinctions when it decided to include the award of attorney's fees in these different types of actions in different statutory provisions. If so, then the spirit of the act and what we believe the act seeks to accomplish would be disregarded if we interpreted the statute as do Chief Justice Mitchell and Justice Whichard. Accordingly, we conclude that there is some justification to support a legislative determination that the standard in custody and support actions should be different from the standard in alimony actions.

Further, we believe that our courts are fully capable of applying the holding in this case with "fairness to litigants and fulfillment of perceived legislative intent." We do not believe that our courts will apply this holding with the "literal starkness" mentioned in Justice Whichard's dissenting opinion. Accordingly, we decline to read into the statute a requirement that the trial court must compare the relative estates of the parties in determining whether to award attorney's fees in child custody and support actions.

For the foregoing reasons, the decision of the Court of Appeals on the issue of attorney's fees is reversed, and the case is remanded to that court for further remand to the trial court for reinstatement of that portion of the trial court's order denying defendant's request for attorney's fees. We do not decide, of course, whether defendant's condition may have changed since the date of the trial court's order so as to entitle her to attorney's fees after that date.

REVERSED AND REMANDED.

Chief Justice MITCHELL dissenting.

I disagree with the majority that the trial court is not to consider the relative estates of the parties in determining whether defendant

has "insufficient means to defray the expense of the suit." N.C.G.S. § 50-13.6. The majority correctly concludes that a spouse has insufficient means to defray the expense of a custody and support action if he or she is "unable to meet the other spouse as litigant in the suit." Meeting a spouse "as litigant," however, implies that both spouses have the resources necessary to adequately assert and defend claims on substantially equal terms. *See Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980). This determination necessarily requires an evaluation of the relative estates of the parties.

The majority relies in part on the trial court's finding that defendant's monthly income exceeded her monthly expenses, excluding attorneys' fees, by approximately $477. At the same time, however, the trial court found that plaintiff's monthly income exceeded his monthly expenses by approximately $28,000. Thus, while defendant's net financial condition is substantial, it may not be adequate to enable her to meet plaintiff in court on *relatively* equal terms. In fact, defendant's attorneys' fees, which have exceeded $100,000, indicate the enormous resources she has exhausted to meet plaintiff on substantially even terms and the numerous barriers defendant "as litigant" has faced in resolving this case. Therefore, I would affirm the Court of Appeals' decision to remand the issue of attorneys' fees to the trial court for consideration of the relative estates of the parties.

Justices WHICHARD and PARKER join in this dissenting opinion.

Justice WHICHARD dissenting.

I have joined in Chief Justice Mitchell's dissenting opinion, and I write separately only to say the following:

The rationale of the Chief Justice's dissent rests entirely on this Court's interpretation of the statute governing payment of attorney's fees in alimony cases. As the majority opinion notes, that statute requires a determination that one spouse is a supporting spouse and the other a dependent spouse, which, in turn, usually requires a comparison of the parties' estates.

The child support attorney's fee statute, N.C.G.S. § 50-13.6 (1995), contains no such requirement. Applied with literal starkness, that statute's phrase "who has insufficient means to defray the expense of the suit" would limit an award of attorney's fees to parties whose liabilities would exceed their assets upon payment of their attorney's fees. Like the Chief Justice, however, and like this Court when it

interpreted the attorney's fee statute applicable to alimony cases, I do not believe this was the intent of the legislature.

In *Clark*, this Court stated:

> It would be contrary to what we perceive to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse . . . . Furthermore, it flies in the face of common sense and fair play to so require. While in the abstract, it would seem that defendant has ample resources to do battle in the courts, close analysis suggests that such is the case only through unreasonable depletion of her relatively small resources.

*Clark v. Clark*, 301 N.C. 123, 137, 271 S.E.2d 58, 68 (1980). This reasoning is just as pertinent in child support cases as it is in alimony cases, and it is just as probable that the legislature intended it to apply in the one as in the other. The intent would appear to be, as the Chief Justice states, to assure that both spouses can adequately assert and defend claims on substantially equal terms. This determination necessarily requires an evaluation of the relative income and estates of the parties.

The majority's consideration of the duration of the parents' relationship as a pertinent factor in interpreting the statute is misguided. Child support actions protect the same interests whether the child is the product of a single encounter or a lengthy marital relationship. Those are the interests of the child in being adequately supported and the interests of the State in having the child supported by a solvent parent or parents rather than by the taxpayers. The duration of the parents' relationship has no bearing on these interests. Considerations as to "the estate to which [the parent seeking support and attorney's fees] has contributed in some way during the familial relationship that is now being dissolved" are appropriate in an equitable distribution action but not in answering the question of whether the legislature intended that relative estates be weighed in determining entitlement to attorney's fees in a child support action.

In the interest of symmetry in the law and, more importantly, fairness to litigants and fulfillment of perceived legislative intent, I would resolve the question presented by affirming the Court of Appeals' decision to remand to the trial court for a redetermination of the

attorney's fee issue, considering the relative incomes and estates of the parties. I therefore dissent.

Chief Justice MITCHELL and Justice PARKER join in this dissenting opinion.

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STATE OF NORTH CAROLINA v. LANCE ALBERT SNYDER

No. 210PA95

(Filed 4 April 1996)

1. **Indictment, Information, and Criminal Pleadings § 36 (NCI4th)— driving while impaired—"street or highway"—amendment to "public vehicular area"**

The trial court did not err in a prosecution for driving while impaired and being an habitual felon by granting the State's motion to amend the DWI indictment that defendant operated a motor vehicle on "a street or highway" to read "on a highway or public vehicular area" where defendant was stopped in a parking lot. This change was merely a refinement in the description of the type of *situs* on which defendant was driving while impaired rather than a change in an essential element of the offense. Furthermore, defendant cannot demonstrate how such a change prejudiced the defense on the merits. N.C.G.S. § 15A-923(e).

**Am Jur 2d, Indictments and Informations §§ 166-187.**

**Power of court to make or permit amendment of indictment with respect to allegations as to place. 14 ALR3d 1335.**

**Comment Note.—Power of court to make or permit amendment of indictment. 17 ALR3d 1181.**

**Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances. 17 ALR3d 1285.**

2. **Automobiles and Other Vechiles § 849 (NCI4)— driving while impaired—sufficiency of evidence—public vehicular area**

The trial court did not err in a prosecution for driving while impaired and being an habitual felon by denying defendant's

motion to dismiss for insufficient evidence that defendant was driving on a "street or highway," based on defendant having been arrested in a parking lot, where the trial court correctly allowed the State's motion to amend the indictment to add "public vehicular area."

**Am Jur 2d, Automobiles and Highway Traffic § 301.**

**Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense. 29 ALR3d 938.**

**3. Automobiles and Other Vehicles § 852 (NCI4th)— driving while impaired—peremptory instruction—parking lot as public vehicular area**

The trial court did not err in a prosecution for driving while impaired and being an habitual felon by giving a peremptory instruction that the parking lot where defendant was arrested was a public vehicular area as a matter of law where the club which the parking lot served was licensed by the state to serve alcohol to the guests of members as well as to the members themselves; the parking lot could generally be used as a thoroughfare by members of the general public who were trying to access either the club or the adjacent motel; there were no signs in the parking lot prohibiting the public from parking there and no signs posted stating that the parking lot was private property, nor were there any security or membership cards allowing members exclusive access to the parking lot; and members of the general public were free to use the parking lot while they checked in and out of the club and as an entrance and exit to the adjacent motel.

**Am Jur 2d, Automobiles and Highway Traffic § 301.**

**Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense. 29 ALR3d 938.**

Justice WEBB dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 118 N.C. App. 540, 455 S.E.2d 914 (1995), arresting judgments entered upon defendant's convictions of driving while impaired, habitual impaired driving, and being a habitual felon by Hudson, J., at the 15 November 1993 Criminal Session of Superior Court, Guilford County, and awarding defendant a new trial. Heard in the Supreme Court 13 December 1995.

**STATE v. SNYDER**

[343 N.C. 61 (1996)]

*Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State-appellant.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by J. Michael Smith, Assistant Appellate Defender, for defendant-appellee.*

ORR, Justice.

Defendant is appealing from his sixth conviction in the last ten years for impaired driving offenses. On 19 November 1993, defendant pled guilty to the offense of habitual impaired driving and was convicted by a jury of the offenses of driving while impaired (DWI) and being a habitual felon. The evidence presented at trial tended to show that on 11 May 1993, Officer Long of the Greensboro Police Department responded to a call describing a disturbance involving an individual, the defendant, with a knife at the Lost Dimensions Nightclub ("the Club"). When Long arrived at the Club, the Club manager told Long that the man causing the disturbance was driving a beige station wagon in the Club's parking lot. After locating and stopping the vehicle being driven by defendant, Long approached the vehicle and asked defendant to exit it. Long noticed that defendant needed to hold on to the vehicle to maintain his balance, that he smelled very strongly of alcohol, and that his speech was slurred. Long asked defendant to perform several field sobriety tests, which defendant failed. Long arrested the defendant for DWI.

Defendant was taken to the police department where Officer Cuthbertson administered further sobriety and physical tests to determine the extent of his impairment. After refusing to submit to a Breathalyzer test, defendant was taken to the magistrate's office. Based on their observations of defendant on 11 May 1993, Long and Cuthbertson formed the opinion that defendant had consumed sufficient alcohol to be "appreciably impaired." Subsequently, on 7 June 1993, defendant was indicted in two separate indictments for driving while impaired ("DWI") and habitual impaired driving ("the DWI indictment") and for being a habitual felon.

On 18 November 1993, after a mistrial was declared due to the illness of a juror, the case was tried before a second jury. During this new trial, the State presented the following evidence regarding the Club's parking lot on which defendant was observed driving: The Club is located on a service road at 510 Farragut Street off Randleman Road near Interstate 40. The Club parking lot opens up onto Farragut Street. Officer Long testified that the Club sits on a small hill with a

Budget Motel next door. There is a top-level asphalt parking lot for the Club that wraps around the back. He further testified as follows:

> The parking lot winds around the back, and then, there's a spot right behind the back [of the Club] by a dumpster that has enough room if you wanted to try and drive through there. Then, the parking lot wraps around and leads to the back, and this is the hotel. There's two separate buildings for the hotel, which are separated by an area. The parking lot winds around, and there's parking spots for the rooms there, and you can drive up . . . .

Mark Pulliam, general manager, testified that the Club is a private club and that the Club's policy restricts the use of the Club to members and their guests and only during the Club's open business hours; it is not open to the public. He further testified that Club members may not park in the lot overnight without special permission from Club management and that the Club does not permit patrons of the motel to use the Club's parking lot. On cross-examination, Pulliam testified that the Club enforces this policy by not permitting use of the Club's parking lot by nonmembers, by not permitting any loitering by the public, and by not allowing Club members to use the lot when they are not in the Club. On redirect examination, Pulliam testified that there is no membership card required to get into the parking lot. Finally, on recross examination, when asked by defense counsel whether a person who came into the parking but did not go into the Club would have to leave, Pulliam testified that nonmembers are allowed to park in the lot to "come in and check things out. . . . [E]verybody is welcome in the lobby."

At the close of the State's evidence, defendant, who offered no evidence, moved to dismiss all charges because the State failed to offer sufficient evidence that "defendant . . . unlawfully, willfully did operate a motor vehicle on a *street or highway* while subject to an impairing substance" as charged in the DWI indictment. (Emphasis added.) The State then moved to amend the DWI indictment to read "on a *highway or public vehicular area.*" (Emphasis added.) Over defendant's objection, the trial court granted the State's motion to amend the DWI indictment and denied defendant's motion to dismiss. Subsequently, the jury found defendant guilty of all charges, and the trial court entered judgment against him and sentenced him to forty years in prison.

On appeal to the Court of Appeals, defendant contended that the trial court erred (1) by granting the State's motion to amend the DWI

indictment to include the allegation that defendant drove in a "public vehicular area," (2) by denying defendant's motion to dismiss for insufficient evidence to prove that defendant was driving on a "street or highway," and (3) by instructing the jury that the parking lot of the Club is a "public vehicular area" as a matter of law. The Court of Appeals arrested judgment and commitment on all charges, holding that the trial court erred in amending the DWI indictment and in failing to dismiss the charges stemming from the flawed indictment. The Court of Appeals further held that the trial court erred by instructing the jury that the Club's parking lot was a "public vehicular area" as a matter of law, as this removed an essential element of the offense charged from the jury's consideration.

On 27 July 1995, this Court granted discretionary review.

## I.

**[1]** The first issue before this Court is whether the trial court erred in granting the State's motion to amend the DWI indictment that defendant operated a motor vehicle on "a street or highway" to read "on a highway or public vehicular area." Defendant contends that such amendment was not proper because it substantially altered the charge contained in the bill of indictment, thereby violating defendant's right to an indictment by a grand jury as guaranteed by Article I, Section 22 of the North Carolina Constitution and pursuant to N.C.G.S. § 15A-641(a).

Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution. *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969). An indictment charging a statutory offense must allege all of the essential elements of the offense. *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975).

N.C.G.S. § 15A-923(e) provides that "[a] bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (1988). This Court has interpreted the term "amendment" under N.C.G.S. § 15A-923(e) to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). In *State v. Coker*, this Court stated that an

> indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indict-

> ment must also enable the court to know what judgment to pronounce in the event of conviction.

*State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984).

> An indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. N.C. Gen. Stat. § 15-153 (1983). It will not be quashed "by reasons of any informality or refinement, if[,] in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." [*State v. Russell*, 282 N.C. 240, 244, 192 S.E.2d 294, 296 (1972)]. It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended. 41 Am. Jur. 2d, *Indictments and Informations* § 68 (1968).

*Coker*, 312 N.C. at 435, 323 S.E.2d at 346.

N.C.G.S. § 20-138.1(a) provides in pertinent part that "a person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . while under the influence of an impaired substance." N.C.G.S. § 20-138.1(a)(1) (1988). With regard to indictments in any prosecution for impaired driving, the *situs* of the impaired driving offense is one of the essential elements of the offense charged. *See State v. Bowen*, 67 N.C. App. 512, 515, 313 S.E.2d 196, 197, *appeal dismissed*, 312 N.C. 79, 320 S.E.2d 405 (1984). However, there simply has to be an al-legation of a *situs* that is included within the parameters of N.C.G.S. § 20-138.1(a) that defendant drove a vehicle on "*any* highway, *any* street, or *any* public vehicular area." N.C.G.S. § 20-138.1(a) (emphasis added). Greater specificity is not required.

In the instant case, defendant contends that the DWI indictment was fatally defective because the omission of the phrase "public vehicular area" removed from the jury's consideration the *situs* of the offense—an essential element of the DWI offense charged. He argues that the subsequent amendment resulted in a substantial deviation from the charge alleged and upon which defendant was tried. Specifically, defendant argues that the term "street" in the DWI indictment was referring to "street" as defined in N.C.G.S. § 20-4.01(46) as a "highway." N.C.G.S. § 20-4.01(13) defines "highway" as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the pub-

lic as a matter of right for the purposes of vehicular traffic." N.C.G.S. § 20-4.01(13) (1993). Because defendant was stopped in a parking lot, he contends that the original indictment was fatally flawed and that later amending the indictment to include "public vehicular area" was a substantial alteration of the charge.

N.C.G.S. § 20-4.01(32) defines "public vehicular area" in pertinent part as

> [a]ny area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:
>
> . . . .
>
> b. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or *any other business*, residential, or municipal *establishment providing parking space for customers, patrons, or the public*; or
>
> . . . .
>
> The term "public vehicular area" shall not be construed to mean any private property not generally open to and used by the public.

N.C.G.S. § 20-4.01(32) (emphasis added).

We conclude that the change made in the DWI indictment is not one prohibited by N.C.G.S. § 15A-923(e). It does not alter the burden of proof or constitute a material change in a DWI indictment so as to vitiate the entire bill. This change merely represents one of form rather than substance under the circumstances of this case. It was merely a refinement in the description of the type of *situs* on which defendant was driving while impaired rather than a change in an essential element of the offense. We believe that the amendment to the indictment at issue was not an "indispensable allegation[] under our Constitution and general statutory provisions." *State v. Haigler*, 14 N.C. App. 501, 504, 188 S.E.2d 586, 589 (change to indictment changing description of stolen property, an essential element of the offense, from "scrap copper" to "scrap bronze" was not a prohibited amendment), *cert. denied*, 281 N.C. 625, 190 S.E.2d 468 (1972); *see also State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991) (change made in the indictment from "knife" to "firearm" did not alter the bur-

den of proof or constitute a substantial change prohibited by N.C.G.S. § 15A-923(e)), *disc. rev. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992); *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990) (change to indictment which stated victim's name as Pettress Cebron to correctly reflect the victim's name as Cebron Pettress was not a prohibited amendment). Defendant also cannot demonstrate how such a change has prejudiced the defense on the merits. This assignment of error is, therefore, overruled.

## II.

**[2]** In his next assignment of error, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence tending to prove that defendant was driving while impaired on a "street or highway" as the original DWI indictment charged. He asserts that all of the evidence at trial tended to prove that defendant never drove off the parking lot owned by the Club. However, having concluded that the trial court correctly allowed the State's motion to amend the DWI indictment because "public vehicular area" includes the term "street," we also conclude that the trial court did not err in denying defendant's motion to dismiss. Therefore, this assignment of error is also overruled.

## III.

**[3]** Defendant next assigns as error the trial court's peremptory instruction to the jury that as a *matter of law*, the Club parking lot was a "public vehicular area."

A trial court must instruct jurors on every element of the charged offense. As we previously stated, the *situs* of the impaired driving offense is one of the essential elements of the offense charged. *Bowen*, 67 N.C. App. at 515, 313 S.E.2d at 197. "[P]eremptory instructions are permissible only in rare instances in this State, where uncontradicted evidence establishes the element(s) beyond a reasonable doubt." *Id.*

In the case at bar, during the charge conference, the State requested that the trial court give a peremptory instruction on the element of the *situs* of the offense—"public vehicular area." Over defendant's objection, the trial court granted the State's request and instructed the jury that "the parking lot area of the Lost Dimensions Nightclub would be a public vehicular area under our law." As such, defendant contends that the trial court erred in peremptorily instructing the jury that the parking lot was a "public vehicular area" as a mat-

ter of law because there was conflicting evidence as to whether the parking lot was "generally open to and used by the public" as required by N.C.G.S. § 20-4.01(32). He further contends that the trial court erroneously withdrew an essential element of the crime from the jury's deliberations. We disagree and hold that the evidence supported a peremptory instruction that the Club's parking lot was a "public vehicular area" as a matter of law.

As previously stated, a "public vehicular area" is defined as "[a]ny area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, *including* . . . any . . . parking lot upon the grounds and premises of . . . [a]*ny* . . . *business* . . . *establishment providing parking space for customers, patrons, or the public*." N.C.G.S. § 20-4.01(32) (emphasis added). Thus, even if an establishment is cloaked in the robe of being a private club, it is still a "business establishment providing parking space for its customers, patrons, *or* the public" and cannot escape liability simply because a membership fee is required.

We also believe that the Court of Appeals' reliance on *Bowen*, 67 N.C. App. 512, 313 S.E.2d 196, is misplaced. There, the Court of Appeals held that the evidence presented regarding a condominium complex driveway did not support the trial court's conclusion that as a matter of law, the driveway was a "public vehicular area" within the meaning of N.C.G.S. § 20-4.01(32) because the evidence was "sharply conflicting." *Id.* at 514, 313 S.E.2d at 197. In *Bowen*, the evidence that the parking lot was a "public vehicular area" established that there was a "For Sale" sign which the Court of Appeals concluded "apparently invit[ed] in the public, and that there appeared to be no obstruction to public access." *Id.* at 514-15, 313 S.E.2d at 197. Evidence to the contrary indicated that "'No Trespassing' signs were posted, that there was no parking set aside for the public, and that the driveway had not been dedicated for public use." *Id.* at 515, 313 S.E.2d at 197.

In this case, unlike that in *Bowen*, the evidence establishes that the Club in this case is licensed by the State to serve alcohol to the guests of members as well as to the members themselves. Moreover, the Club's parking lot could generally be used as a thoroughfare by members of the general public—both Club members and nonmembers—who were trying to access either the Club or the motel. There were no signs posted in the Club's parking lot prohibiting the public from parking there and no signs posted stating that the parking lot was private property, nor were there any security or membership cards allowing members exclusive access to the parking lot. Also,

members of the general public were free to use the parking lot while they "[came] in and check[ed] out" the Club and as an entrance and exit to the adjacent motel.

Finally, in construing the statutory language, "'we are guided by the primary rule that the intent of the legislature controls.'" *State v. Carawan*, 80 N.C. App. 151, 153, 341 S.E.2d 96, 97 (quoting *State v. Spencer*, 276 N.C. 535, 546, 173 S.E.2d 765, 773 (1970)), *disc. rev. denied*, 317 N.C. 337, 346 S.E.2d 141 (1986). The legislature clearly intended to protect persons from the dangers posed by others who drive while they are impaired within any area where there is public vehicular traffic. While it appears that this Court has never decided a case in which N.C.G.S. § 20-4.01(32) was interpreted, cases decided by the Court of Appeals on the issue of whether a location was a "public vehicular area" support our holding in this case that the evidence was sufficient to support a peremptory instruction that the Club's parking lot is a "public vehicular area" as a matter of law. *See State v. Turner*, 117 N.C. App. 457, 451 S.E.2d 19 (1994) (privately maintained paved road in privately owned mobile home park); *Corns v. Hall*, 112 N.C. App. 232, 435 S.E.2d 88 (1993) (traffic lane between grocery store and parking lot); *State v. Mabe*, 85 N.C. App. 500, 355 S.E.2d 186 (wheelchair ramp in a motel parking lot), *disc. rev. denied*, 320 N.C. 516, 358 S.E.2d 527 (1987); *Carawan*, 80 N.C. App. 151, 341 S.E.2d 96 (park grounds used as temporary parking lot during special event). To hold otherwise would result in parking areas for private clubs selling alcoholic beverages being insulated from the drunk driving laws of our State while the parking lots of nonprivate establishments serving alcohol would not be. Such a distinction could not have been intended by the legislature.

Summarizing, the trial court did not err in allowing the State's motion to amend the DWI indictment because the change did not substantially alter the offense charged. Further, the trial court did not err in denying defendant's motion to dismiss. Finally, the trial court did not err in peremptorily instructing the jury that the Club's parking lot was a "public vehicular area" as a matter of law. Thus, the decision of the Court of Appeals is

REVERSED.

Justice WEBB dissenting.

I dissent. I believe it was error to allow the State to amend the indictment to allege the defendant was driving in a public vehicular

area. The majority says the *situs* of the impaired driving offense is one of the essential elements of the offense charged. Nevertheless, the majority says, it was not error to allow this amendment because it was alleged in the indictment that the offense occurred on a highway which was a *situs* included within the parameters of N.C.G.S. § 20-138.1(a). "It was merely a refinement in the description of the type of *situs* on which defendant was driving while impaired rather than a change in an essential element of the offense," says the majority. *State v. Snyder*, 343 N.C. 61, 67, 468 S.E.2d 221, 225 (1996)

I do not believe this amendment to the indictment was merely a refinement in the description of the *situs* alleged in the indictment. Adding the words "public vehicular area" to the indictment changed one of the elements in the offense charged and substantially altered the charge. It violated Article I, Section 22 of the North Carolina Constitution and N.C.G.S. § 15A-923(e) (1988).

I vote to affirm the Court of Appeals.

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STATE OF NORTH CAROLINA v. KERRY LEE DALE

No. 98A95

(Filed 4 April 1996)

**1. Evidence and Witnesses § 778 (NCI4th)— exclusion of question—absence of answer from record**

Defendant cannot show prejudice from the trial court's exclusion of a question asked by defense counsel in cross-examination of a State's witness where the record does not show what the answer of the witness would have been had she been permitted to respond to the question.

**Am Jur 2d, Appellate Review §§ 752-754, 759.**

**2. Evidence and Witnesses § 2927 (NCI4th)— statement by another—not prior inconsistent statement**

Testimony by a State's witness on cross-examination in a murder trial that a person called "Grip" had told her he "shot at the boy" was not admissible as a prior inconsistent statement since it was not a prior statement of the witness, and it was not

inconsistent with her testimony that defendant, Grip, and two other men asked her to help them rob the victim several days before the shooting, that all four men carried weapons, and that she did not see the shooting.

**Am Jur 2d, Witnesses §§ 1008, 1011-1013, 1016, 1018, 1022, 1023.**

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

**3. Evidence and Witnesses § 765 (NCI4th)— cross-examination—door not opened by State's direct examination**

The State's direct examination of a witness in a murder trial did not open the door to testimony by the witness on cross-examination that a person called "Grip" had told her he "shot at the boy" where the witness did not give any testimony on direct examination which related to anything Grip told her after the killing, and this testimony did not explain or clarify any evidence presented by the State on her direct examination. Assuming that the exclusion of this testimony was error, defendant was not prejudiced where the trial court's ruling did not exclude further testimony by the witness that she "told the police Grip shot at the boy."

**Am Jur 2d, Appellate Review §§ 752-754, 759.**

**4. Criminal Law § 818 (NCI4th)— interested witness instruction not required**

The trial court did not err, much less commit plain error, by refusing to give an instruction in a murder trial on the testimony of an interested witness, and the trial court's instruction that the jury could consider the interest, bias, or prejudice of a particular witness in determining whether to believe the witness was sufficient, where the State's only eyewitness to identify defendant as the shooter testified that she had not been promised anything in exchange for her testimony; she was not charged with any offense related to this crime; she was not testifying pursuant to a plea agreement or a grant of immunity; and nothing other than a pending probation violation suggested that she had an interest in the outcome of this case.

**Am Jur 2d, Witnesses §§ 1406, 1412.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases. 23 ALR4th 1089.**

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Battle, J., at the 24 October 1994 Criminal Session of Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 November 1995.

*Michael F. Easley, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Charles L. Alston, Jr., Assistant Appellate Defender, for defendant-appellant.*

PARKER, Justice.

Defendant was tried noncapitally on an indictment charging him with the first-degree murder of Barry Maurice Wiggs ("victim"). The jury returned a verdict finding defendant guilty as charged, and defendant was sentenced to life imprisonment. For the reasons discussed herein, we uphold defendant's conviction and sentence.

The State's evidence tended to show that just after noon on 21 July 1993, defendant and the victim stood and talked in front of an abandoned building in Raleigh. The victim began running, and defendant chased the victim down a sidewalk. While giving chase defendant fired two shots which missed the victim. A third shot, fired at close range, hit the victim in the head; and the victim fell to the pavement.

An examination of the body revealed a small entry wound at the base of the victim's skull and an exit wound in the victim's forehead. The medical examiner determined that the shot was fired from a distance of at least two feet and that the bullet wound would have killed the victim instantly. In the medical examiner's opinion, the murder weapon was probably a small-caliber gun. Two nine-millimeter shell casings were found at the crime scene.

The victim was a drug dealer, and the evidence tended to show that defendant had been involved in a plan to rob the victim prior to the shooting. Defendant, Iven Morgan, Jr. ("Grip"), and two other men

visited Barbara Williams several days before the shooting and asked Ms. Williams to help them rob the victim. Ms. Williams was the victim's friend, and she declined. According to Ms. Williams, all four men usually carried a gun, and Grip had a nine-millimeter pistol in his possession on the day that the men asked her to help them rob the victim.

Four to six days after the killing, Tracey Watkins heard defendant say that he had "smoked [the victim]." Ms. Watkins testified that defendant had a nine-millimeter gun in his possession at the time he made this statement.

Defendant presented evidence at trial which tended to show that he was at his girlfriend's house at the time of the murder. Another defense witness stated that he saw the shooting and that defendant was not the killer.

In his first assignment of error, defendant contends that the trial court erred by sustaining the State's objections to questions posed by defendant during his cross-examination of Barbara Williams. We disagree.

Ms. Williams testified that four men, including defendant and Grip, asked her to help them rob the victim several days before the killing. On cross-examination defendant elicited testimony that Grip had a nine-millimeter pistol in his possession on that day, and the following exchange occurred:

Q. And then after this happened, Grip said they were going—

[THE PROSECUTOR]: Objection as to what Grip said unless he is going to testify later on, Your Honor.

COURT: Well, objection sustained.

Q. Did you tell the police that one of the members of the conspiracy had planned to allow another member of the conspiracy to quote take the rap? Did you tell the police that?

A. I told the police Grip shot at the boy. That is what I told the police. That is what Grip told me.

[THE PROSECUTOR]: Objection to what Grip told her, Your Honor, and motion to strike.

COURT: Well, motion allowed. Disregard that comment of the witness.

**[1]** "Counsel is allowed great latitude on cross-examination to test matters related by a witness on direct examination." *State v. Lee*, 335 N.C. 244, 271, 439 S.E.2d 547, 560, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162 (1994). With respect to the trial court's ruling sustaining the State's objection to the first question, however, the record fails to show what the answer would have been had the witness been permitted to respond.

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

*State v. Johnson*, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995). In this instance the record does not show what the witness' answer would have been had she been permitted to respond to defendant's first question. Thus, defendant cannot show that the trial court's ruling with respect to this question prejudiced him. *State v. Miller*, 288 N.C. 582, 593, 220 S.E.2d 326, 335 (1975).

**[2]** The trial court also sustained the State's objection and motion to strike Ms. Williams' testimony with respect to what Grip told her. Defendant contends that this testimony is admissible for three reasons: (i) prior inconsistent statements are always admissible to impeach a witness; (ii) the testimony was not offered for the truth of the matter asserted, but rather to explain and clarify a subject alluded to by the State on direct examination; and (iii) the State's direct examination "opened the door" to the testimony. We disagree.

"For impeachment purposes a witness may ordinarily be cross-examined concerning statements he has made on other occasions which are inconsistent with his testimony at the present trial." *State v. McKeithan*, 293 N.C. 722, 730, 239 S.E.2d 254, 259 (1977). In this instance, however, the State objected only to what Grip told Ms. Williams, not to the testimony with respect to what she told the police. For this reason the trial court's ruling did not exclude any of

Ms. Williams' prior statements, including her testimony that she "told the police Grip shot at the boy."

Moreover, Ms. Williams' testimony at trial was not inconsistent with the excluded statement. Ms. Williams' testimony on direct examination was that defendant, Grip, and two other men asked her to help them rob the victim several days before the shooting. She also stated that all four of the men were at her house on the morning and the afternoon of the murder. On cross-examination Ms. Williams testified that all of the men carried a weapon at all times and that Grip carried a nine-millimeter pistol on the day the men asked her to help them rob the victim. Importantly, Ms. Williams testified that she did not see the shooting. She did not give any testimony inconsistent with the statement that "Grip shot at the boy." We conclude that the excluded testimony was not a prior statement of the witness and that it was not inconsistent with any of her testimony at trial. Thus, the testimony was not admissible as a prior inconsistent statement.

**[3]** Defendant also argues that Ms. Williams' testimony was admissible to explain and clarify a subject alluded to by the State on direct examination and that the State "opened the door" to this testimony.

> The phrase "opening the door" refers to the principle that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Garner*, 330 N.C. 273, 290, 410 S.E.2d 861, 870 (1991) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)).

*State v. Rose*, 335 N.C. 301, 337, 439 S.E.2d 518, 538, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994).

The State presented evidence through Ms. Williams' testimony that defendant, Grip, and two other men asked her to help them rob the victim several days before the killing. Ms. Williams did not give any testimony on direct examination which related to anything Grip told her after the killing, and the excluded testimony did not explain or clarify any evidence presented by the State on her direct examination. For this reason we conclude that the trial court properly excluded the testimony with respect to what Grip told Ms. Williams.

Assuming *arguendo* that the excluded testimony was admissible, the trial court's ruling could not have prejudiced defendant. The

State's objection and motion to strike applied only to what Grip told Ms. Williams, not to Ms. Williams' testimony that she "told the police Grip shot at the boy." This testimony was not excluded by the trial court's ruling and was thus available for the jury's consideration. We conclude that there is no reasonable possibility that, had the testimony not been excluded, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

**[4]** Defendant next assigns as error the trial court's refusal to give an instruction on the testimony of an interested witness as requested by the State during the charge conference. Defendant contends that the trial court committed plain error by failing to give the instruction requested by the State. We disagree.

The State made a general request at the charge conference for an instruction on interested witnesses. The trial court declined this request, stating that the instruction on considering the interest and bias of a witness would be sufficient. Defendant did not object when the trial court declined the State's request, and defendant did not make any specific request at that time for an instruction on the testimony of an interested witness. After the trial court gave its instructions, defendant again did not object or make any request for further instructions. Thus, the trial court was never made aware of a specific instruction sought by the parties with respect to the testimony of an interested witness. Under these circumstances this assignment of error must be reviewed under the "plain error" rule. *See State v. Allen*, 339 N.C. 545, 554-55, 453 S.E.2d 150, 155 (1995).

"[T]he term 'plain error' does not simply mean obvious or apparent error." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993); *accord State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). 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. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

Defendant argues that the pattern jury instruction on the testimony of an interested witness would have isolated and emphasized the steps the jury should have used in considering the testimony of Denise Yates, who saw defendant chase the victim and who was the only eyewitness to identify defendant as the shooter. However, "an instruction to scrutinize the testimony of a witness on the ground of

interest or bias is a subordinate feature of the case which does not require the trial judge to give the cautionary instruction *unless there is a request for such an instruction.*" *State v. Vick*, 287 N.C. 37, 43, 213 S.E.2d 335, 339 (1975).

Further, the trial court gave the following instruction to the jury:

> In determining whether to believe any witness you should apply the same tests of truthfulness which you apply in your everyday affairs.
>
> As applied to this trial these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness . . . .

In *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994), where the trial court gave an almost identical instruction, we held that the failure to give the requested pattern jury instruction concerning the testimony of an interested witness was harmless error. *Id.* at 193, 446 S.E.2d at 90.

We also note that there was very little evidence that Ms. Yates was an interested witness. The record discloses that Ms. Yates' criminal record included a probation violation and that at the time of trial she was awaiting a court appearance for this violation. On the morning that she testified, Ms. Yates apparently made a statement that she was not going to testify on account of something that the prosecutor had not done. However, Ms. Yates testified that she had not been promised anything in exchange for her testimony. Ms. Yates was not charged with any offense related to this crime, she was not testifying pursuant to a plea agreement or a grant of immunity, and nothing other than the probation violation suggested that she had an interest in the outcome of this case.

Under these circumstances the trial court's instruction that the jury could consider the interest, bias, or prejudice of a witness in determining whether to believe a particular witness was sufficient. We conclude that the trial court did not err, much less commit plain error, by declining to give an instruction on the testimony of an interested witness. Accordingly, this assignment of error is overruled.

We conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

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STATE OF NORTH CAROLINA v. RODNEY GAINEY AND CURTIS HUNTLEY

No. 138A95

(Filed 4 April 1996)

**1. Homicide § 552 (NCI4th)— first-degree murder—refusal to charge on second-degree murder—premeditation and deliberation**

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on second-degree murder as to defendant Huntley where the State's evidence tended to show that defendants borrowed a car under false pretenses at a car wash, obtained two guns and several bullets, and waited for the victim; when the victim drove by, defendant Huntley said, "there's the truck," or "there's the son-of-a-bitch now"; defendants then chased down the victim and fired multiple shots into his truck, one of which struck him in the back of the head; there was no evidence that the victim provoked defendants before he was shot; defendant Huntley's statements indicate that he did not like the victim and was waiting for him; and, after the killing, defendant returned to the car wash as if nothing had happened. The State met its burden of proving all of the elements of first-degree murder (motive is not an element of first-degree murder) and defendant Huntley presented no evidence to negate the State's.

**Am Jur 2d, Homicide §§ 485, 486.**

**2. Homicide § 552 (NCI4th)— first-degree murder—refusal to charge on second-degree murder—specific intent to murder**

The trial court did not err in a first-degree murder prosecution as to defendant Gainey by not instructing on second-degree murder where the State's evidence showed that defendants engaged in a common plan to murder the victim; they borrowed a car, procured deadly weapons, and waited for the victim; there was evidence permitting an inference that defendant Gainey had

a weapon in that a witness testified that he saw someone give defendants two guns; and the fact that defendant Gainey drove the car instead of doing the actual shooting makes him no less culpable. The cumulative evidence permits a reasonable inference that the victim's fatal contact with defendant Gainey was planned and that defendant Gainey possessed a specific intent to murder the victim.

**Am Jur 2d, Homicide §§ 485, 486.**

**3. Criminal Law § 794 (NCI4th)— first-degree murder—discharging firearm into occupied property—instructions—acting in concert**

There was no plain error in a first-degree murder prosecution where the trial court instructed the jury that it could find defendant Gainey guilty of both first-degree murder by premeditation and deliberation and discharging a firearm into occupied property under the theory of acting in concert. The evidence presented and the inferences logically drawn therefrom show both that defendant Gainey engaged in a common plan with defendant Huntley to murder the victim and that defendant Gainey acted with premeditation and deliberation in carrying out the murder. Because evidence of either constitutes proof of specific intent, the instruction on acting in concert was proper.

**Am Jur 2d, Trial §§ 1362-1364.**

**4. Homicide § 244 (NCI4th); Assault and Battery § 81 (NCI4th)— first-degree murder—discharging firearm into occupied vehicle—motion to dismiss—properly denied**

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into an occupied vehicle by denying defendant Gainey's motion to dismiss on the grounds that the State failed to present any evidence that he specifically intended to commit the crimes charged.

**Am Jur 2d, Homicide §§ 437-440.**

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

**5. Evidence and Witnesses §§ 928, 931 (NCI4th)— exclamation that defendant had a gun—excited utterance—present sense impression**

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into an occupied vehicle by overruling defendant Huntley's objection to allowing a witness to state that another person exclaimed "he had a gun." The statement was properly admitted as an excited utterance under N.C.G.S. § 8C-1, Rule 803(2), or as a present sense impression pursuant to N.C.G.S. § 8C-1, Rule 803(1).

**Am Jur 2d, Evidence §§ 864, 865.**

**Comment Note.—Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury. 56 ALR2d 372.**

**Admissibility in criminal case, as part of the res gestae, of statements or utterances of bystanders made at time of arrest. 78 ALR2d 300.**

**When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed. 451.**

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Helms (William H.), J., at the 29 August 1994 Criminal Session of Superior Court, Union County, upon verdicts finding the defendants guilty of first-degree murder. Defendants' motions to bypass the Court of Appeals as to additional judgments of imprisonment entered upon their convictions for discharging firearms into an occupied vehicle were allowed 29 March 1995. Heard in the Supreme Court 15 December 1995.

*Michael F. Easley, Attorney General, by Elizabeth R. Mosley, Assistant Attorney General, for the State.*

*Charles B. Brooks, II, for defendant-appellant Gainey.*

*Robert L. Huffman for defendant-appellant Huntley.*

WHICHARD, Justice.

Defendants were tried jointly and noncapitally for first-degree murder and for discharging a firearm into an occupied vehicle. The

jury found both defendants guilty on both charges. The trial court sentenced each defendant to a mandatory term of life imprisonment on the murder convictions and sentenced defendants to three years' imprisonment for discharging a firearm into occupied property, to run concurrently with the murder sentences. We hold that defendants received a fair trial, free from prejudicial error.

The State's evidence at trial tended to show that on the evening of 15 November 1993, defendants Curtis Huntley and Rodney Gainey borrowed a blue Honda Prelude from Fred Marsh, ostensibly to visit some girls. Instead, they drove to the Rite-Way Carwash. Jimmy Taylor saw someone at the car wash give defendants two guns. Christopher Blakeney gave defendant Huntley four or five bullets, and he saw defendant Huntley shoot what he believed was a .38-caliber revolver in the air.

According to Taylor, a red truck passed the car wash, and defendant Huntley said, "there's the truck," or "there's the son-of-a-bitch now." Defendants got into the Prelude, with defendant Huntley sitting in the front passenger seat, and chased the red truck up a hill. Jeffrey Sanders, defendant Huntley's cousin, saw the Prelude go past him, with defendant Huntley leaning out the window and something flashing in his hand. At that time Ruddy (record does not reveal full name), a passenger in Sanders' car, said defendant Huntley had a gun.

Immediately thereafter, Blakeney saw the flash from a gun from the passenger side of the Prelude; he then saw the red truck rolling. Moments later, defendants returned to the car wash in the Prelude. Vadia Blakeney then saw defendant Huntley holding a "black object" at his waistline.

The driver of the truck, Michael Alton Greene, was found inside the truck, shot in the head. He died from the gunshot wound. SBI Agent Bobby Bonds investigated the scene the next day and removed spent bullets from the door and tailgate of the truck. Agent Bonds also took latent fingerprints from the Prelude. Seven of the prints were defendant Gainey's.

**[1]** Both defendants contend that the trial court erred by refusing to charge the jury on second-degree murder. The unlawful killing of a human being committed during the commission of a felony or with malice, premeditation, and deliberation is murder in the first degree. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). A killing is "premeditated" if "the defendant formed

the specific intent to kill the victim some period of time, however short, before the actual killing." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. A killing is "deliberate" if the defendant acted "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.* Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. N.C.G.S. § 14-17; *State v. Downey*, 253 N.C. 348, 353, 117 S.E.2d 39, 43 (1960).

Where a defendant is charged with premeditated and deliberate first-degree murder, an instruction on the lesser-included offense of second-degree murder need be given "only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater." *State v. Strickland*, 307 N.C. 274, 287, 298 S.E.2d 646, 654 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

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

*Strickland*, 307 N.C. at 293, 298 S.E.2d at 668.

Defendant Huntley contends that the failure to instruct on second-degree murder was error because the State failed to prove premeditation and deliberation, because an inference may rationally be drawn from the State's evidence tending to show murder in the second degree, and because there is evidence to support a verdict of second-degree murder. We disagree.

The State's evidence tended to show that defendants borrowed a car under false pretenses, obtained two guns and several bullets at the car wash, and waited for the victim. When the victim drove by, defendant Huntley said, "there's the truck," or "there's the son-of-a-bitch now." Defendants then chased down the victim and fired multiple shots into his truck, one of which struck him in the back of the head. There was no evidence that the victim provoked defendants before defendant Huntley shot him. Defendant Huntley's statements

indicate that he did not like the victim and was waiting for him. After the killing, defendants returned to the car wash as if nothing had happened. The State's evidence thus sufficiently proved premeditation and deliberation by the defendants in the murder of Greene.

Defendant Huntley insists that the lack of evidence indicating a motive for the killing creates the inference that the victim's death was an unlawful killing with malice but without premeditation and deliberation, thereby requiring an instruction on second-degree murder. Motive, however, is not an element of first-degree murder. *State v. Van Landingham*, 283 N.C. 589, 600, 197 S.E.2d 539, 546 (1973). The State met its burden of proving all the essential elements of first-degree murder, and defendant Huntley presented no evidence to negate the State's. Therefore, the trial court properly refused to instruct on second-degree murder.

**[2]** Defendant Gainey argues that it was error for the trial court not to instruct on second-degree murder because there was no evidence that he had the specific intent to kill. Because a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983). As noted, the State's evidence showed that defendants engaged in a common plan to murder the victim. They borrowed a car, procured deadly weapons, and waited for the victim. There was evidence permitting an inference that defendant Gainey had a weapon, in that a witness testified that he saw someone give defendants two guns. The fact that defendant Gainey drove the car instead of doing the actual shooting makes him no less culpable. The cumulative evidence permits a reasonable inference that the victim's fatal contact with defendant Gainey was planned and that defendant Gainey possessed a specific intent to murder the victim. Therefore, defendant Gainey was not entitled to an instruction on second-degree murder. Both defendants' assignments of error are therefore overruled.

**[3]** In a related assignment, defendant Gainey asserts that the trial court erred by instructing the jury that it could find defendant Gainey guilty, under the theory of acting in concert, of both first-degree murder by premeditation and deliberation and discharging a firearm into occupied property. Relying on *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), defendant Gainey argues that the instruction as

given allowed him to be convicted of each crime without a showing that he possessed the requisite specific intent.

Under the principle of acting in concert, a defendant "may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988). A defendant who possesses the requisite intent may be found guilty of a specific-intent crime based on acting in concert even if the other person did all of the acts necessary to the commission of the crime. *Blankenship*, 337 N.C. at 557-58, 447 S.E.2d at 736. Specific intent may be proven by evidence tending to show either (1) that the specific-intent crime was part of a common plan, *State v. Joyner*, 297 N.C. 349, 358, 255 S.E.2d 390, 396 (1979); or (2) premeditation and deliberation, which is proof of intent to kill, *Lowery*, 309 N.C. at 768, 309 S.E.2d at 237.

Defendant Gainey did not object to the instruction at trial, so we review only for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The evidence presented and the inferences logically drawn therefrom show both that defendant Gainey engaged in a common plan with defendant Huntley to murder Greene and that defendant Gainey acted with premeditation and deliberation in carrying out the murder. Because evidence of either constitutes proof of specific intent, the trial court's instruction on acting in concert was proper.

**[4]** Defendant Gainey also argues that the trial court erred by denying his motion to dismiss because the State failed to present any evidence that he specifically intended to commit the crimes charged. In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 257, 271 S.E.2d 368, 377 (1980). The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial. *Id.* If any evidence reasonably tends to show that defendant formed the specific intent to kill the victim and that this intention to kill was preceded by premeditation and deliberation, the denial of defendant's motion was proper. *Lowery*, 309 N.C. at 767-69, 309 S.E.2d at 236-38.

Applying the foregoing principles, we conclude that there was substantial evidence of each essential element of murder in the first degree and of defendant Gainey's specific intent to kill. We need not reiterate the State's evidence; evidence that supported the trial court's instruction on first- rather than second-degree murder, as well as the instruction on acting in concert, also required the denial of defendant's motion to dismiss. Therefore, the trial court did not err in denying defendant Gainey's motion to dismiss.

**[5]** Finally, defendant Huntley contends that the trial court improperly overruled his objection to allowing a witness to state that another person exclaimed "he had a gun." At trial Sanders testified that Ruddy, a passenger in Sanders' car, said: "[H]e [defendant Huntley] had a gun." Defendant Huntley argues that the statement was inadmissible hearsay and that its admission violated his constitutional rights of confrontation and cross-examination.

Evidence which falls within a firmly rooted hearsay exception does not violate a defendant's right to confront and cross-examine witnesses. *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991); *State v. Roper*, 328 N.C. 337, 359, 402 S.E.2d 600, 618, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). We conclude that the statement here was properly admitted as an excited utterance under N.C.G.S. § 8C-1, Rule 803(2), or as a present sense impression pursuant to N.C.G.S. § 8C-1, Rule 803(1).

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as an exception to the hearsay rule, whether or not the declarant is available as a witness. N.C.G.S. § 8C-1, Rule 803(2) (1992). Ruddy and Sanders were pulling up to a store when defendants raced by them in the Prelude, nearly sideswiping them, with defendant Huntley hanging out the passenger window with a gun in his hand. Ruddy's statement, "he had a gun," was a spontaneous reaction that occurred while he was under the stress of this startling experience without opportunity to reflect on what the declarant was seeing or to fabricate his statement before speaking. Hence, Sanders' testimony regarding the statement fits squarely within the excited utterance exception to the hearsay rule and was properly admitted.

The statement was likewise admissible as a present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or

immediately thereafter, is admissible as an exception to the hearsay rule whether or not the declarant is available as a witness. N.C.G.S. § 8C-1, Rule 803(1). The underlying theory of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation. *See State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (nine days not considered "immediately thereafter"). Here, Ruddy's statement that defendant "had a gun" was made simultaneously with the occurrence of the event—that is, immediately upon his seeing the gun—and therefore falls within this exception. Defendant Huntley's assignment of error is therefore overruled.

We conclude that both defendants received a fair trial, free from prejudicial error.

NO ERROR.

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CRAVEN COUNTY BOARD OF EDUCATION, A STATUTORY CORPORATION OF NORTH CAROLINA v. THE HONORABLE HARLAN E. BOYLES, STATE TREASURER; THE HONORABLE EDWARD RENFROW, STATE CONTROLLER; THE HONORABLE JONATHAN B. HOWES, SECRETARY OF THE DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES; AND A. PRESTON HOWARD, JR., DIRECTOR OF THE DIVISION OF ENVIRONMENTAL MANAGEMENT

No. 365PA95

(Filed 4 April 1996)

**Penalties, Fines, and Forfeitures § 8 (NCI4th)— violations of environmental laws—payment to DEHNR—penalty—entitlement of local school district**

Monies paid to the Department of Environment, Health and Natural Resources pursuant to a settlement agreement for violations of air pollution control standards constituted a penalty under Article IX, Section 7 of the North Carolina Constitution and should be remitted to the local school district. It was not determinative that the monies were collected pursuant to a settlement agreement or that the agreement stated that payment was not to be construed as a fine, penalty, or forfeiture.

**Am Jur 2d, Forfeitures and Penalties § 67; Pollution §§ 81, 558.**

**Recovery of cumulative statutory penalties. 71 ALR2d 986.**

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of summary judgment for plaintiff entered by Bowen, J., on 6 March 1995 in Superior Court, Wake County. Heard in the Supreme Court 16 February 1996.

*Henderson, Baxter & Alford, P.A., by David S. Henderson; and Tharrington Smith, LLP, by Michael Crowell, for plaintiff-appellee.*

*Michael F. Easley, Attorney General, by W. Dale Talbert, Special Deputy Attorney General, for defendant-appellant.*

FRYE, Justice.

Defendants present one issue on appeal: whether monies paid to the Department of Environment, Health and Natural Resources pursuant to a settlement agreement for violations of environmental laws constituted a penalty, forfeiture, or fine under Article IX, Section 7 of the North Carolina Constitution. We answer in the affirmative, and therefore, affirm the judgment of the trial court.

On 11 June 1991, the Director of the Division of Environmental Management (DEM) assessed a civil penalty of $1,466,942.44 against Weyerhaeuser Company (Weyerhaeuser) pursuant to N.C.G.S. § 143-215.114A for violations of air pollution control standards at its pulp mill in Craven County. The fine included $1,000 per day for operating equipment without certain air pollution controls, a lump sum of $3,000 for failing three emissions tests, and $5,000 for making major modifications to equipment without following the proper procedures. The Director concluded that the actual particulate emissions at the facility during the period of the violations were at least 193 tons per year over the allowable emission limit, but made no findings or conclusions as to any specific damage to the environment. In addition to the amount assessed for the violations, the Director assessed $1,942.44 as the cost of investigating the violations. Weyerhaeuser appealed the assessment to the Office of Administrative Hearings (OAH), but later settled the matter with the Department of Environment, Health and Natural Resources (DEHNR). The parties entered into a settlement agreement on 11 October 1991.

On 17 October 1991, pursuant to the settlement agreement, Weyerhaeuser paid $926,000 to DEHNR. Under the terms of the settlement agreement, $922,000 was paid to the State General Fund and DEM for "the sole purpose of redressing any harm or risk, if any, to

the environment or the public health of the people of North Carolina, which may have resulted from any actions or admissions by [Weyerhaeuser] in connection with any alleged violation(s)." The remaining $4,000 was paid to the General Fund for four violations of environmental protection regulations that established maximum allowable pollution emission rates. The settlement agreement also incorporated Weyerhaeuser's position that the payments did "not constitute, nor shall they be construed as forfeitures, fines, penalties or payments in lieu thereof." DEHNR deposited $924,057.56 with the State Treasurer to go to the General Fund and credited $1,942.44, which constituted investigative cost, to a DEM account to be used to support investigations of other environmental violations.

By letter dated 7 November 1991, the Craven County Board of Education (Board), relying on Article IX, Section 7 of the North Carolina Constitution and N.C.G.S. § 115C-437, made a written demand on the State Treasurer for payment of the monies paid by Weyerhaeuser to DEHNR. A copy of the demand letter was sent to the Director of DEM. Counsel for the State Treasurer responded that the Treasurer had no authority to honor the Board's demand without a warrant being authorized by the Secretary of DEHNR. The State Controller, the Secretary of DEHNR, and the Director of DEM informed the Board that they could not honor the Board's demand based in part on their belief that the disposition of funds sought was not controlled by Article IX, Section 7 of the North Carolina Constitution. The Board then filed a petition for a contested case hearing in the OAH, but that petition was dismissed for lack of subject matter jurisdiction.

On 18 August 1993, the Board instituted this declaratory judgment action seeking the proceeds of the civil penalty. The Board contended that the civil penalty paid by Weyerhaeuser to DEHNR in settlement of its case constituted a penalty, forfeiture, or fine under Article IX, Section 7 of the North Carolina Constitution. The Board also contended that the civil penalty was assessed for "breach of the penal laws of the State" and was not remedial in nature. Defendants filed a motion to dismiss the action, and the Board filed a motion for summary judgment. The trial court denied defendants' motion to dismiss, granted the Board's motion for summary judgment, and ordered that the clear proceeds of the settlement be paid to the Board.

Defendants gave notice of appeal from the trial court's order granting the Board's motion for summary judgment, and both parties

petitioned this Court for discretionary review prior to a determination by the Court of Appeals. We allowed the petition on 5 October 1995.

Defendants contend that the trial court erred in granting plaintiff's motion for summary judgment. In accordance with N.C. R. Civ. P. 56(c), we have stated that summary judgment should be "'granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Aetna Cas. & Sur. Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 774, 392 S.E.2d 377, 379 (1990) (quoting *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191 (1990)). In order to be entitled to summary judgment, the moving party must bear the burden and show that no questions of material fact remain to be resolved. *Id.*

Defendants contend that there was a genuine issue of material fact as to whether the money paid by Weyerhaeuser constituted a penalty, forfeiture, or fine under Article IX, Section 7 of the North Carolina Constitution. We disagree with defendants' contention.

Article IX, Section 7 of the North Carolina Constitution, entitled "County school fund," provides as follows:

> Moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

In *State ex rel. Thornburg v. 532 B Street*, 334 N.C. 290, 432 S.E.2d 684 (1993), this Court interpreted the meaning of Article IX, Section 7 of the North Carolina Constitution and the scope of its coverage. This Court said:

> "We interpret the provisions of section 7 relating to the clear proceeds from penalties, forfeitures and fines as identifying two distinct funds for the public schools. These are (1) *the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state*; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. . . . Thus, in the first category, the monetary payments are penal in nature and accrue to the state regardless of whether the

> legislation labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal."

*Id.* at 294, 432 S.E.2d 686 (emphasis added) (quoting *Mussallam v. Mussallam*, 321 N.C. 504, 508-09, 364 S.E.2d 364, 366-67 (citation omitted)); *see also Mussallam*, 321 N.C. 504, 510, 364 S.E.2d 364, 367 (1988) (clear proceeds of bond forfeited by defendant who did not appear should have been remitted to the local school district in accordance with Article IX, Section 7); *State ex rel. v. Marietta & N. Ga. R.R.*, 108 N.C. 24, 12 S.E. 1041 (1891) (judgment in civil suit brought by the State against railroads for violation of law requiring submission of certain reports should be remitted to the local school fund in accordance with Article IX, Section 7).

Under *Thornburg*, "the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state," should be paid to the local school district. We have no difficulty in concluding that the clear proceeds from the settlement paid by Weyerhaeuser to DEHNR were covered by Article IX, Section 7 of the North Carolina Constitution. First, the monies accrued to the State. Defendants do not contest this fact which is clear from the evidence. The monies from the settlement were paid to DEHNR, a department of the State. Second, the monies paid by Weyerhaeuser constituted a penalty. Defendants' evidence showed that Weyerhaeuser entered into a settlement agreement with DEHNR after the department found that the company had violated state environmental standards and assessed a civil penalty against Weyerhaeuser for violation of those standards. Weyerhaeuser filed for a contested hearing and then settled with the department in lieu of contesting the civil penalty that had been assessed. The fact that the monies were paid pursuant to a settlement agreement does not change the nature of these payments. The monies were still paid because of a civil penalty assessed against Weyerhaeuser.

Defendants also presented evidence that the settlement agreement stated that the money paid by virtue of the settlement was not to be construed as a fine, penalty, or forfeiture. However, the fact that the parties chose not to call the payment a fine, penalty, or forfeiture is not determinative. *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980).

In *Cauble*, the city collected fines for overtime parking by allowing individuals to remit the monies voluntarily. If the individuals failed to remit the money, a criminal warrant was issued against the

person. The city argued, among other things, that since citizens were allowed to pay the fines voluntarily, the monies did not constitute penalties, forfeitures, or fines under the constitutional provisions. The trial court, the Court of Appeals, and this Court disagreed with the city. We stated that

> [t]he heart of [the] court's distinction lies not in whether the monies are denominated "fines" or "penalties." Indeed, we have often stated that the label attached to the money does not control. . . . The crux of the distinction lies in the *nature* of the *offense* committed, and not in the [collection] *method* employed . . . .

*Id.* at 344, 271 S.E.2d at 260 (citations omitted).

In the instant case, it is not determinative that the monies were collected by virtue of a settlement agreement, nor is it determinative that defendants and Weyerhaeuser stated that the payment not be construed as a penalty. The monies were paid to settle the assessment of a penalty for violations of environmental standards. As we said in *Cauble*, it is neither "the label attached to the money" nor "the [collection] method employed," but "the nature of the offense committed" that determines whether the payment constitutes a penalty. Viewing the evidence in the light most favorable to defendants, we nevertheless conclude that there is no genuine issue of material fact as to whether the clear proceeds constituted a penalty as that term is used in Article IX, Section 7 of the North Carolina Constitution. Accordingly, the trial court did not err in granting summary judgment for plaintiff.

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

STATE OF NORTH CAROLINA v. KEVIN M. DELLINGER

No. 215PA95

(Filed 4 April 1996)

**Criminal Law § 67 (NCI4th); Infants or Minors § 72 (NCI4th)—defendant minor at time of crime—superior court—no jurisdiction to try after adulthood**

Age at the time of the alleged offense governs for purposes of determining subject matter jurisdiction over a juvenile, N.C.G.S. § 7A-523(a), and a juvenile offender does not "age out" of district court jurisdiction and by default become subject to superior court jurisdiction upon turning eighteen. Therefore, the superior court did not have subject matter jurisdiction to try defendant for the felony of crime against nature where defendant was twelve or thirteen years old at the time he allegedly committed the crime; he was indicted in superior court when he was sixteen; defendant appealed the denial of his motion to dismiss for lack of subject matter jurisdiction to the Court of Appeals and turned eighteen while the appeal was pending; and the district court never exercised jurisdiction and did not transfer the case to the superior court in accordance with N.C.G.S. § 7A-608. The decisions of *State v. Lundberg*, 104 N.C. App. 543, 410 S.E.2d 216 (1991) and *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982) are overruled to the extent that they conflict with this holding.

**Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 14-16.**

**Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR2d 506.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 118 N.C. App. 529, 455 S.E.2d 877 (1995), dismissing as moot defendant's appeal from an order entered by Burroughs, J., at the 6 October 1993 Criminal Session of Superior Court, Mecklenburg County, denying defendant's motion to dismiss for lack of jurisdiction. Heard in the Supreme Court 14 February 1996.

*Michael F. Easley, Attorney General, by Robin W. Smith, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender; and William M. Davis, Jr., Assistant Public Defender, for defendant-appellant.*

WHICHARD, Justice.

The issue is whether the Superior Court, Mecklenburg County, which lacked jurisdiction over the juvenile offender at the time he allegedly committed the offense in question, may now obtain jurisdiction, the defendant having subsequently become an adult. Defendant was born on 26 October 1976. Sometime in 1989, when he was twelve or thirteen years old, he allegedly committed the felony of crime against nature. Defendant was indicted in superior court on 23 August 1993 when he was sixteen. He moved to dismiss, arguing that the superior court lacked subject matter jurisdiction due to his age at the time of the offense. The trial court denied the motion, and defendant appealed to the Court of Appeals. He turned eighteen while the case was pending in that court, and it held that the question was moot because defendant is now an adult properly subject to the superior court's jurisdiction. *State v. Dellinger*, 118 N.C. App. 529, 532, 455 S.E.2d 877, 879 (1995). For reasons that follow, we hold that the superior court lacks subject matter jurisdiction over defendant in this case and that the motion to dismiss must therefore be allowed.

Jurisdiction in juvenile cases is governed by N.C.G.S. § 7A-523(a), which provides: "The [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent . . . . For purposes of determining jurisdiction, the age of the juvenile . . . at the time of the alleged offense . . . governs." N.C.G.S. § 7A-523(a) (1995). A juvenile is defined as an unmarried, unemancipated civilian (*i.e.*, not a member of the armed forces) who has not reached his or her eighteenth birthday. N.C.G.S. § 7A-517(20) (1995).

Section 7A-523(a) was most recently interpreted in *State v. Lundberg*, 104 N.C. App. 543, 410 S.E.2d 216 (1991), upon which the Court of Appeals relied. In *Lundberg*, the defendant was indicted when he was twenty-three years old for offenses committed when he was thirteen and fifteen. The State attempted to prosecute him on both offenses in superior court. The trial court granted the defendant's motion to quash based upon the superior court's lack of jurisdiction over the defendant at the time of commission of the crimes.

The Court of Appeals reversed, holding that the defendant could be tried as an adult in superior court. It stated that the case turned not upon the defendant's age at the time of the crime, but upon whether he was entitled to the continued protection of the Juvenile Code. *Id.* at 545, 410 S.E.2d at 217. It concluded that although the defendant was under eighteen when the alleged offenses occurred, he was no longer a "juvenile" and thus not entitled to the insulation the Code afforded. *Id.* The court relied upon *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982), where this Court held that an eighteen-year-old defendant could be indicted and tried as an adult for felony offenses committed when he was fifteen.

Defendant here argues that *Lundberg* was wrongly decided in that N.C.G.S. § 7A-523(a) explicitly mandates that age at the time the offense is committed governs jurisdiction. We agree.

Statutory interpretation properly begins with an examination of the plain words of a statute. *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 688 (1988). N.C.G.S. § 7A-523(a) is clear. For purposes of determining subject matter jurisdiction over a juvenile, age at the time of the alleged offense governs. Defendant here was either twelve or thirteen when he allegedly committed the offense charged. Therefore, applying the plain language of N.C.G.S. § 7A-523(a), we hold that the district court had exclusive, original jurisdiction.

It is further apparent that the district court no longer has jurisdiction. Once that court obtains jurisdiction over a juvenile, its jurisdiction continues until the court by order terminates it or until the juvenile reaches eighteen. N.C.G.S. § 7A-524 (1995); *Stedman*, 305 N.C. at 98, 286 S.E.2d at 531. Here, defendant turned eighteen on 26 October 1994, while this case was pending in the Court of Appeals. On that date, the district court's jurisdiction automatically terminated. *See In re Doe*, 329 N.C. 743, 748 n.7, 407 S.E.2d 798, 801 n.7 (1991) (this Court's decision as applied to juvenile moot due to fact juvenile had already turned eighteen).

It is equally clear that the superior court does not have jurisdiction. Pursuant to N.C.G.S. § 7A-608 as in effect at the time of defendant's alleged offense,

> [t]he [district] court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 14 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult.

N.C.G.S. § 7A-608 (1989) (recently amended to apply to juveniles thirteen or older for acts committed on or after 1 May 1994, Act of Mar. 26, 1994, ch. 22, secs. 25, 30, 1993 N.C. Sess. Laws 62, 75, 76). The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure this statute prescribes. Contrary to the Court of Appeals' opinion and the State's arguments, the superior court cannot obtain jurisdiction by the mere passage of time nor can the mere passage of time transform a juvenile offense into an adult felony. A juvenile offender does not "age out" of district court jurisdiction and by default become subject to superior court jurisdiction upon turning eighteen. Because the district court never actually exercised jurisdiction here, that court could not and did not properly transfer the case to the superior court. Therefore, the superior court lacks subject matter jurisdiction.

This interpretation both conforms to the plain language of these statutes and accords with legislative intent. In the Juvenile Code, the General Assembly enacted procedural protections for juvenile offenders with the aim that delinquent children might be rehabilitated and reformed and become useful, law-abiding citizens. *In re Whichard*, 8 N.C. App. 154, 161, 174 S.E.2d 281, 285, *appeal dismissed*, 276 N.C. 727 (1970), *cert. denied*, 403 U.S. 940, 29 L. Ed. 2d 719 (1971). These safeguards evince conceptual distinctions between the purpose of juvenile proceedings and that of adult criminal prosecutions. Further, had the legislature intended that the time of institution of proceedings should govern jurisdiction, the 1994 amendment lowering the age at which juveniles may be transferred to superior court for trial as adults would have been superfluous. As Judge Johnson notes in his concurrence in the Court of Appeals, it is logical to assume that the General Assembly intended that juveniles thirteen and younger be dealt with solely at the district court level and not, under any circumstances or at any age, be tried in superior court for offenses committed before the age of thirteen. *Dellinger*, 118 N.C. App. at 532-34, 455 S.E.2d at 879-80.

For the reasons stated, we reverse the Court of Appeals and remand to that court for further remand to the Superior Court,

Mecklenburg County, for entry of an order dismissing the case for lack of subject matter jurisdiction. To the extent that *Lundberg* and *Stedman* conflict with this holding, they are overruled.

REVERSED AND REMANDED.

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JOHN N. BUNCH, JR., PETITIONER v. NORTH CAROLINA CODE OFFICIALS QUALIFICATIONS BOARD, RESPONDENT

No. 304PA95

(Filed 4 April 1996)

**Building Codes and Regulations § 24 (NCI4th)— building inspector—gross negligence—revocation of certificates**

The Code Officials Qualifications Board had statutory authority to revoke a "standard certificate" and a "limited certificate" issued to a county building inspector where the Board determined that the inspector was guilty of "gross negligence and gross incompetence" in failing to detect plainly visible building code violations in the construction of a house. There is no statutory authority allowing various levels or classes of work, such as building, electrical, mechanical and plumbing, to be referenced as part of the certificates issued, and the Court of Appeals erred in concluding that the Board erred in revoking the building inspector's mechanical and plumbing certificates. N.C.G.S. § 143-151.17(a) and (b).

**Am Jur 2d, Buildings § 10.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 293, 458 S.E.2d 248 (1995), reversing in part and affirming in part an order entered 4 April 1994 by Watts, J., in Superior Court, Chowan County, reversing, vacating and setting aside an order of the North Carolina Code Officials Qualifications Board. Heard in the Supreme Court 13 February 1996.

*No petitioner-appellee's brief filed.*

*Michael F. Easley, Attorney General, by W. Wallace Finlator, Jr., Assistant Attorney General, for respondent-appellant.*

ORR, Justice.

This case arises out of a complaint filed by homeowner Gordon L. Stagaard with the North Carolina Code Officials Qualifications Board ("Board"). Stagaard alleged that Chowan County Building Inspector John Bunch, Jr., violated 11 NCAC 8 .0801(5) by affixing his signature to a report of inspection concerning Stagaard's house located in Edenton, North Carolina, when Bunch had in fact neither made an inspection nor had one made under his direction. Stagaard also alleged that Bunch was "guilty of willful misconduct, gross negligence, or gross incompetence" in failing to detect Uniform Residential Building Code ("Code") violations in the construction of the Stagaard house and thereby violated 11 NCAC 8 .0801(6).

The complaint to the Board led to an on-site investigation being performed by a certified Code-enforcement official of the engineering division of the North Carolina Department of Insurance. The official determined that numerous violations were plainly visible and should have been discovered by an inspector exercising ordinary care and prudence. Following a hearing on 20 October 1992, the Board issued an order on 16 November 1992, stating that Bunch's failure to discover the Code violations constituted "gross negligence and gross incompetence." N.C.G.S. § 143-151.17 provides:

> (a) The Board shall have the power to suspend, revoke or refuse to grant any certificate issued under the provisions of this Article to any person who:
>
> (5) Has affixed his signature to a report of inspection or other instrument of service if no inspection has been made by him or under his immediate and responsible direction; or,
>
> (6) Has been guilty of willful misconduct, gross negligence or gross incompetence.

N.C.G.S. § 143-151.17(a)(5)-(6) (1993). Following that authority, the Board revoked "all Building, Electrical, Mechanical, and Plumbing Standard, Probationary, and Limited Inspection Certificates issued to John N. Bunch, Jr." On 24 November 1992, the Board issued an amended order incorporating the 16 November 1992 order by reference and correcting a finding of fact which erroneously denoted the Chowan County Inspection Department as being the Cleveland County Inspection Department.

On 1 December 1992, Bunch filed a petition in Superior Court, Chowan County, for judicial review of the Board's order. The matter was heard before Judge Thomas S. Watts at the 11 October 1993 Civil Session of Superior Court, Chowan County and on 5 April 1994, Judge Watts entered an order reversing, vacating, and setting aside the Board's 16 November 1992 order as amended. On 2 May 1994, the Board gave notice of appeal to the North Carolina Court of Appeals.

On 20 June 1995, the Court of Appeals held *inter alia* that although evidence of Bunch's gross negligence and gross incompetence rendered the revocation of Bunch's building and electrical certificates proper, the Board lacked evidence to support its findings and conclusions pertaining to the revocation of Bunch's mechanical and plumbing certificates. *Bunch v. N.C. Code Off'ls Qualifications Bd.*, 119 N.C. App. 293, 458 S.E.2d 248 (1995).

The sole issue thus presented is whether the Court of Appeals erred in concluding that the Board erred in revoking Bunch's mechanical and plumbing certificates. While the Court of Appeals, the trial judge, and the Board all frame the issue in this case in terms of specific certificates—that is, building, electrical, mechanical, and plumbing—we find no statutory basis for such distinctions. N.C.G.S. § 143-151.13 sets forth only three types of certificates to be issued:

> No person may engage in Code enforcement pursuant to this Article unless he possesses one of the following types of certificates, currently valid, issued by the Board attesting to his qualifications to hold such position: (i) a standard certificate, (ii) a limited certificate provided for in subsection (c); or (iii) a probationary certificate provided for in subsection (d). To obtain a standard certificate, a person must pass an examination, as prescribed by the Board, which is based on the North Carolina State Building Code and administrative procedures required to enforce the Code. The Board shall issue a standard certificate of qualification to each person who successfully completes the examination authorizing the person named therein to practice as a qualified Code-enforcement official in North Carolina. The certificate of qualification shall bear the signatures of the chairman and secretary of the Board.

N.C.G.S. § 143-151.13(a) (1991).

We note, however, that N.C.G.S. § 143-151.13(b) does require the Board to "establish appropriate performance levels, including desig-

nation of territory and type and size of buildings and structures, and classes of qualified Code-enforcement officials." Although the record fails to disclose any information pertaining to performance levels or classes referenced in N.C.G.S. § 143-151.13(b) and contains no copies of any specific certificates(s) held by Bunch, we conclude that our decision can be reached without such additional information. A "Preliminary Investigation Report" submitted as an exhibit provided that "[i]n April, 1987, [Bunch] was issued the following Standard Inspection certificates: Level I Building, Mechanical, and Plumbing. He was issued a Limited Inspection Certificate valid for building, electrical, mechanical, and plumbing inspections. The Limited Certificate is valid for inspections of any size buildings."

Bunch was issued "a standard certificate" and "a limited certificate" allowing him to "practice as a qualified Code-enforcement official in North Carolina" pursuant to statutory authority. N.C.G.S. § 143-151.17(b) allows "[t]he Board [to] suspend or revoke the certification of any qualified Code-enforcement official . . . whom it finds to have been guilty of one or more of the actions set out in subsection (a) as grounds for disciplinary action."

The Board, having determined that Bunch was guilty of "gross negligence and gross incompetence," was completely within its statutory authority to revoke the "standard certificate" and "limited certificate" issued to him. To the extent that various levels or classes of work such as building, electrical, mechanical, and plumbing are referenced as part of the certificates issued, we find no statutory authority to allow the revocation of separate selected certificates dealing with those specific levels or classes of work.

The "standard certificate" and the "limited certificate" issued to Bunch are all that the statute authorizes to be issued and thus all that are subject to revocation. Therefore, we conclude that the Court of Appeals erred in its decision to the extent that it concluded that the Board erred in revoking Bunch's mechanical and plumbing certificates.

This case is remanded to the Court of Appeals for further remand to the Superior Court for reinstatement of the Board's order revoking Bunch's certificates authorizing him to serve as a North Carolina Code-enforcement official.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

STATE OF NORTH CAROLINA v. DEANO DONDAY FLOYD

No. 390A94

(Filed 4 April 1996)

**1. Jury § 260 (NCI4th)— peremptory challenges—racially neutral reasons**

The trial court did not err by finding that the prosecutor in a trial for armed robberies and aggravated assault did not exercise peremptory challenges in a racially discriminatory manner in violation of the Equal Protection Clause of the U.S. Constitution or Article I, Sections 19 and 26 of the N.C. Constitution where the prosecutor peremptorily challenged four black potential jurors and one Hispanic potential juror, and the prosecutor articulated the following racially neutral reasons for peremptorily challenging those five potential jurors: the first juror was excused because she stated her duty was just to be fair when asked what her duty would be if the State proved guilt beyond a reasonable doubt, and she had a son who had been convicted of breaking or entering; the second juror was excused because he had been charged with three assaults and communicating a threat, and he had a relative who was involved in an armed robbery similar to the robberies in this case; the third juror was excused because her responses indicated she was headstrong and the prosecutor had trouble making eye contact with her because of her tinted glasses; the fourth juror was excused because she had been involved in an incident involving drugs and had been charged with writing bad checks; and the Hispanic juror was excused because he had been charged with driving while impaired and had not been promoted in the military as he should have been.

**Am Jur 2d, Jury § 244.**

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

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

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

**2. Jury § 259 (NCI4th)— peremptory challenges—disparate treatment of jurors—racial discrimination not shown**

Disparate treatment of potential jurors does not necessarily show racial discrimination in the exercise of peremptory challenges.

**Am Jur 2d, Jury § 244.**

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

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

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

**3. Jury § 248 (NCI4th)— peremptory challenges—absence of racial discrimination—findings not required**

The trial court was not required to make findings of facts in its order overruling defendant's objections to the prosecutor's peremptory challenges of black and Hispanic potential jurors where there was no material conflict in the evidence.

**Am Jur 2d, Jury § 244.**

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

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

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

**4. Jury § 240 (NCI4th)— peremptory challenge—criminal record as justification**

It was not error for the State to use the criminal record of a potential juror as a justification for peremptorily challenging him when the juror was not questioned about the record.

**Am Jur 2d, Jury § 244.**

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

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

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

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 115 N.C. App. 412, 445 S.E.2d 54 (1994), finding no error in a trial that resulted in convictions and sentences imposed by Britt (Joe Freeman), J., at the 8 February 1993 mixed session of Superior Court, Cumberland County. Heard in the Supreme Court 13 October 1995.

The defendant was tried on three counts of armed robbery and one count of assault with a deadly weapon with intent to kill inflicting serious injury. He was convicted of all charges and received sentences totaling sixty-five years in prison. The Court of Appeals found no error, with one judge dissenting.

The defendant appealed to this Court.

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

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

*Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Anita S. Hodgkiss for NAACP, NAACP Legal Defense Fund, North Carolina Association of Black Lawyers, ACLU of North Carolina Legal Foundation, and North Carolina Academy of Trial Lawyers, amici curiae.*

WEBB, Justice.

**[1]** The defendant in this case challenges the selection of the jury for what he contends was a violation of his right to the equal protection of the laws. He says this is so because the prosecuting attorney dis-

criminated against him, a black person, in the exercise of peremptory challenges to prospective jurors.

The question raised by the defendant's assignment of error is treated in *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), and *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). These cases establish that the Equal Protection Clause forbids a party from challenging potential jurors solely on account of their race. When a defendant objects to a peremptory challenge on the ground that it is racially discriminatory, the court must make a three-step analysis. First, it must determine if the defendant has established a *prima facie* case of racial discrimination. One way of establishing a *prima facie* case is by reviewing the pattern of strikes against members of a race in the case to be tried.

If the defendant establishes a *prima facie* case of racial discrimination, the second step of the analysis requires the prosecutor to articulate some racially neutral reason for exercising the strike. The reason does not have to be plausible. *Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed racially neutral.

If the prosecutor articulates a racially neutral reason for a peremptory strike, the court must then take the third step in the analysis, which is to determine whether the defendant has established purposeful discrimination. Whether the prosecutor intended to discriminate against the members of a race is a question of fact, the trial court's ruling on which must be accorded great deference by a reviewing court. This is so because often there will be little evidence except the statement of the prosecutor, and the demeanor of the prosecutor can be the determining factor. The presiding judge is best able to determine the credibility of the prosecutor. Disparate treatment of potential jurors should be considered, but it is not determinative.

The State exercised five of its six peremptory challenges to excuse four potential black jurors and one potential juror who identified himself as an Hispanic. The jury was composed of eleven white persons and one American Indian. The court held that the defendant had made a *prima facie* case of racial discrimination.

The prosecutor articulated his reasons for excusing the potential jurors. He said that a Ms. Kinlaw was excused because when he asked

her, "Should the state prove guilt beyond a reasonable doubt, do you understand what your duty would be as a juror?" she said, "Yes, just to be fair about the hearing." The other jurors, when asked this question, said their duty would be to find the defendant guilty. The prosecutor said he did not think Ms. Kinlaw understood her duty as a juror. Ms. Kinlaw also had a son who had been convicted of breaking or entering, and the prosecutor said this might keep her from being a good juror.

The prosecutor then stated that he excused a Mr. Dixon because he had been charged with three separate assaults and with communicating a threat. In addition, he had a relative involved in an armed robbery similar to the robberies in this case.

The prosecutor said he excused a Ms. Hawkins because she appeared very headstrong. He based this on her description of her job, which made him think she enjoyed telling people "where to go and where not to go." He also relied, for this conclusion, on her statement that she told her daughter to quit her job because she was not being paid enough. He also said Ms. Hawkins wore tinted glasses, and he had trouble making eye contact with her.

As to a Ms. Spencer, the prosecutor said that he challenged her because she had been in an incident that involved drugs and that on at least eight occasions, she had been charged with writing bad checks.

A potential juror, Mr. Pomare, who identified himself as an Hispanic, was challenged by the prosecutor because the prosecutor said that Mr. Pomare had been charged with driving while impaired. The prosecutor also said Mr. Pomare had not been promoted in the military as he should have been.

The court found that the prosecutor had offered racially neutral explanations for each of the peremptory challenges and accepted them as clear and legitimate explanations. There was no discriminatory intent inherent in the prosecutor's explanations. Unless we are convinced that this finding of fact is clearly erroneous, we cannot disturb it. *Hernandez*, 500 U.S. at 374, 114 L. Ed. 2d at 416. We cannot say it is clearly erroneous.

**[2]** The defendant argues that the disparate treatment between potential white and black jurors shows a discriminatory intent by the prosecutor. He says potential white jurors who had the same qualities as challenged potential black jurors were not challenged. In *State v.*

*Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990), we rejected the argument that disparate treatment of potential jurors is necessarily dispositive. In that case, we said many factors govern the decision to accept or reject a potential juror. A quality which might cause the rejection of one person as a juror does not necessarily cause the rejection of another person as a juror, because the second person may have other qualities which would cause him or her to be a good juror. *See also State v. Jackson*, 322 N.C. 251, 256-57, 368 S.E.2d 838, 841 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989).

**[3]** The defendant also takes issue with the court's failure to find facts in its order overruling his objection to the challenges to the potential jurors. Where there is no material conflict in the evidence, which is what we have in this case, no findings of fact are necessary. *Porter*, 326 N.C. at 502, 391 S.E.2d at 153.

**[4]** The defendant also contends it was error for the State to use a criminal record of a potential juror as a justification for challenging him when the potential juror was not questioned about it. We held it was permissible to do so in *State v. Kandies*, 342 N.C. 419, 467 S.E.2d 67 (1996).

The defendant says that in addition to a violation of the Fourteenth Amendment to the Constitution of the United States, the peremptory challenges of the potential black jurors in this case violate Article I, Sections 19 and 26 of the North Carolina Constitution. In *Jackson v. Housing Auth. of High Point*, 321 N.C. 584, 364 S.E.2d 416 (1988), we held that Article I, Section 26 of the North Carolina Constitution forbids the exercise of peremptory challenges based on race. *Jackson* does not promulgate a test to determine whether such a challenge has been made. We see no reason why the test under our state Constitution should be different from the test under the Constitution of the United States. We hold that the peremptory challenges exercised by the State in this case did not violate the North Carolina Constitution.

The defendant's assignment of error is overruled.

AFFIRMED.

STATE OF NORTH CAROLINA v. MITCHELL GIBBARD KALEY

No. 38A95

(Filed 4 April 1996)

**1. Homicide § 583 (NCI4th)— involuntary manslaughter—acting in concert—victim outside car reaching in—holding onto victim and driving away**

The trial court did not err by charging the jury on acting in concert in a second-degree murder trial which resulted in an involuntary manslaughter conviction where defendant went with another man to buy crack cocaine with the other man driving and defendant in the passenger seat; a witness testified that the automobile pulled to the curb; the victim went to the vehicle on the passenger side and leaned in; defendant held the victim by the hand and the automobile picked up speed; the victim ran or was dragged until she fell and the automobile ran over her; the victim died as a result of being hit by the automobile; and the Court of Appeals held that it was error for the court to charge the jury on acting in concert because there was no evidence the two men were acting together pursuant to a common plan which caused the victim's death. Involuntary manslaughter can be based on culpable negligence, which in this case was allowing the automobile to move while the victim was being held, there was evidence from which the jury could find that defendant held the victim while the driver drove away, and there was evidence in the circumstances in which the incident occurred that the two men were engaged in a common plan.

**Am Jur 2d, Homicide §§ 29, 30.**

**Who other than actor is liable for manslaughter. 95 ALR2d 175.**

**2. Appeal and Error § 22 (NCI4th)— appeal by State to Supreme Court on dissent—limits of argument**

In an appeal by the State to the Supreme Court based on a dissent in the Court of Appeals which concluded that the defendant acted with another person to purchase crack cocaine and that this was evidence of acting in concert which caused the resulting death of the victim, who was leaning into the car as it drove away, the State is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge. The dissent was

based on the premise that there was evidence to support a charge of acting in concert and the State can argue in the Supreme Court any evidence that supports this premise.

**Am Jur 2d, Appellate Review § 697.**

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 117 N.C. App. 420, 451 S.E.2d 6 (1994), finding error in a trial that resulted in a conviction of the defendant with a sentence imposed by Wright, J., on 16 April 1993 in Superior Court, Wayne County. Heard in the Supreme Court 16 November 1995.

The defendant was tried for second-degree murder. The evidence in the light most favorable to the State showed that on 6 June 1990, the defendant went with another man to an area of Goldsboro for the purpose of buying crack cocaine. The other person was driving an automobile, and the defendant occupied the front passenger seat.

A witness testified that she saw the automobile in which the defendant was riding pull over to the curb and stop. She saw someone in the automobile motion to Evelyn Parks, who went to the vehicle on the passenger side. She saw Ms. Parks lean into the automobile and saw it start moving while the defendant held Ms. Parks by the hand. The automobile picked up speed. Ms. Parks was running or was dragged beside the vehicle until she fell and the automobile ran over her. The witness did not "know if they turned her loose or what but she fell." Evelyn Parks died as a result of being hit by the automobile.

An investigating officer said the defendant made the following statement to him:

> On May the 6, 1992, Saturday, I was with Clark Sharp. We had been together that day since about 10:30 a.m. We had both been drinking. I was pretty well drunk. Clark was driving his white Pontiac. During this time I was with him and Clark and I wanted to get some crack cocaine. We went to his house and got twenty dollars from his wife. Clark drove down to the Block, James and Pine. When we got to James and Pine Street, Clark stopped the car on Pine Street. Clark had the twenty dollar bill in his hand. My window was down. A black female came up to the car. She came up to my side, to my side. My window was down. She kind of dove in the car. The top part of her body was in the car. Her hands touched me as she was trying to get the money. I pushed her

hands away from me and Clark took off. Clark gave the car right much gas. The door post caught her up under the arm on the side causing her to spin, turn like out of the car. She then fell underneath the right passenger wheel. I heard a thump and I felt the car raise up. I looked back and saw her on the ground. I told Clark to stop but he kept going because there was so many black people around.

The jury found the defendant guilty of involuntary manslaughter, and Judge Wright sentenced him to seven years in prison. The Court of Appeals, with one judge dissenting, awarded the defendant a new trial. The State appealed to this Court.

*Michael F. Easley, Attorney General, by Ranee S. Sandy, and H. Alan Pell, Assistant Attorneys General, for the State-appellant.*

*Glenn A. Barfield for defendant-appellee.*

WEBB, Justice.

**[1]** The defendant contends and the Court of Appeals held that it was error for the court to charge the jury on acting in concert because there was no evidence the defendant and Sharp were acting together pursuant to a common plan which caused the death of Ms. Parks. We note at the outset that it is not necessary for a person to intend to kill in order to be guilty of involuntary manslaughter. Involuntary manslaughter can be based on culpable negligence. *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977). If two persons act together in a culpably negligent way and the culpable negligence proximately causes the death of a person, the two persons would be guilty of involuntary manslaughter. *State v. Robinson*, 83 N.C. App. 146, 349 S.E.2d 317 (1986).

The question posed by this appeal is whether there is sufficient evidence from which the jury could conclude the defendant acted together with the driver of the automobile in a culpably negligent way which proximately caused the death of Ms. Parks. We believe there is such evidence. We start with the premise that a person intends the consequences of his acts.

The culpable negligence in this case was allowing the automobile to move while Ms. Parks was being held. There was evidence from which the jury could find the defendant held Ms. Parks while the driver of the automobile drove away from the curb. Each of the two men did something which caused the death.

The evidence from which the jury could conclude that the men were engaged in a common plan is found from the circumstances in which the incident occurred. The two men had gone to the neighborhood to buy crack cocaine. When Ms. Parks approached the vehicle which they occupied, it is reasonable to conclude it was to sell them cocaine. When she reached into the automobile in an attempt to get the money, it is reasonable to conclude she had not been paid for the crack cocaine. When the two men drove away without paying for the cocaine, it can be concluded that they planned to drive away without paying for the drugs. To drive away when a person is standing next to the automobile in such close proximity that the automobile may hit or catch and drag her can be found to be culpable negligence. This evidence supported the court's charge on involuntary manslaughter.

**[2]** The defendant argues that Rule 16(b) of the North Carolina Rules of Appellate Procedure limits the State's right of appeal to the matters which are the basis of the dissent in the Court of Appeals. The dissent says that "[d]eath is a natural and sometimes probable consequence of an attempt to purchase drugs on the street." *State v. Kaley*, 117 N.C. App. 420, 423, 451 S.E.2d 6, 9 (1994). The dissent concludes that the defendant acted with another person to purchase crack cocaine and that this was evidence of acting in concert which caused the resulting death. The defendant contends the State is limited on appeal to arguing that the attempted purchase of the cocaine was the concerted action which would support the charge.

We do not believe Rule 16(b) should be interpreted so narrowly. The dissent was based on the premise that there was evidence to support a charge of acting in concert. The State can argue in this Court any evidence that supports this premise. It is not limited to arguing the reasons in the dissent as to why there was evidence to support the charge.

We reverse the Court of Appeals on the issue upon which it decided the case. The defendant brought forward two assignments of error which the Court of Appeals did not reach in light of its disposition of the matter. We remand the case to the Court of Appeals for the consideration of these two assignments of error.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. WILLIAM BRITT REEVES

No. 350A95

(Filed 4 April 1996)

1. **Criminal Law § 113 (NCI4th)— statement by defendant to witness—not disclosed—open file policy—admissible**

The trial court did not err in a noncapital first-degree murder prosecution by admitting a statement by defendant that if he ever got out he would go after the victim's parents where defendant argued that trial counsel was not made aware of the incriminating statement that defendant made to a witness, despite the open file policy, and that to allow the prosecutor to introduce this statement circumvents the intent of the discovery statute. That argument was rejected in *State v. Abbot*, 320 N.C. 475, and defendant has not offered any compelling reason to abandon prior precedent.

**Am Jur 2d, Depositions and Discovery §§ 427, 431.**

**Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses—modern cases. 33 ALR4th 301.**

2. **Evidence and Witnesses § 222 (NCI4th)— flight—evidence sufficient**

The trial court did not err in a noncapital first-degree murder prosecution by giving an instruction on flight where there was evidence tending to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away.

**Am Jur 2d, Evidence § 532; Trial §§ 1333-1335.**

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27 from a judgment imposing a sentence of life imprisonment entered by Wood, J., on 4 April 1995 in Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 February 1996

*Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.*

*Warren Sparrow for defendant-appellant.*

MITCHELL, Chief Justice.

Defendant, William Britt Reeves, was indicted for the first-degree murder of Lorenzo Sorento France. He was tried noncapitally, found guilty as charged, and sentenced to a mandatory term of life imprisonment.

Evidence presented at trial tended to show that on the evening of 26 May 1994, defendant, Teron Tate, Antonio Gaither, and "Apache" Byrd visited the apartment of Denise Martin to watch a film. Martin testified that defendant had a handgun with him at the time. When the film showed a man being shot, defendant brandished his gun and said, "I want to lay a mother f—— just like that." Later that evening, defendant went with Tate, Gaither, and Byrd to the house of Tommonoca Smith. While there, defendant learned that Lorenzo France, also known as "Man," was involved with Latasha Brannon, a woman with whom defendant had been involved.

Shortly thereafter, defendant and the three other men went to Brannon's apartment. France was sitting on the front porch of the apartment with his head down as if he were sleepy. After asking France if he was "Man," defendant hit France with the gun two or three times, grabbed him by the back of his jacket, and continued to hit him with the gun until France fell down. When France fell, defendant shot him in the left side of the back. France then ran behind the apartment building, where he was found dead a short time thereafter. An autopsy showed that the bullet had passed through France's stomach, spleen, liver, and heart. After shooting France, defendant got in a car with Tate, Gaither, and Byrd and went to a bowling alley, where the group ate and played video games. Defendant was arrested the next morning at Martin's apartment.

**[1]** Defendant first assigns error to the trial court's failure to exclude statements made by defendant during a telephone conversation with Latasha Brannon. He argues that Brannon's testimony that defendant said that "if [defendant] ever got out he would go after the [murder victim's] parents" should have been excluded because (1) defendant had no prior notice of the State's intention to use the statement, and (2) the statement was unfairly prejudicial.

*State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987), involved a situation similar to the case *sub judice*. In *Abbott*, the State did not disclose a witness's oral statement that had not been reduced to writing. Although he did not make a motion for discovery, the defendant relied upon the "open-file" policy of the district attorney, arguing that the open-file policy was implicitly founded on a standing motion to disclose all discoverable material. This Court rejected the defendant's argument, holding that a prosecutor's open-file policy does not grant a defendant a standing motion for discovery. *Id.* at 482, 358 S.E.2d at 370. A defendant is not entitled to discovery of materials in the State's possession unless he makes a motion to compel discovery. *Id.*

In this case, defendant makes the same argument that we rejected in *Abbott*. He contends that, despite the open-file policy, trial counsel was not made aware of an incriminating statement that defendant made to a witness and that to allow the prosecutor to introduce this statement circumvents the intent of the discovery statute. Defendant has not offered any compelling reason for this Court to abandon its prior precedent. Accordingly, this assignment of error is overruled.

**[2]** Defendant next assigns error to the trial court's action in instructing the jury on flight. For the trial court to instruct a jury on flight, there must be "some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990). In this case, there was evidence tending to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away. This is sufficient evidence of flight to warrant the instruction. This assignment of error is without merit.

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

NO ERROR.

SAMMY ROGER JOHNSON, JR., PLAINTIFF v. LISA McGHEE JOHNSON (MEEHAN), DEFENDANT AND LISA McGHEE JOHNSON (MEEHAN), PLAINTIFF v. THOMAS C. MEEHAN, DEFENDANT

No. 427A95

(Filed 4 April 1996)

**Evidence and Witnesses § 1920 (NCI4th); Illegitimate Children § 7 (NCI4th)— blood grouping test—alleged natural father—standing to compel**

The language of N.C.G.S. § 8-50.1 in effect when this action originated does not confer standing upon an alleged natural father to compel a presumed father to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father and the mother.

**Am Jur 2d, Illegitimate Children § 27.**

**Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.**

**Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born. 84 ALR4th 655.**

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 1, 461 S.E.2d 369 (1995), affirming an order entered by Lanier (Franklin F.), J., on 19 January 1994 in District Court, Johnston County. Heard in the Supreme Court 14 March 1996.

*Mast, Morris, Schulz & Mast, P.A., by George B. Mast, Bradley N. Schulz, and Christi C. Stem, for plaintiff-appellant Sammy Johnson.*

*Armstrong & Armstrong, P.A., by Marcia H. Armstrong; and Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee Thomas C. Meehan.*

PER CURIAM.

Judge Walker's dissenting opinion in the Court of Appeals correctly poses the "narrow" issue presented:

> Does the language of N.C.[G.S.] § 8-50.1 in effect when this action originated confer standing upon an alleged natural parent such as

Mr. Meehan to compel a presumed father such as Mr. Johnson to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father to the natural mother?

*Johnson v. Johnson*, 120 N.C. App. 1, 14, 461 S.E.2d 369, 376 (1995) (Walker, J., dissenting). We agree with the dissenting opinion that the question should be answered in the negative.

Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court for remand to the District Court, Johnston County, for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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RALPH HOWARD LEE v. ELIZABETH C. LYERLY AND NORTH CAROLINA VETERINARY MEDICAL ASSOCIATION

No. 457A95

(Filed 4 April 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 250, 461 S.E.2d 775 (1995), affirming an order granting summary judgment to defendants entered by Butterfield, J., on 8 August 1994 in Superior Court, Greene County. Heard in the Supreme Court 13 March 1996.

*Wooten & Coley, by William C. Coley III, for plaintiff-appellant.*

*Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., for defendant-appellees.*

PER CURIAM.

For the reasons stated in the dissenting opinion of Judge John Martin, the decision of the Court of Appeals is reversed. The cause is remanded to that court for further remand to the Superior Court, Greene County, for trial.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DAVID LOUIS ODUM

No. 368A95

(Filed 4 April 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. 676, 459 S.E.2d 826 (1995), affirming an order entered by Farmer, J., on 13 December 1993 in Superior Court, Wake County, denying defendant's motion to suppress certain evidence. Heard in the Supreme Court 13 March 1996.

*Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.*

*Thomasin Elizabeth Hughes for defendant-appellant.*

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Greene, the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court, Wake County, for a trial at which the seized evidence in question is suppressed.

REVERSED AND REMANDED.

NORTH CAROLINA COUNCIL OF CHURCHES; AND JIMMY CREECH v. STATE OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF CORRECTION; AND FRANKLIN FREEMAN, IN HIS OFFICIAL CAPACITY

No. 433A95

(Filed 4 April 1996)

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 84, 461 S.E.2d 354 (1995), affirming an order entered by Stephens (Donald W.), J., on 11 August 1993, in Superior Court, Wake County. Heard in the Supreme Court 14 March 1996.

*Patterson, Harkavy & Lawrence, by Burton Craige, for plaintiff-appellants.*

*Michael F. Easley, Attorney General, by W. Dale Talbert and Jacob L. Safron, Special Deputy Attorneys General, and William McBlief, Associate Attorney General, for defendant-appellees.*

PER CURIAM.

AFFIRMED.

SANTOS ARROYO v. SCOTTIE'S PROFESSIONAL WINDOW CLEANING

No. 403PA95

(Filed 4 April 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 154, 461 S.E.2d 13 (1995), reversing an order entered by Hudson, J., on 10 June 1994 in Superior Court, Wake County. Heard in the Supreme Court 12 March 1996.

*Law Offices of Thomas J. White, III, by Thomas J. White, III, and John M. McCabe, for plaintiff-appellee.*

*Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and David K. Liggett, for defendant-appellant.*

*Patterson, Harkavy & Lawrence, by Burton Craige and Donnell Van Noppen III, on behalf of North Carolina Academy of Trial Lawyers, amicus curiae.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

**RUSHER v. TOMLINSON**

[343 N.C. 119 (1996)]

E. ALAN RUSHER AND H & R TOWING, INC., PETITIONERS v. EUGENE B. TOMLINSON, CHAIRMAN, NORTH CAROLINA COASTAL RESOURCES COMMISSION AND NORTH CAROLINA COASTAL RESOURCES COMMISSION, RESPONDENTS, AND ATLANTIC DIVING AND MARINE, INC., INTERVENOR-RESPONDENT

No. 341A95

(Filed 4 April 1995)

Appeal by petitioners 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. 458, 459 S.E.2d 285 (1995), affirming an order entered by Gore, J., on 12 May 1994, in Superior Court, Brunswick County. Heard in the Supreme Court 13 March 1996.

*Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Alan D. McInnes and Michael Murchison, for petitioner-appellants.*

*Michael F. Easley, Attorney General, by Robin W. Smith, Assistant Attorney General, for respondent-appellees.*

*Clark, Newton, Hinson & McLean, L.L.P., by Reid G. Hinson, for intervenor-respondent-appellee.*

PER CURIAM.

AFFIRMED.

**STATE v. BRAXTON**

[343 N.C. 120 (1996)]

| | | |
|---|---|---|
| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| MICHAEL JEROME BRAXTON | ) | |

No. 551A94

(Filed 4 April 1996)

The record on appeal regarding defendant's first assignment of error reflects conflicting evidence as to: (1) whether defendant was custodially interrogated in the police car by Detective Sanders without being advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and (2) whether defendant invoked his right to counsel in the police car thereby rendering his subsequent waiver of rights at the police station during his interview with Detectives Bissette and Lyles involuntary unless defendant reinitiated conversation pursuant to *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981).

The superior court's order contains no findings of fact resolving these conflicts in the evidence. We, therefore, remand to the superior court for a hearing on this matter and for additional findings of fact. The additional findings of fact, together with any amended conclusions and the order along with a transcript of the additional evidence, shall be certified to this Court forthwith and shall be treated as an addendum to the record. Copies shall be forwarded to all parties for such further proceedings, if any, in this Court as may then be ordered.

It is so ordered.

REMANDED to the Superior Court, Wake County, for further proceedings consistent with this order.

Done by the Court in Conference this 3rd day of April 1996.

Orr, J.
For the Court

APPALACHIAN POSTER ADVERTISING CO. v. HARRINGTON

No. 407A95

Case below: 120 N.C.App. 72

Petition by appellant for writ of supersedeas allowed 3 April 1996.

C.W.&P. PARTNERSHIP v. PATE

No. 60P96

Case below: 121 N.C.App. 396

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

CARTERET COUNTY v. UNITED CONTRACTORS OF KINSTON

No. 468P95

Case below: 120 N.C.App. 336

Motion by plaintiff to withdraw petition for discretionary review allowed 3 April 1996.

CHILTOSKI v. DRUM

No. 37P96

Case below: 121 N.C.App. 161

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

CONGRESS v. COLLINS & AIKMAN

No. 513P95

Case below: 120 N.C.App. 645

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

EDEN'S GATE, LTD. v. LEEPER

No. 40P96

Case below: 121 N.C.App. 171

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

FULTON CORP. v. FAULKNER

No. 305A93-2

Case below: 110 N.C.App. 493

Motion by plaintiff for order remanding to the trial court denied 20 March 1996.

HALL v. CUMBERLAND COUNTY HOSPITAL SYSTEM

No. 103P96

Case below: 121 N.C.App. 425

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996. Motion by plaintiffs to dismiss petition for discretionary review denied 3 April 1996. Second motion by plaintiffs to dismiss petition for discretionary review denied 3 April 1996. Motion by plaintiffs to treat notice of appeal as a contingent appeal dismissed as moot 3 April 1996.

HOGAN v. CITY OF WINSTON-SALEM

No. 96A96

Case below: 121 N.C.App. 414

Notices of appeal by defendant (substantial constitutional question and dissent) retained 3 April 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 3 April 1996.

JOHNSON v. AMETHYST CORP.

No. 521PA95

Case below: 120 N.C.App. 529

Motion by defendants to withdraw petitions for discretionary review allowed 3 April 1996.

KELLY v. BLACKWELL

No. 98P96

Case below: 121 N.C.App. 621

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

KIRK v. STATE OF N.C. DEPT. OF CORRECTION

No. 551PA95

Case below: 121 N.C.App. 129

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 April 1996.

LEWIS v. NATIONWIDE MUTUAL INS. CO.

No. 559P95

Case below: 120 N.C.App. 883

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

LOWERY v. BARNHILL CONTRACTING CO.

No. 9A96

Case below: 121 N.C.App. 220

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 3 April 1996.

MOBLEY v. VERMONT AMERICAN CORP.

No. 88P96

Case below: 121 N.C.App. 626

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

N.C. DEPT. OF CORRECTION v. HARDING

No. 491PA95-2

Case below: 342 N.C. 658

120 N.C.App 451

Petition by Attorney General for writ of certiorari to review the decision of the Court of Appeals allowed 3 April 1996. The Supreme Court ex mero motu vacates its prior denial of the defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31 and now allows the petition 3 April 1996.

PREMIER FEDERAL CREDIT UNION v. DOUGLAS

No. 80P96

Case below: 121 N.C.App. 341

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

RATLIFFE v. SUN STATE DRYWALL

No. 534P95

Case below: 120 N.C.App. 647

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

RUSHER v. TOMLISON

No. 341A95

Case below: 119 N.C.App. 458

Motion by respondent (Atlantic Diving) to dismiss denied 3 April 1996.

STATE v. BARNES

No. 74PA96

Case below: 121 N.C.App. 220

Petition by Attorney General for writ of supersedeas allowed 3 April 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 April 1996.

STATE v. BLANTON

No. 572P95

Case below: 121 N.C.App. 220

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. COTHRAN

No. 502P95

Case below: 120 N.C.App. 633

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. CROSS

No. 118P96

Case below: 121 N.C.App. 788

Motion by Attorney General for temporary stay allowed 22 March 1996.

STATE v. CRUMMY

No. 512P95

Case below: 120 N.C.App. 647

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 April 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. FLOWERS

No. 67P96

Case below: 121 N.C.App. 299

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 April 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. JACKSON

No. 56P96

Case below: 121 N.C.App. 398

Petition by defendant for writ of supersedeas denied and stay dissolved 3 April 1996. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 April 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. JACKSON

No. 12A96

Case below: Superior Court Buncombe County

Motion by defendant (Jackson) to withdraw death penalty appeal denied 3 April 1996.

STATE v. KALEY

No. 38A95

Case below: 117 N.C.App. 420

Attorney General's motion in the alternative to consider question presented in appellant's brief pursuant to Rule 2 denied 3 April 1996.

STATE v. KSOR

No. 73P96

Case below: 121 N.C.App. 398

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

STATE v. McBRIDE

No. 524PA95

Case below: 120 N.C.App. 623

Notice of appeal by defendant (substantial constitutional question) retained 3 April 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed as to Issue 1, otherwise denied 3 April 1996.

STATE v. MOSBY

No. 553P95

Case below: 120 N.C.App. 648

Petition by defendant (Mosby) Pro Se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 April 1996.

STATE v. ORMOND

No. 536P95

Case below: 120 N.C.App. 648

Petition by defendant for discretionary review pursuant to G.S 7A-31 denied 3 April 1996.

STATE v. SERZAN

No. 548P95

Case below: 119 N.C.App. 557

Petition by defendant (Serzan) Pro Se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 April 1996.

STATE v. WATKINS

No. 509P95

Case below: 120 N.C.App. 804

Attorney General's motion to withdraw temporary stay and writ of supersedeas allowed 3 April 1996.

TWEED v. BRYAN EASLER ENTERPRISES

No. 526P95

Case below: 120 N.C.App. 649

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

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

WATKINS v. WATKINS

No. 487A95

Case below: 120 N.C.App. 475

Notice of appeal filed Pro Se by Kim U. Kim (formerly known as Kim Watkins) pursuant to G.S. 7A-30 (substantial constitutional question) dismissed ex mero motu 3 April 1996.

YOUNG v. YOUNG

No. 101P96

Case below: 121 N.C.App. 399

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 April 1996.

PETITIONS TO REHEAR

DARE COUNTY BD. OF EDUCATION v. SAKARIA

No. 229A95

Case below: 342 N.C. 648

Petition by defendants to rehear pursuant to Rule 31 denied 26 March 1996.

GRIMSLEY v. NELSON

No. 35A95

Case below: 342 N.C. 542

Petition by plaintiff to rehear pursuant to Rule 31 denied 26 March 1996.

STATE OF NORTH CAROLINA v. RAYFORD LEWIS BURKE

No. 181A93

(Filed 10 May 1996)

**1. Evidence and Witnesses § 876 (NCI4th)— capital murder—victim's fear of defendant—statements of defendant to others**

The trial court in a prosecution for first-degree murder did not err by overruling defendant's objections to testimony by a victim witness coordinator and an officer concerning statements made to them by the victim concerning threats made by defendant through the victim's uncle and an intimidating visit made by defendant's brothers to the victim's home. The trial court concluded after a *voir dire* that there was a factual basis for the alleged fear in that the victim was a material witness against defendant in another case involving a shooting death, evidence relating to the victim's mental or emotional state of mind concerning his feelings about defendant was admissible, and the probative value of that evidence outweighed any prejudicial aspects that the statements may have had in regard to defendant, then allowed the State to present the evidence subject to an instruction limiting the purposes for which the testimony could be used. The decision to admit the testimony of these two witnesses is in accord with the precedent of the North Carolina Supreme Court. Since the evidence was competent as a statement of the victim's existing state of mind, it does not matter that it may prove some fact that is irrelevant or for which the evidence is incompetent. In each instance, the court gave a limiting instruction to which defendant did not object. N.C.G.S. § 8C-1, Rule 803(3).

**Am Jur 2d, Witnesses § 1026.**

**Uniform evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.**

**2. Evidence and Witnesses § 875 (NCI4th)— capital murder—visit to victim's house by defendant's brothers—statements by defendant to others—not prejudicial**

There was no prejudicial error in a prosecution for first-degree murder in the admission of testimony from a victim assistance coordinator, and corroborating testimony from an officer,

that the victim had told her that defendant's brothers had visited the victim's house, that his girlfriend was there, and that he was afraid for his girlfriend and himself. Although the testimony was inadmissible because the brothers' state of mind was not relevant and could not be used to show defendant's state of mind, the trial court granted defendant's request for an instruction limiting the purposes for which the evidence could be used, the jury was aware that the victim had testified against defendant on a previous murder charge, and there had been testimony that defendant had gotten into an altercation about the victim's testimony in the prior trial when defendant entered the house.

**Am Jur 2d, Witnesses § 1026.**

**Uniform evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.**

**3. Criminal Law § 480 (NCI4th)— capital murder—conversation overheard by juror—no error**

The trial court did not abuse its discretion in a first-degree murder prosecution by not conducting an inquiry into the precise content and possible impact of an incorrect and prejudicial statement made by outsiders which may have been heard by a juror during the guilt-innocence phase of the trial where the trial court announced that a juror had overheard in the canteen during recess unidentified people say that defendant had been involved in two other murders or two other murder cases. There is no contention that a spectator actually talked to the juror, only that the juror may have inadvertently overheard prejudicial conversation, defendant declined the judge's offer to make an inquiry of the juror in order to determine whether the juror had overheard the conversation, and the judge instituted special measures to insulate the jury from exposure to any casual conversations between spectators.

**Am Jur 2d, Trial §§ 1526, 1562, 1564, 1566.**

**Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-*Parker* cases. 34 ALR4TH 890.**

**4. Evidence and Witnesses § 2898.5 (NCI4th)— capital murder—cross-examination of defendant—details of prior crimes**

There was no error in a first-degree murder prosecution where defendant contended that the court erred in overruling his objection to cross-examination of defendant about the details of two crimes for which defendant had prior convictions. The trial court did not overrule defendant's objection to his client's attempt to explain the circumstances surrounding the first assault, but simply responded, "He may explain his answer if he wishes to do that." Defendant may not obtain a new trial based on his own election to testify about these matters. As to the second assault, defendant failed to object to the cross-examination and, although he argues that an objection would have been futile in view of the trial court's overruling the prior objection, the trial court did not overrule that objection. The prosecutor asked, "Was that self-defense too?" and defendant responded, "I was into it with Mr. Anthony and several other people. Whatever you may want to call it." The trial court did not err in permitting defendant to respond to the prosecutor's question.

**Am Jur 2d, Trial §§ 501, 844, 924.**

**Adequacy of defense counsel's representation of criminal client regarding prior convictions. 14 ALR4th 227.**

**Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding—post-*Luce* cases. 80 ALR4th 1028.**

**5. Evidence and Witnesses § 263 (NCI4th)— capital murder—witness's request for relocation—not admitted to show defendant's violent character**

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to the State's question to its witness about the witness's request for relocation where the testimony was not admitted to show that defendant has such a violent character that he would kill anyone who testified against him, but to explain why the witness initially did not want to testify against defendant and why the witness could have made statements indicating that he could not remember what happened

during the shooting. Furthermore, the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 404.

**Am Jur 2d, Witnesses §§ 739, 935, 986, 991.**

**6. Evidence and Witnesses § 2090 (NCI4th)— capital murder—victim afraid—lay opinion testimony**

The trial court did not err in a prosecution for first-degree murder by admitting testimony from the director at a shelter where the victim had been staying that he had appeared tense or scared at times. Opinion testimony, including lay testimony, is admissible concerning the state of a person's appearance or emotions on a given occasion; here, the testimony described the victim's emotional state during his time in the shelter and was admissible as tending to shed light upon his state of mind at that time. The probative value of the evidence was not substantially outweighed by its unfair prejudice to defendant.

**Am Jur 2d, Wills § 159; Witnesses § 197.**

**Comment note.—Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness. 10 ALR3d 258.**

**7. Evidence and Witnesses § 3091 (NCI4th)— capital murder—impeachment of defense witness—extrinsic evidence**

There was no prejudicial error in a first-degree murder prosecution in overruling defendant's objection to the State's introduction of extrinsic evidence to impeach the credibility of a defense witness on a collateral matter. Assuming error, there was not a reasonable possibility that a different result would have been reached had the error not been committed because the State thoroughly cross-examined the witness on this general topic. Also, although she was an important witness, she was not inside the house where the shooting occurred at the time of the shooting.

**Am Jur 2d, Witnesses §§ 814, 815, 865, 995.**

**Admissibility of affidavit to impeach witness. 14 ALR4th 828.**

**8. Evidence and Witnesses § 2470 (NCI4th)— capital murder—state witness not arrested—defendant not allowed to question law enforcement officials**

The trial court did not err in a first-degree murder prosecution by refusing to allow defendant to question prosecutors, members of the prosecutorial staff, and law enforcement officers about their decision not to seek to have a key prosecution witness arrested on outstanding warrants prior to his testimony. There was no evidence presented at the *voir dire* to show that the witness had received or been promised favors from the State, the evidence shows that the prosecutors refused to discuss the pending charges with the witness, defendant cross-examined the witness as to the nature of the charges pending against him and the reason he had not been arrested, the witness testified that no one had offered him any concessions, and defendant did not attempt to question law enforcement officers during their testimony about their failure to serve the outstanding warrants.

**Am Jur 2d, Witnesses §§ 717, 815.**

**Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel—modern cases. 81 ALR4th 872.**

**9. Homicide § 485 (NCI4th)— capital murder—deliberation—intent to kill formed during quarrel—instruction not given**

There was no plain error in a first-degree murder prosecution where the trial court did not instruct the jury that a killing is not done with deliberation if a defendant forms the intent to kill during a quarrel or struggle where no evidence presented at trial showed that defendant formed the intent to kill during a quarrel or struggle.

**Am Jur 2d, Trial §§ 1078, 1124, 1176, 1186, 1483.**

**Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.**

**10. Evidence and Witnesses § 1070 (NCI4th)— capital murder—flight as evidence of guilt**

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could consider evidence that defendant had fled the scene of the shooting as evidence of his guilt.

**Am Jur 2d, Trial §§ 1333, 1334.**

**Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases. 36 ALR4th 1046.**

**11. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstances—prior conviction involving violence—timing of conviction**

The trial court did not err in a capital sentencing hearing in submitting the aggravating circumstance of prior conviction for a violent felony by instructing the jury to consider defendant's conviction for a felonious assault where the conviction occurred after the capital murder. It is not necessary that a defendant be convicted before the commission of a capital murder so long as defendant has been convicted of the violent felony prior to the capital trial.

**Am Jur 2d, Trial § 1760.**

**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.**

**12. Criminal Law § 1337 (NCI4th)— capital sentencing—prior conviction involving violence—sufficiency of evidence**

There was sufficient evidence in a capital sentencing proceeding to support the jury's finding of the aggravating circumstance that defendant had previously been convicted of a crime involving the use or threat of violence, and the trial court did not err in instructing the jury to consider defendant's conviction for breaking or entering with respect to this circumstance, where the State presented evidence that defendant had pled guilty and was convicted of felonious breaking or entering with intent to commit a sexual assault against a four-year-old child; the child's mother testified that she briefly left her apartment with her two children inside; the four-year old was "screaming and hollering" at defendant when she returned; the child had been fully dressed when her mother left but was wearing only panties and a t-shirt when she returned; defendant was in the bathroom, washing his penis in front of the one-year old; defendant replied, "Ha," when the

mother confronted him; and defendant's hat was found on the four-year old's bed.

**Am Jur 2d, Trial § 1760.**

**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.**

**Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263.**

**13. Criminal Law §§ 1363, 468 (NCI4th)— first-degree murder—residual doubt—not allowed as closing argument—not submitted as mitigating circumstance**

The trial court did not err in a first-degree murder prosecution by granting the State's motion to prohibit defendant's closing argument about residual doubt and by denying defendant's request to submit residual doubt as a mitigating circumstance.

**Am Jur 2d, Trial § 645.**

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

**14. Jury § 141 (NCI4th)— capital murder—jury selection—questions on parole eligibility**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to permit questioning of prospective jurors on parole eligibility.

**Am Jur 2d, Jury § 196.**

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

**15. Criminal Law § 1351 (NCI4th)— capital sentencing—mitigating circumstances—instructions—burden of persuasion**

The was no error in a capital sentencing proceeding in jury instructions that defined defendant's burden of persuasion to prove mitigating circumstances as evidence that "satisfies" each juror.

**Am Jur 2d, Trial § 1291.**

**Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.**

**16. Criminal Law § 1323 (NCI4th)— capital sentencing—mitigating circumstances—instructions—value of circumstances**

The trial court in a capital sentencing hearing did not violate the Eighth and Fourteenth Amendments by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed it not to have mitigating value or by allowing jurors not to give effect to mitigating circumstances found by the jurors.

**Am Jur 2d, Trial § 1760.**

**17. Constitutional Law § 314 (NCI4th)— capital sentencing—effective assistance of counsel—certain witnesses not presented—no psychiatric examination—counsel acceding to defendant's choice**

The trial court did not err in a capital sentencing hearing by permitting defense counsel to accede to defendant's choice to present defendant's penalty phase case without witnesses from defendant's family and without a psychiatric examination of defendant.

**Am Jur 2d, New Trial § 197.**

**Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense. 8 ALR5th 713.**

**18. Criminal Law § 1373 (NCI4th)— capital murder—death sentence not disproportionate**

A sentence of death for first-degree murder was not disproportionate where the record fully supports the two aggravating circumstances found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, this case is not substantially similar to any case in which the Court has found the death penalty disproportionate, and the case is similar to certain cases in which the death penalty was found proportionate. There are four statutory aggravating circumstances which have been held sufficient, standing alone, to sustain death sentences and the circumstance found here, a previous conviction of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), is among them. Furthermore, the evidence of defendant's guilt was clear; he shot the victim in cold blood

before three eyewitnesses because the victim had testified against him in a previous murder trial. N.C.G.S. § 15A-2000(e)(8).

**Am Jur 2d, Trial §§ 841, 1760.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Cornelius, J., at the 15 March 1993 Criminal Session of Superior Court, Iredell 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 Barry S. McNeill, Special Deputy Attorney General, for the State.*

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

FRYE, Justice.

In a capital trial, defendant, Rayford Lewis Burke, was convicted by a jury of first-degree murder. In a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of death. For the reasons discussed herein, we conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's conviction of first-degree murder and sentence of death.

The State's evidence presented at trial tended to show the following facts and circumstances: On 23 January 1992, Jesse Wilson was at his home in his kitchen with Freddie Teasley, Timothy Morrison (the victim), and Jimmy Knox. In the early afternoon, Wilson had consumed a pint of Wild Irish Rose wine, but no controlled substances. Morrison gave Teasley some money, and Teasley went to the liquor store and purchased a bottle of gin. When Teasley returned shortly thereafter with the bottle of gin, defendant and Robert Lee Griffin arrived at Wilson's house. Morrison, Knox, and Teasley were sitting at the table in the kitchen. Wilson went to the

door and allowed defendant and Griffin to enter the house. Wilson had known defendant for several years, and defendant had been to Wilson's house on prior occasions. Neither defendant nor Griffin announced the purpose of their visit.

After defendant entered the house, he proceeded to the kitchen, and when he asked for a drink of the gin, Morrison invited him to "go ahead and get you a drink." According to Wilson, defendant drank "about half" of the bottle of gin. Defendant then told Morrison that he wanted to talk to him; and, at Wilson's suggestion, defendant and Morrison stepped into an adjoining bedroom. After defendant and Morrison left the kitchen area, Wilson "heard a ruckus," which he described as "some bumping around." Wilson hollered that he "wasn't going to have it in [his] house." When defendant and Morrison came out of the bedroom, defendant said, "I am going to tell all you son-of-a-bitches something." Defendant pointed at Morrison and said, "That man testified against me. He know [sic] I didn't kill that man at the Busy Bee." Defendant then left the house for "a minute or so." Morrison sat down at the kitchen table and said, "[E]verything is all right." Wilson asked Griffin to talk to defendant, and Griffin then exited the house through the front door.

Shortly thereafter, defendant reentered the house and walked "straight through" to where Morrison was still seated at the kitchen table. According to Wilson, defendant said that if Morrison denied having testified against him in a previous trial, defendant would "knock his head off." Morrison did not respond and did not say or do anything to provoke defendant. Defendant then hit Morrison, and Morrison got up from his seat. Defendant and Morrison started scuffling, and Wilson again admonished them that he "wasn't going to have it in [his] house." Wilson got between defendant and Morrison and separated them in order to stop the scuffle.

Morrison again sat down at the kitchen table. As Wilson was pushing against defendant with his shoulder, trying to get him to leave the house, defendant angrily told Morrison that "he wasn't no good" and that Morrison should not have been a witness against him in the earlier murder case. Wilson saw defendant "jiggling" and reaching in his pocket "to get something out," but Wilson could not determine whether the pocket was a pants pocket or a coat pocket. Wilson then heard three gunshots in rapid succession coming from "right over [the] top of [his] head." Wilson testified that he did not see defendant

or anyone else in the house with a handgun. According to Wilson, at the time of the gunshots, defendant was facing the kitchen, and Morrison was seated at the kitchen table.

Following the gunshots, defendant exited through the front door. Wilson went to the front door and observed defendant leave in a "little blue car" being driven by a black female. Wilson then turned around to see if anyone had been struck by the bullets. He heard something fall in the kitchen and ran to the kitchen where he saw that Morrison had been shot. Teasley was standing at the entrance to the kitchen, and Knox was still in the kitchen. Morrison was lying on the kitchen floor on his side and had a small bloodstain on his shirt. Wilson touched Morrison's arm to feel for a pulse, but detected none. Wilson could not determine whether Morrison was breathing. He saw what appeared to be blood flowing from Morrison's mouth. Since Wilson did not have a telephone at his house, he then went outside and directed his neighbors to call for an ambulance. The emergency medical personnel and police arrived, and Wilson informed the police that defendant had shot Morrison.

The State also presented evidence at trial tending to show that defendant had threatened Morrison on several occasions prior to the shooting and that defendant's brothers had made an intimidating visit to Morrison's home in Lexington, North Carolina. The State further presented evidence that, because of these threats, Morrison was afraid of defendant and wanted to avoid him.

Defendant also presented evidence at trial. Defendant testified that he did not see Morrison in Wilson's house on the day of the shooting. However, defendant testified that he did see Jimmy Knox and Johnny Elwood Pless seated in the kitchen with "crack pipes going." According to defendant, he was at the front door when he heard gunshots. Defendant testified that he collided with Wilson as Wilson was trying to enter the front door while defendant was trying to exit. According to defendant, after he exited Wilson's house, he ran to Juanita Keaton's car and left with her. When Keaton asked him what had happened, he responded, "Some crazy m—— f—— in there [was] shooting. Let's get the hell away from here." Defendant denied that he had threatened Morrison after his acquittal for the murder of Calvin Royal at the Busy Bee Lounge. Defendant also denied asking his brothers to threaten Morrison and insisted that his brothers "wouldn't do anything like that." According to defendant, he had contacted some of the persons who testified against him in the trial for

the murder of Calvin Royal and had asked them to testify in support of his civil rights lawsuit.

At trial, defendant also presented the testimony of three witnesses which tended to show that he was not the perpetrator of the crime charged. Dorothea Peggy Ramseur, a witness for the State in the previous trial for the murder of Calvin Royal, testified that, after defendant was acquitted, she encountered defendant at a liquor house. She further testified that defendant did not threaten her and that she even left the liquor house with him. Ramseur also testified that she went to Wilson's house after Morrison was shot, and Wilson told her that he did not know what had happened during the shooting, that he was outside, and that the shooting was over when he reentered the house. Ramseur was in prison at the time she testified in the instant case.

J.D. Sturgis, Jr., testified at trial that he routinely visited Wilson's house to sell or use drugs. After the Morrison shooting at Wilson's house, Sturgis asked Wilson what happened. Wilson told Sturgis that he did not know what happened because everyone ran when the shooting occurred.

Johnny Elwood Pless testified that, on 23 January 1992, he was walking toward Wilson's house to look for his nephew, Keith Neils, when he heard three gunshots and saw several people run out of Wilson's house. According to Pless, defendant and Wilson were "about right at the door" when the second and third shots were fired.

Defendant's motions to dismiss, made at the close of the State's evidence and again at the close of all the evidence, were denied. The jury returned a verdict of guilty of first-degree murder. After a separate sentencing proceeding, the jury recommended and the trial court imposed a sentence of death. Defendant appeals to this Court, making eighteen arguments based on twenty-three assignments of error.

**[1]** In his first argument, defendant contends that the trial court erred in overruling his objections to inadmissible hearsay testimony by prosecution witnesses Sandy Williams, Sergeant Michael Flory, and Investigator Michael Grant concerning statements made to them by the victim, Timothy Morrison. These statements concerned (1) threats against Morrison by defendant through Morrison's uncle, and (2) an intimidating visit by defendant's brothers to the victim's home while his girlfriend was present.

During pretrial motions on 15 March 1993, defendant asked the trial court for an instruction to the jury, during the testimonies of Sandy Williams, Michael Flory, and Michael Grant, regarding certain hearsay statements made to these individuals by Morrison. Defendant argued that although these statements may be relevant to show Morrison's state of mind, they "should not be considered and do not have the indicia of reliability to be considered as to infer that the defendant actually made threats against Morrison." The court granted defendant's motion, saying, "[W]hen it comes to that point, you need to request an instruction for the record."

During the State's case-in-chief, the trial court conducted a *voir dire* of Sandy Williams, a victim witness coordinator for the district attorney's office, and Sergeant Michael Flory of the Statesville Police Department. Following the *voir dire* of Williams and Sergeant Flory, the trial court made findings of fact and conclusions of law. The trial court found, *inter alia*, that Williams was a victim witness coordinator during the trial of defendant for the shooting death of Calvin Royal in November 1991 at the Busy Bee Lounge; that a jury found defendant not guilty of second-degree murder in that case; that during the trial, Williams had contacts with Timothy Morrison, who was a witness in that case; that subsequent thereto, Williams arranged the transportation for Morrison to move to Lexington, North Carolina; that on 21 December 1991, a call was received in her office from Morrison; that Williams returned the call on 2 January 1992; that Morrison told her that he had been threatened by defendant; that Morrison also related that defendant had gone by Morrison's uncle's house looking for him and had made the statement that if he caught him, he would shoot him; that Morrison was requesting the district attorney's help in dealing with this situation; that based upon her knowledge of Morrison, Williams formed the opinion that Morrison was upset and detected concern in his voice; and that Morrison also related that defendant's brothers had gone to his home in Lexington, North Carolina.

The trial court further found that, during December 1991 and January 1992, Sergeant Michael Flory was involved with the drug task force; that Morrison was paid as an informer for that task force; that Sergeant Flory had a conversation with Morrison earlier on the day Morrison died; that Morrison told Sergeant Flory that he had been threatened by defendant; that on several other occasions when Sergeant Flory had conversations with Morrison, Morrison expressed concern about threats made by defendant; that on the date in ques-

tion, Morrison told Sergeant Flory that he was going to Harrison Street and that he would try to obtain information, if he did not run into defendant; that Morrison indicated to Sergeant Flory that he was trying to avoid defendant; that Morrison indicated that he was scared that defendant would find him; that Morrison had testified against defendant in a previous second-degree murder case involving an incident at the Busy Bee Lounge in which defendant was found not guilty; that Morrison was fearful of defendant; that Morrison's state of mind and defendant's state of mind were material for the case being tried before the jury; and that there was a factual basis for the alleged fear in that Morrison had testified against defendant in the earlier case.

Based upon these findings of fact, the trial court concluded that there was a factual basis for the alleged fear in that Morrison was a material witness for the State in the case against defendant in regard to the shooting death of Calvin Royal at the Busy Bee Lounge, that evidence relating to the existence of Morrison's mental or emotional state of mind concerning his feelings about defendant was admissible, and that the probative value of that evidence outweighed any prejudicial aspects that the statements may have had in regard to defendant. However, the court ruled that it would allow the State to present the evidence subject to an instruction limiting the purposes for which the testimony could be used.

"Hearsay testimony is not admissible except as provided by statute or by the North Carolina Rules of Evidence." *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 597 (1988). In the instant case, the trial court found all of the statements admissible under Rule 803(3) of the North Carolina Rules of Evidence. Rule 803(3) provides that "[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)" is not excluded by the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1992). Thus, evidence tending to show a declarant's then-existing state of mind is an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3); *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988). "[E]vidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case." *State v. Jones*, 337 N.C. 198, 209, 446 S.E.2d 32, 38 (1994). However, such relevant evidence is admissible only if its probative value is not substantially outweighed by the potential for unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992); *Weeks*, 322 N.C. at 170, 367 S.E.2d at 906. The failure of a trial court to admit or exclude this evidence will not result in the

granting of a new trial absent a showing by the defendant that a reasonable possibility exists that a different result would have been reached absent the error. *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1987).

In the instant case, Sandy Williams testified, over defendant's objection and after a limiting instruction by the trial court, that she had a telephone conversation with Morrison on 2 January 1992. On direct examination at trial, the following exchange took place:

> Q What was the nature of your conversation with Timothy Morrison over the telephone on January second, 1992?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Request an instruction.
>
> THE COURT: Objection is overruled. Ladies and gentlemen of the jury, at this time let me instruct you that you are to consider this witness's testimony concerning any statement made to her by Timothy Morrison only to the extent that you find that it indicates ill will or fear on the part of the victim Timothy Morrison by the defendant or the defendant. You may consider it for no other reason in this case.
>
> Q Would you go ahead and relate what the telephone conversation was about?
>
> A He said that he had been threatened by Rayford Burke. And that Rayford had been by his uncle's house. And he said that he was looking for him. And if he caught him, he would shoot him. He also said that Rayford's brothers had been by his home in Lexington and that his girlfriend was there. And that he was afraid for his girlfriend and himself.
>
> . . . .
>
> Q And at some point as a result of that phone call from Timothy Morrison, did you report the nature of the things that were stated by Mr. Morrison in that call to any law enforcement official?
>
> A I contacted Investigator Mike Grant on January second of '92.

Following the testimony of Williams, Sergeant Michael B. Flory testified that, on the morning of 23 January 1992 at about 9:00 a.m., he saw Morrison at Karen Neils' house. Morrison had called and stated that he wanted to meet with his law enforcement contacts. Sergeant Flory proceeded to Neils' house, met with Morrison, and paid him

$100 for a drug deal that Morrison had arranged the previous day. On direct examination at trial, the following exchange took place:

Q So you went out there and spoke with him?

A Yes, ma'am.

Q And what was the substance of the conversation that you had with him that morning?

A Our initial trip was to pay him one hundred dollars from a deal that he had done the previous day. During the time we were paying the money, he told me that he had again been threatened by Rayford Burke.

Q When you say again, had he told you that he had been threatened by Mr. Burke previous to that?

A Yes, ma'am, he had.

Q How many times would you say that he told you that he had been threatened by Mr. Burke?

A Numerous occasions. Almost every time we had a meeting.

Q And what would he say to you about it?

A He said he was scared of him and —

[DEFENSE COUNSEL]: Objection, ask for instruction.

THE COURT: Okay, objection is overruled. Ladies and gentlemen of the jury, at this time, let me instruct you that you are to consider this witness's testimony concerning any statements made by Timothy Morrison only to the extent that you find that it indicates ill will or fear on the part of the victim by the defendant or of the defendant. You may consider it for no other reason in this case.

Q Okay. You indicated he said he was scared of Rayford Burke?

A Yes, ma'am.

Q And that was on more than one occasion?

A Yes, ma'am.

Q Did he say any—give you any reason of why he was afraid of Rayford Burke?

A That he had been threatened by Rayford Burke.

Q What exactly did he tell you on the morning of January twenty-third, 1992?

A Told me that he had been threatened by Rayford Burke and that he wished not to go into any area that Rayford Burke might be, that he was trying to avoid him. He told us that he was going to Harrison Street to work on an investigation that we had previously worked on. . . . That I was to go through Harrison Street about five o'clock that afternoon. And that he would take his hat off if he had any further information for me. And then he said, that is in case—unless I run into Rayford Burke.

We conclude that the trial court's decision to admit the testimony of Williams and Sergeant Flory, which tended to show the victim's state of mind, is in accord with the precedent of this Court. *See State v. Jones*, 337 N.C. at 209, 446 S.E.2d at 39 (trial court did not err in admitting testimony of victim's state of mind regarding the nature of her relationship with defendant notwithstanding that defendant may not have known the statements were made); *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 302 (1993) (victim's conversations with three witnesses related directly to the victim's fear of defendant and were admissible to show the victim's state of mind at the time the conversations took place), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Wynne*, 329 N.C. 507, 518, 406 S.E.2d 812, 817 (1991) (testimony concerning victim's fear shortly after being in defendant's presence shows victim's existing state of mind); *State v. Stager*, 329 N.C. 278, 315, 406 S.E.2d 876, 897 (1991) (victim's recorded statements relevant because they tended to disprove the normal loving relationship that defendant contended existed between the two); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818 (1990) (evidence of threats of defendant to victim shortly before the murder admissible to show victim's then-existing state of mind); *State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990) (victim's statements regarding defendant's threats shortly before the murder admissible); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (victim's statements about her husband's threats made three weeks before her disappearance admitted because the victim's state of mind was relevant to the issue of her relationship with her husband).

In the instant case, Morrison's statements to Williams were admissible under Rule 803(3) as a statement of his then-existing state of mind to show the relationship between Morrison and defendant. Since the evidence was competent for this purpose, it does not mat-

ter that it may prove some fact that is not relevant or for which the evidence is not competent. *See State v. White*, 331 N.C. 604, 615, 419 S.E.2d 557, 564 (1992). Thus, the trial court did not abuse its discretion in admitting this evidence for the purpose of showing Morrison's then-existing state of mind. We note that at trial defendant objected to the testimony of these witnesses and requested a limiting instruction. In each instance, the court overruled defendant's objection and gave a limiting instruction. The record shows that defense counsel did not object to the instructions.

"A criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991); *see also State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965); *State v. Plowden*, 65 N.C. App. 408, 308 S.E.2d 918 (1983). Since defendant requested the instruction that he now contends was prejudicial, any error was invited error not entitling defendant to relief on appeal.

**[2]** Defendant further contends that the trial court erred in admitting testimony by Williams that Morrison told her that defendant's brothers had visited Morrison's house in Lexington, that Morrison's girlfriend was there, and that he was afraid for his girlfriend and himself. Defendant argues that Williams' testimony as to what the brothers said was not subject to any exception to the hearsay rule and that it was reversible error not to exclude it.

After Sergeant Flory's testimony, the State called Investigator Michael Grant as a witness. After testifying about other matters, Investigator Grant offered testimony to corroborate Williams' testimony that Timothy Morrison told Williams, during the 2 January 1992 telephone call, that defendant's brothers had gone to Morrison's house in Lexington when Morrison's girlfriend, Karen Neils, was there and that Morrison told Williams that he was afraid for his girlfriend and for himself.

On direct examination of Investigator Grant, the following exchange took place:

Q Do you recall, Investigator Grant, earlier in January of 1992, speaking with Sandy Williams?

A Yes, I did.

Q Do you recall the nature of the conversation?

A Yes. She had—I believe it to be January twenty-fourth, 1992, Sandy Williams, the assistant—victim assistant coordinator contacted me by the telephone. And she told me that she had—

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained. Members of the jury, this is being offered for corroborating the testimony of an earlier witness. It will be for you to say and determine whether it does in fact corroborate that witness's testimony. It is not being offer [sic] for the truth or falsity of the statement or whether the statement was made on that occasion.

Q Go ahead.

A Okay. She related that she had talked to Mr. Morrison. And at this time, she stated that David Burke, the brother of Rayford Burke, had located him in Lexington and had told him if Rayford ever saw Timothy Morrison, he, Rayford Burke, would shoot or kill him, Timothy Morrison.

Defendant argues that Investigator Grant's corroborative testimony concerning what the brothers said was inadmissible hearsay. Defendant contends that under Rule 403, if this evidence has any probative value at all, such value is substantially outweighed by the danger of unfair prejudice from the obvious but unwarranted speculation that defendant somehow encouraged his brothers to intimidate Neils.

We agree with defendant that the testimony of Williams and Investigator Grant concerning what the brothers said was inadmissible because the brothers' state of mind was not relevant and could not be used to show defendant's state of mind. Nevertheless, we conclude that this error was not prejudicial. First, we note that the trial court granted defendant's request for an instruction limiting the purposes for which the evidence could be used. Furthermore, with reference to Investigator Grant's testimony, the court instructed the jury that the testimony was to be used for no other purpose than to corroborate Williams' testimony. In addition, the jury was aware through Williams' testimony that Morrison had testified against defendant on a previous murder charge, which would provide a factual basis for Morrison's fear of defendant. Furthermore, Jesse Wilson had testified that when defendant entered the house, he got into an altercation about Morrison's testimony in the prior trial. Under these circumstances, we conclude that defendant has failed to demonstrate that a reasonable possibility exists that, had this evidence been excluded, a

different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988); *State v. Bryant*, 337 N.C. 298, 311, 446 S.E.2d 71, 78 (1994).

**[3]** In his second argument, defendant contends that the trial court erred by not conducting an inquiry into the precise content and possible impact of an incorrect and prejudicial statement made by outsiders which may have been heard by a juror during the guilt-innocence phase of the trial. While the jury was out of the courtroom, the trial court announced that during a recess, juror Kennedy had possibly overheard unidentified people in the canteen say that defendant had been involved in two other murders or two other murder cases. In a conference at the bench, the following exchange took place:

> THE COURT: Okay, let the record show that at the end of the recess period, the Court was approach [sic] by counsel for the State and by the defense. Counsel for the State indicating that during the recess period, that an attorney who was in the area of the canteen area overheard individuals, citizens engaged in conversation about that the defendant had been—what was the statement?
>
> [STATE]: I believe it was something to the effect that this guy has been involved in two other cases—two other murders.
>
> THE COURT: Two other murders. That this statement was in made in the—may have been made in the presence of a juror in this case, Juror McKinney?
>
> [STATE]: Kennedy, Your Honor.
>
> THE COURT: Kennedy. That the Court has made counsel for the State and for the defense aware that the Court is willing to bring that juror in and question him as to whether he in fact heard anything or overheard any conversation. That after consultation with the defense team with the defendant, that the defense team has indicated at the bench that they did not wish to question the juror about that matter, but would request that the Court take steps to assure that jurors had no further contact with individuals who might be in the canteen area. Is that the—
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: On behalf of the defense, you do not wish to question the juror?

[DEFENSE COUNSEL]: That's correct.

Following this exchange, the court instructed (1) that a court officer be assigned to the jurors and that they be kept on the floor on which the trial was taking place, (2) that everyone remain in the courtroom until jurors exited or completely left the building at any recess or break periods throughout the remainder of the trial, (3) that a law enforcement official assigned to the jury service bring back from the canteen any items requested by jurors, and (4) that spectators and witnesses not have any contact with the jurors or make any statements in their presence.

We note that the record clearly shows that the court asked if defense counsel wanted the court to conduct an inquiry and that, after consultation between defendant and defense counsel, defense counsel declined. Defendant now argues that, although North Carolina law vests a trial judge with discretion to determine the procedure and scope of the inquiry, the law does not give the trial judge any discretion about whether to conduct an inquiry. Defendant contends that a trial judge must do so, at least where, as in this case, the statement, if heard by the juror, would obviously be prejudicial.

We agree that when a trial court learns of an alleged improper contact with a juror, or of a prejudicial statement inadvertently overheard by a juror, the trial court's inquiry into the substance and possible prejudicial impact of the contact is a vital measure for ensuring the impartiality of the juror. *Remmer v. United States*, 347 U.S. 227, 98 L. Ed. 2d 654 (1954). In *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), this Court stated that "[i]n the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make." *Id.* at 173, 420 S.E.2d at 168.

In this case, we first note that there is no contention that a spectator actually talked to the juror, only that the juror may have inadvertently overheard prejudicial conversation. Defendant declined the judge's offer to make an inquiry of the juror in order to determine whether the juror had overheard the conversation. Furthermore, the judge instituted special measures to insulate the jury from exposure to any casual conversations between spectators. Under these circumstances, we conclude that the trial judge properly exercised his discretion in not making further inquiry into this matter.

**[4]** In his third argument, defendant contends that the trial court erred in overruling his objection to cross-examination of defendant about the details of two crimes for which defendant had prior convictions: misdemeanor assault with a deadly weapon of Jerry Roseboro and misdemeanor assault with a deadly weapon of George Melvin Anthony. Defendant argues that when a party impeaches the credibility of a witness under Rule 609, counsel may not inquire into the details of the crime leading to the conviction. *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993) (impeachment under Rule 609 is limited to the name of the crime, the time and place of the conviction, and the punishment imposed). However, the instant case is distinguishable from *Lynch*.

In *Lynch*, the trial court overruled defendant's numerous objections to the State's cross-examination regarding details of defendant's prior convictions. In the instant case, however, the trial court did not overrule defense counsel's objection to his client's attempt to explain the circumstances surrounding the assault on Jerry Roseboro, but simply responded: "He may explain his answer if he wishes to do that." Our reading of the transcript suggests that defendant elected to offer a detailed explanation of the circumstances which led to his prior conviction for the assault of Roseboro in order to inform the jury that Roseboro had testified in the previous trial that Roseboro had stabbed defendant first. Because defendant elected to explain the circumstances surrounding the crime, he may not obtain a new trial based on his own election to testify about these matters.

As to the prosecutor's questioning about defendant's assault upon George Melvin Anthony, defendant concedes that he failed to object to this cross-examination, but argues that such an objection would have been futile in view of the trial court's "overruling of the objection to identical cross-examination about the assault against Mr. Roseboro." However, as we noted earlier, the trial court did not overrule defendant's objection; it merely permitted defendant to explain his answer if he desired to do so. Here, the prosecutor simply asked defendant, with respect to the assault on Anthony, "Was that self-defense too?" Defendant responded, "I was into it with Mr. Anthony and several other people. Whatever you may want to call it." We conclude that the trial court did not err in permitting defendant to respond to the prosecutor's question. Accordingly, we reject defendant's third argument.

**[5]** In his fourth argument, defendant contends that the trial court erred in overruling his objection to the State's "prejudicially improper" question to a prosecution witness about the witness' request for relocation. On direct examination of Jimmy Knox during trial, the following exchange took place:

Q Mr. Knox, you came and talked to [the prosecutor] about this case?

A Yes, ma'am.

. . . .

Q And when we talked with you about testifying, did you want to come here and testify?

A No, ma'am.

[DEFENSE COUNSEL]: Objection to leading.

THE COURT: Sustained.

THE WITNESS: No, ma'am.

Q Do you want to testify—did you want to testify in this case, Mr. Knox?

A After a while, I thought about it, I said Timmy was my friend. And if—if—if he would have missed him, he could have killed me. That's—because he—I was sitting right there behind him.

Q Did [the prosecutors] offer to help you in any way if you came and testified in this case?

A No, ma'am.

Q Well, we talked about helping you relocate to another area outside of Statesville?

[DEFENSE COUNSEL]: Objection to leading.

THE COURT: Sustained.

. . . .

Q Do you remember anything that we told you that we would help you do?

A I—I—I asked you all, I said, I can't testify against that man. He done killed one man.

[DEFENSE COUNSEL]: Objection, excepts [sic] to the extent it corroborates.

THE COURT: Overruled. Go ahead and answer the question.

THE WITNESS: I asked you all, where did I live at. Because I lived with my parents. And I didn't want nobody come to my parents' house and shooting up my family like that, you know. Could you all help me relocate.

Q And did we tell you that we would try to do that?

A Yes, ma'am.

Defendant contends that this testimony should have been excluded under Rule 404(a), which prohibits evidence that a defendant acted in conformity with a trait of his character. Defendant argues that the clear purpose of this testimony by Jimmy Knox was to show that defendant has such a violent character that he would kill anyone who testified against him. Defendant further contends that the unfair prejudice of this testimony substantially outweighed any probative value under Rule 403.

The State argues, however, that the evidence concerning Knox's inquiry about relocation was relevant not to show defendant's violent or criminal disposition, but to explain why Knox initially did not want to testify against defendant and why Knox could have made statements indicating that he could not remember what happened during the shooting at Wilson's house. We agree. Knox's testimony showed that he was fearful of testifying against defendant, having witnessed defendant shoot and kill Morrison in retaliation for Morrison's having testified against defendant in a previous trial. Thus, the testimony was not admitted to prove defendant's character or that defendant acted in conformity therewith so as to require exclusion under Rule 404(a). We further conclude that the probative value of Knox's testimony was not substantially outweighed by the danger of unfair prejudice to defendant so as to require exclusion under Rule 403. Accordingly, we reject defendant's fourth argument.

**[6]** In his fifth argument, defendant contends that the trial court erred in overruling his objection to irrelevant lay opinion testimony by a prosecution witness about the victim's state of mind a few weeks before his death. Patty West, director of women's and children's services at the Fifth Street Shelter Ministries, testified that Morrison stayed at the shelter for several weeks before his death on 23 January

1992. West testified, over defendant's objection, that "[t]here were times that I—when we would—during certain conversations that I felt like he [Timothy Morrison] was tense or, you know, scared of something." Defendant contends that the trial court erred in overruling his objection to this testimony because West's lay opinion about Morrison's state of mind was so vague that it was irrelevant and therefore inadmissible under Rule 402. Rule 402 provides in pertinent part that "[e]vidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992).

We have held that opinion testimony, including lay opinion testimony, is admissible concerning the state of a person's appearance or emotions on a given occasion. *State v. Gallagher*, 313 N.C. 132, 138, 326 S.E.2d 873, 878 (1985). Here, the testimony by West that Morrison appeared to be "tense" and "scared of something" during certain conversations with her described Morrison's emotional state during the time he was in her presence at the shelter. We conclude that such evidence was admissible as tending to shed light upon Morrison's state of mind at that particular time. *See State v. McHone*, 334 N.C. 627, 435 S.E.2d 296. We reject defendant's further contention that, even if relevant, the probative value of this evidence was substantially outweighed by its unfair prejudice to defendant and it thus should have been excluded under Rule 403.

**[7]** In his sixth argument, defendant contends that the trial court erred in overruling his objection to the State's introduction of extrinsic evidence to impeach the credibility of a defense witness on a collateral matter. The impeachment in question concerned Juanita Keaton's employment. Keaton testified on direct examination that she was a licensed practical nurse. During cross-examination, in response to a question by the prosecutor, Keaton agreed that she had told the prosecutor during a pretrial telephone conversation that she would be assisting as a nurse in a brain surgery operation during the week of 15 March 1993. The prosecutor expressed skepticism as to Keaton's statement and cross-examined Keaton about it.

After the defense rested its case, the State introduced rebuttal testimony through Dorra Mack, a registered nurse who had been Keaton's supervisor. During direct examination, Mack testified that Keaton had been hired as a certified nursing assistant and, to the best

of her knowledge, was not a licensed practical nurse. Mack further testified, over defendant's objection as to relevancy, that the duties that a certified nursing assistant can legally perform in the State of North Carolina include "[a]ssist[ing] with personal care, which is bathing, assisting with dressing, cooking, light housekeeping, grocery shopping, those types of duties." Mack further expressed doubt that a certified nursing assistant could assist in a brain surgery operation. Defendant contends that the State's introduction of this testimony was improperly calculated to ridicule and impeach the testimony of Keaton, an important defense witness.

The general rule is that once a witness testifies about a collateral matter on cross-examination, the cross-examiner, who draws out such answers, is bound by the answers of the witness and will not be permitted to contradict them by the testimony of others. *See* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 160 (4th ed. 1993) ("contradiction of collateral facts by other evidence is not permitted"). Assuming *arguendo* that the trial court erred in allowing Mack to testify as to a collateral matter, we conclude that defendant has not met his burden of showing that there is a reasonable possibility that had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a). We first note that the State thoroughly cross-examined Keaton about her education, qualifications, and employment. We further note that while Keaton was an important defense witness, she was not present inside the house at the time of the shooting. Although she testified that she saw defendant standing in the doorway to Wilson's house, she also testified that she did not hear any gunshots. The import of Keaton's testimony to the defense was that she testified she did not see defendant in possession of a handgun on the day of the shooting. Accordingly, we reject defendant's sixth argument.

**[8]** In his seventh argument, defendant contends that the trial court erred in refusing to allow his counsel to question prosecutors, members of the prosecutorial staff, and law enforcement officers about their decision not to seek to have Jesse Wilson, a key prosecution witness, arrested on outstanding warrants for his arrest prior to his testimony in this trial. Defendant contends that such examination was permissible for the purpose of impeaching Wilson on the ground of bias.

Before ruling upon defendant's request to examine these persons, the trial court held a lengthy *voir dire*. Both prosecutors testified dur-

ing the *voir dire* and were cross-examined by defendant. The prosecutors testified that Wilson had been arrested on drug charges; that Wilson failed to appear in district court; that the State took dismissals with leave in regard to the charges; that the officer who served the subpoena for Wilson to appear and testify in the instant case was unaware of the outstanding warrants for Wilson's arrest; that the district attorney's office, once Wilson was located, decided not to process him unless he failed to appear in this case; and that the prosecutors in this case refused to discuss the pending charges with Wilson since he was a witness for the State in this case. Upon this evidence, the court denied defendant's request, concluding that "there were no promises, offers or reward or inducements to . . . the witness Jesse Wilson by any official of the prosecutorial staff or by any law enforcement official."

Defendant contends that the *voir dire* testimony should have been heard by the jury because it would show Wilson's bias in that he had an inducement to appear as a prosecution witness in this trial. We find no error. First, there was no evidence presented at the *voir dire* to show that Wilson had received, or had been promised, favors from the State. Further, the evidence shows that, although the prosecutors withheld service of the warrants for arrest, they refused to discuss the pending charges with Wilson since he was a witness for the State in this case. Defendant's interest was in showing the bias of Wilson in that he was testifying for the State because they were withholding outstanding warrants for his arrest. The record shows that defendant cross-examined Wilson as to the nature of the charges pending against him and the reason he had not been arrested. Wilson testified that no one had offered him any concessions in exchange for his testimony. We note as well that during the testimony of law enforcement officers, defendant did not attempt to question them about their failure to serve the outstanding warrants for arrest upon Wilson. We hold that the trial court did not err in denying defendant's request to have the prosecutors and members of the prosecutorial staff testify before the jury about the reason for the unserved warrants for Wilson's arrest. Accordingly, we reject defendant's seventh argument.

**[9]** In his eighth argument, defendant contends that the trial court committed plain error by not instructing the jury that a killing is not done with deliberation if a defendant forms the intent to kill during a quarrel or struggle. We reject this argument since no evidence presented at trial shows that defendant formed the intent to kill during a quarrel or struggle.

The only provocation shown by the evidence as to the victim, Morrison, was the fact that he had previously testified against defendant. Defendant's evidence was to the effect that he did not see Morrison at the house and did not shoot him. The State's evidence was to the effect that Morrison, rather than provoking defendant, not only acceded to defendant's wishes by sharing his bottle of gin with him but also by not responding violently to defendant's aggressive efforts to provoke him. The victim was seated at the table when he was shot. Under these circumstances, the trial court correctly denied defendant's request and charged the jury in accordance with North Carolina Pattern Instructions, N.C.P.I.—Crim. 206.10 (1989), as follows:

> [T]he State must prove that the defendant acted with . . . deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, *not under the influence of some suddenly aroused violent passion*, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Accordingly, we reject defendant's eighth argument.

**[10]** In his ninth argument, defendant contends that the trial court erred in instructing the jury that it could consider evidence that defendant fled the scene of the shooting as evidence of his guilt. Defendant acknowledges that this Court has decided against his position on this issue. *See State v. Moseley*, 338 N.C. 1, 36, 449 S.E.2d 412, 434 (1994) (A trial court may properly instruct on flight "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged."), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995); *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) ("[F]light from a crime shortly after its commission is admissible as evidence of guilt."). We hold that the record in this case includes such evidence and see no reason to abandon the precedent of this Court based on defendant's arguments. Accordingly, we reject defendant's ninth argument.

**[11]** 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. In his first sentencing issue, defendant contends that the trial court erred in instructing the jury to consider defendant's conviction for a felonious assault with respect to the

aggravating circumstance of prior conviction for a violent felony, where the conviction for that offense occurred after defendant's alleged commission of the capital murder.

Defendant argues that in submitting the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance, the trial court erred in instructing the jury that it could consider a conviction in June 1992 for assault with a deadly weapon inflicting serious injury, which occurred in December 1991. Defendant contends that the trial court's submission of the June 1992 assault conviction was erroneous because defendant was not convicted of the assault until after 23 January 1992, the date of the capital murder in this case. Defendant contends that the plain language of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance makes it clear that the two times relevant to that circumstance are the date of a defendant's conviction for the aggravating violent felony and the date of the commission of the capital murder.

N.C.G.S. § 15A-2000(e)(3) lists the following as an aggravating circumstance: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." Defendant acknowledges that in *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), and *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court stated that the relevant event with respect to this aggravating circumstance is the date of the commission of the violent felony, rather than the date of the conviction. However, defendant argues that the Court's brief analysis of that issue in *Silhan* and *Goodman* was dictum with respect to this issue because the Court did not have to squarely address the precise timing issue raised here to reach its holding in either *Silhan* or *Goodman*.

In *State v. Goodman*, this Court said:

> G.S. 15A-2000(e)(3) states that one of the aggravating factors which may justify the imposition of the death penalty is the fact that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person." This section requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) *the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose.* If there is no such evidence, it would be improper for the court to instruct the jury on this subsection.
>
> . . . .

> . . . [W]e believe that the "previously convicted" language used by the legislature in subsection (e)(3) refers to "*criminal activity conducted prior to the events out of which the charge of murder arose.*" *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *see also, State v. Rust*, [197 Neb. 528, 250 N.W.2d 867, *cert. denied*, 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198 (1977)]; *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876, *cert. denied*, 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198 (1977). To decide otherwise would lead to unnecessary duplication within the statute, for G.S. 15A-2000(e)(5) enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subsection encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged.

*Goodman*, 298 N.C. at 22-23, 257 S.E.2d at 583-84 (emphases added).

In *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994), we stated:

> In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), we held that [the aggravating circumstance found at N.C.G.S. § 15A-2000(e)(3)] *does not include crimes committed after the murder*. Recognizing the relationship between this circumstance and the mitigator pertaining to defendant's history of prior criminal activity, it has been stated: "Just as prior conviction of a felony involving violence is designated an aggravating circumstance, the absence of any significant history of prior criminal activity calls for mitigation of sentence." II Model Penal Code § 210.6 commentary at 137 (1980). To the extent that the mitigating circumstance of "no significant history of prior criminal activity" is related to the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence," it seems clear that the legislature intended the same time frame to be used in both circumstances. Thus, the aggravating circumstance in N.C.G.S. § 15A-2000(e)(3) is some indication that the mitigating circumstance of no significant history of prior criminal activity does not include crimes committed after the murder.

*Coffey*, 336 N.C. at 418-19, 444 S.E.2d at 435 (emphasis added).

The rationale for this aggravating circumstance seems to be that it is more egregious for a person to commit first-degree murder after

having previously committed a violent felony against the person of another. While this aggravating circumstance could not be submitted to the jury prior to a conviction, there is no requirement that the conviction occur prior to the capital murder so long as the conduct giving rise to the conviction occurred prior to the events out of which the capital murder arose. The "previously convicted" language used by the legislature in N.C.G.S. § 15A-2000(e)(3) simply establishes a more reliable means of assuring that the defendant is guilty of the violent felony. Ordinarily, whether the defendant has been convicted is a matter of public record and is beyond dispute. However, if the crime for which the defendant has been convicted does not have as an element the use or threat of violence to the person or if the defendant denies that he was the defendant shown on the conviction record, that he was convicted, or that the crime involved the use or threat of violence, it may become necessary for the State to present the testimony of the victims themselves. *See State v. Silhan*, 302 N.C. at 272, 275 S.E.2d at 484. Therefore, it is not necessary that a defendant be convicted before the commission of the capital murder so long as defendant has been convicted of the violent felony prior to the capital trial. *See State v. Lyon*s, 343 N.C. 1, 22, 468 S.E.2d 204, 214 (1996). Thus, we find no error in the trial court's jury instruction allowing the jury to consider defendant's June 1992 conviction for a violent felony which was committed prior to the events out of which the capital murder arose. Accordingly, we reject defendant's argument.

**[12]** Defendant next contends that the trial court erred in instructing the jury to consider defendant's conviction for felonious breaking or entering with respect to the aggravating circumstance of prior conviction of a violent felony, since the evidence was not sufficient to show that the offense was violent. Although defendant initially was charged with the sexual assault of a four-year-old child, he pleaded guilty only to felonious breaking or entering, and the sexual assault charge was dismissed with prejudice. Defendant now argues that there was no evidence that he broke into the apartment rather than merely entering an open or unlocked door and that there was no evidence that he ever assaulted, attempted to assault, threatened to assault, or even touched the child.

In *State v. Green*, we said:

> Under N.C.G.S. § 15A-2000(e)(3), a prior felony can be either one which has as an element the use or threat of violence to the per-

son, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but as to which the use or threat of violence to the person was actually involved.

336 N.C. 142, 168, 443 S.E.2d 14, 29 (1994) ("Attempting to commit a crime which inherently involves violence obviously constitutes, at least, a 'threat of violence.' "), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

In the instant case, the State presented evidence that, on 15 December 1987, defendant pleaded guilty and was convicted of felonious breaking or entering with intent to commit a sexual assault against a four-year-old child. The child's mother testified that on 15 December 1987, she briefly left her apartment, leaving her two children inside. When she returned to her apartment, the four-year-old was "screaming and hollering" at defendant. The four-year-old child was wearing only panties and a T-shirt, but had been fully dressed when her mother left the apartment. Defendant was in the bathroom, washing his penis in front of the one-year-old child. Defendant replied, "Ha," when the children's mother confronted him about what he had done. Defendant's hat was found on the four-year-old child's bed. Based upon this evidence, the jury reasonably could have found that defendant broke and entered the apartment with the intent to commit a sexual assault upon a four-year-old child and that the crime involved at least a "threat of violence." Thus, we are satisfied that there was sufficient evidence to support the jury's finding of the aggravating circumstance that defendant had previously been convicted of a crime involving the use or threat of violence. Accordingly, we reject defendant's argument.

Preservation Issues

**[13-17]** Defendant raises six additional arguments which he concedes have been decided against him by this Court: (1) the trial court erred in granting the State's motion to prohibit defendant's closing argument about residual doubt and by denying defendant's request to submit residual doubt as a mitigating circumstance; (2) the trial court violated his due process right to an impartial jury by denying his motion to permit questioning of prospective jurors on parole eligibility; (3) the trial court's capital sentencing jury instructions that defined defendant's burden of persuasion to prove mitigating circumstances as evidence that "satisfies" each juror violated due process and the Eighth and Fourteenth Amendments because that definition

did not adequately guide the jury's discretion about the requisite degree of proof; (4) the trial court violated the Eighth and Fourteenth Amendments by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed the evidence not to have mitigating value; (5) the trial court erred in allowing jurors not to give effect to mitigating circumstances found by the jurors; and (6) the trial court erred in permitting defense counsel to accede to defendant's choice to present the defendant's penalty phase case without witnesses from defendant's family and without a psychiatric examination of defendant, thereby depriving defendant of his right to counsel under the Sixth and Fourteenth Amendments.

Defendant 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. Accordingly, we reject these arguments.

PROPORTIONALITY REVIEW

**[18]** Having concluded that defendant's trial and separate capital sentencing proceeding were free of 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) (Supp. 1995).

In this case, the two aggravating circumstances submitted to and found by the jury were 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), and that the murder was committed against a former witness against the defendant because of the exercise of his official duty, N.C.G.S. § 15A-2000(e)(8). 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 pas-

sion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

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 have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). None of the cases in which this Court has determined the death penalty to be disproportionate has included the (e)(3) aggravating circumstance. *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); *State v. Keel*, 337 N.C. 469, 447 S.E.2d 748 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147 (1995); *State v. Reeves*, 337 N.C. 700, 448 S.E.2d 802 (1994); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Defendant here was convicted of first-degree murder under the theory of premeditation and deliberation. The jury found that defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the murder was committed against a former witness against the defendant because of the exercise of his official duty. Although the jury considered seventeen mitigating circumstances, it found only ten. Of these ten, only one was a statutory mitigating circumstance, that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2).

It is also proper to compare this case to those where the death sentence was found 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 our 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 our duty." *Id.* It suffices to say

here that we conclude the present case is similar to certain cases in which we have found the death sentence proportionate.

There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences; the (e)(3) aggravator is among them. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995). This Court has also noted that the (e)(3) aggravating circumstance "reflect[s] upon the defendant's character as a recidivist." *Brown*, 320 N.C. at 224, 358 S.E.2d at 30. As we said earlier, there was sufficient evidence introduced at trial from which the jury could find that defendant had been previously convicted of a felony involving the use or threat of violence.

Further, the jury found that the murder was committed against a former witness against the defendant because of the exercise of his official duty. This Court has said that the (e)(8) aggravating circumstance reflects the General Assembly's recognition of the "common concern" that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." *Id.* at 230, 358 S.E.2d at 33. Defendant here does not contest the (e)(8) aggravating circumstance. The evidence of defendant's guilt was clear. Defendant shot the victim in cold blood before three eyewitnesses because the victim had testified against him in a previous murder trial. Our system of justice demands that the law protect a former witness against the defendant who testified in the exercise of his official duty.

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. Accordingly, we cannot conclude as a matter of law that the death sentence was excessive or disproportionate. Therefore, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. JEFFREY LEE BARRETT

No. 255A93

(Filed 10 May 1996)

**1. Homicide § 266 (NCI4th)— armed robbery—felony murder—sufficiency of evidence**

There was sufficient evidence of armed robbery to support defendant's conviction of felony murder of Michael Turner where the State presented evidence tending to show that defendant and his companions planned to sell fake cocaine to the victim and his brother at a used car lot; the victim had a bag of money in his possession when he exited a van at the car lot; this bag was not found when the victim's body was discovered at the door of the car lot office a short time later; defendant was last seen standing next to the victim just before a gunshot was heard; the victim died from a gunshot wound to the head; and the gun was placed firmly against the victim's skull when it was fired.

**Am Jur 2d, Homicide § 442.**

**2. Homicide § 226 (NCI4th)— first-degree murder—premeditation and deliberation—defendant as shooter—sufficiency of evidence**

The jury could infer from the evidence that defendant shot the victim so as to support his conviction of first-degree murder under the theory of premeditation and deliberation where the State's evidence tended to show that defendant and his companions planned to sell fake cocaine to the victim and his brother at a used car lot; defendant was seen standing next to the victim seconds before a shot was heard; the victim died from a gunshot wound made with the gun placed firmly against his head; when the shot was fired one of defendant's companions was inside the car lot office with the victim's brother and defendant's other companion was pursuing a friend of the victim who fled the scene; the victim was found with his back against the open screen door of the office, and the victim's brother was shot in the office; and the victim and his brother were not shot with the same gun.

**Am Jur 2d, Homicide § 286.**

**Admissibility of testimony that bullet could or might have come from particular gun. 31 ALR4th 486.**

**3. Homicide § 374 (NCI4th)— first-degree murder—acting in concert—constructive presence—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that defendant was constructively present at the time of the killing of Mitchell Turner so as to support his conviction of first-degree premeditated and deliberated murder under the theory of acting in concert where the evidence tended to show that defendant and his two companions (an older man and a tall man) planned to sell fake cocaine to the victim and his brother at a used car lot; the victim intended to test the powder to determine if it was cocaine; at defendant's suggestion, defendant, the tall man, the victim's brother and a friend of the victim left the car lot and went about a mile and a half from the crime scene to buy baking soda for use in the testing, although defendant had baking soda with him; the older man stayed at the car lot office with the victim; on the ride back from the store, defendant suggested that they not return directly to the car lot; upon arriving at the car lot, defendant attempted to hamper the return of the victim's brother to the office; defendant expressed no surprise at seeing a powdery substance strewn outside the office; and the victim was shot in the back and in the lower abdominal region. The jury could infer from this evidence that defendant and his companions decided to kill the victim and his brother when it became apparent that the victim intended to test the powder and that defendant provided assistance to the older man by momentarily removing the victim's brother and his friend from the scene and by returning to provide a means for the men to flee the scene.

**Am Jur 2d, Criminal Law §§ 168-171; Homicide §§ 28, 29, 445.**

**4. Homicide § 267 (NCI4th)— killing during robbery—guilt of robbery—guilt of felony murder**

The State's evidence was sufficient to support defendant's conviction of felony murder of Mitchell Turner where it tended to show that defendant was guilty of armed robbery and that the victim was killed during perpetration of the robbery. Whether there is sufficient evidence to show that defendant either committed the killing himself, intended that the killing take place or even knew that the killing would take place is irrelevant for purposes of determining defendant's guilt under the felony murder rule.

**Am Jur 2d, Homicide §§ 72-75.**

**Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 ALR3d 589.**

**What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.**

**5. Evidence and Witnesses § 222 (NCI4th)— flight—hearsay testimony—harmless error**

Assuming *arguendo* that the trial court erred by permitting the investigating officer's hearsay testimony on flight that defendant was not found at an address in Richmond, Va. when police arrived there seeking to arrest him for a murder in this state, this error was harmless beyond a reasonable doubt where ample evidence was presented that defendant was not apprehended until almost three years after the murder although defendant was an immediate suspect, and the officer also presented admissible flight evidence that he contacted law enforcement officials in at least two other states in an attempt to find defendant.

**Am Jur 2d, Evidence §§ 532-535.**

**6. Criminal Law § 427 (NCI4th)— capital trial—guilt phase—closing argument—defendant's demeanor—not comment on failure to testify**

The prosecutor's comment on defendant's demeanor in the closing argument of the guilt/innocence phase of a first-degree murder trial did not constitute an improper comment on defendant's failure to testify.

**Am Jur 2d, Trial §§ 577-587.**

**Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.**

**Supreme Court's views as to what comments by prosecuting attorney violate accused's privilege against self-incrimination under Federal Constitution's Fifth Amendment. 99 L. Ed. 2d 926.**

**7. Criminal Law § 427 (NCI4th)— capital trial—closing argument—defendant's knowledge of facts—not comment on failure to testify**

The prosecutor's comment during his closing argument in a first-degree murder trial that "[t]he only one that knows is that man right there and his two buddies" did not constitute an improper comment on defendant's failure to testify where it is clear that the prosecutor was stating that he could not explain every detail of the crime to the jury and that defendant had failed to refute the State's theory of how the victim was killed.

**Am Jur 2d, Trial §§ 577-587.**

**Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.**

**Supreme Court's views as to what comments by prosecuting attorney violate accused's privilege against self-incrimination under Federal Constitution's Fifth Amendment. 99 L. Ed. 2d 926.**

**8. Criminal Law § 442 (NCI4th)— capital trial—closing argument—comment on seriousness of crimes and jury's duty**

The prosecutor's closing argument in a trial for two first-degree murders did not impermissibly urge guilty verdicts based on general deterrence and community fear of crime; rather, the prosecutor was commenting on the seriousness of the crimes and the importance of the jury's duty, and there was no gross impropriety in these comments which required the trial court to intervene *ex mero motu*.

**Am Jur 2d, Trial §§ 567-569.**

**Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132.**

**9. Criminal Law § 1312 (NCI4th)— capital sentencing—good character evidence—rebuttal by prior bad acts**

The State could properly cross-examine defendant's mother in a capital sentencing proceeding about rumors that defendant had killed two other persons and wounded a third person in order

to rebut evidence of good character presented by defendant through the testimony of his mother.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**10. Criminal Law § 454 (NCI4th)— capital sentencing—closing argument—biblical references—harmless error**

Assuming *arguendo* that it was improper for the prosecutor to argue in a capital sentencing proceeding that defendant violated the laws of nature established by God when he, rather than God, decided the time and place of the victims' deaths and that this error implicates defendant's constitutional rights, the error was harmless beyond a reasonable doubt where there was overwhelming evidence of defendant's guilt and where the prosecutor's remarks were made in anticipation of contrasting biblical arguments made by defense counsel.

**Am Jur 2d, Trial § 572.**

**11. Criminal Law § 1373 (NCI4th)— death sentences not disproportionate**

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases where the jury found the course of conduct and pecuniary gain aggravating circumstances for each murder; no juror found the existence of any mitigating circumstance; and the evidence showed that defendant and his companions planned to sell fake cocaine to the victims, the victims indicated an intent to test the substance to determine if it was cocaine, and defendant shot one victim and one of his companions shot the second victim in order to steal money possessed by the victims.

**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.**

**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. BARRETT**

[343 N.C. 164 (1996)]

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Albright, J., at the 10 May 1993 Criminal Session of Superior Court, Northampton County, upon jury verdicts of guilty of first-degree murder. Heard in the Supreme Court 8 May 1995.

*Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.*

FRYE, Justice.

Defendant, Jeffrey Lee Barrett, was indicted for two counts of first-degree murder and one count of robbery with a dangerous weapon [hereinafter armed robbery]. He was tried capitally. The jury returned verdicts of guilty on both counts of first-degree murder based on theories of premeditation and deliberation and felony murder. Defendant was also found guilty of the felony of armed robbery.

After a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended death for both first-degree murder convictions. As to both first-degree murder convictions, the jury found as aggravating circumstances that the murders were committed for pecuniary gain and that each murder was part of a course of conduct of other crimes of violence against another person. No juror found any mitigating circumstances. The trial judge arrested judgment as to the armed robbery conviction and, in accordance with the jury recommendation, imposed sentences of death for each of the murder convictions.

Defendant makes thirteen arguments on appeal to this Court. We reject each of these arguments and conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentences are not disproportionate. Accordingly, we uphold defendant's convictions for first-degree murder and sentences of death.

The State's evidence at trial tended to show the following facts and circumstances: On 5 August 1989, defendant offered to sell

Mitchell Turner a kilogram of cocaine for $17,000. The going price for this amount of cocaine was between $27,000 and $30,000. The men decided to exchange the cocaine for the money on 6 August 1989 at Turner's Auto Sales (the car lot), a business owned by Lawrence Turner, father of the victims Mitchell and Michael Turner. On the way to meet defendant, Mitchell picked up McGarrett Clanton, told him of the deal, and stated that he wanted Clanton to come along so that he could "cook the cocaine" to determine if it was real.

Mitchell and Clanton met defendant and two other men, who were described by witnesses as a tall man and an older man, at the car lot. Defendant and his companions arrived in a red T-1000 Pontiac automobile. The men decided to go inside to transact their business. Defendant asked where the money was, and Mitchell informed him that his brother Michael would be bringing it later. Once inside, defendant stated that he was uncomfortable and asked Mitchell to go with him to the woods to make the deal. Mitchell suggested that they go to the house of Ella Williams (Mitchell's girlfriend). Mitchell then called his brother Michael with instructions to meet them at Williams' house with the money.

Defendant and his companions travelled in the red Pontiac, while Clanton and Mitchell took Mitchell's Chevy Blazer truck. After arriving at Williams' house, defendant and Mitchell went into the bedroom, while Clanton and the other two men waited in the living room. After two or three minutes, Mitchell and defendant left the bedroom and exited the house through the back door. After a while, Mitchell and defendant reentered the house, and all of the men left the house. Mitchell and defendant did not transact the deal at Williams' house and returned to the car lot. As they drove back to the car lot, Mitchell told Clanton that defendant was trying to fool them. Mitchell again phoned Michael and made him aware of the change in plans.

When defendant and his companions drove into the car lot, defendant parked the Pontiac automobile so that it was facing the street. The men then entered the office. Not long after they were in the office, Michael arrived in a burgundy van. Once inside, Mitchell decided they needed to buy some baking soda, an ingredient needed to test the cocaine. Defendant suggested that he and the tall man accompany Clanton and Michael to purchase the baking soda, leaving Mitchell and the older man in the car lot office. Defendant, Clanton, Michael, and the tall man travelled in the burgundy van to Brookhaven Shop and Wash, a store located approximately a mile and

a half from the car lot. As they drove to the store, Clanton noticed a clear plastic bag containing money between the front seats of the van.

After purchasing the baking soda and a beer, defendant, the tall man, Clanton, and Michael headed back towards the car lot. Defendant asked Michael, who was driving, to turn off the road. Michael refused to do so. As they approached the car lot, defendant requested that Michael continue past the car lot. Ignoring defendant's request, Michael turned into the car lot and parked the van so that it faced the office door.

Defendant exited the van first and proceeded to the front of the van, while the tall man went to the passenger side of the Pontiac T-1000 automobile. Michael grabbed the clear plastic bag containing money, and he and Clanton exited the van. Michael and Clanton noticed a white powder on the ground outside the office door. The powder had not been there before they left, and Clanton told Michael that something was wrong. Defendant approached Clanton and Michael and attempted to put his arms around them. He asked Michael to drive him down the road, and Michael again refused. Clanton backed away while Michael took out his key and approached the office. Michael was standing very close to defendant. Clanton turned around and started running away from the car lot. The tall man pursued Clanton. Clanton heard a shot, and when he turned around noticed that the tall man had stopped chasing him. Shortly thereafter, Clanton saw the Pontiac automobile leaving the car lot.

Clanton ran to the house of Clifford Joyner and requested a ride to Turner's Grocery, another business owned by the victims' family. Upon arriving at the grocery store, Clanton told Randy Turner, a brother of the victims, and Mr. and Mrs. Turner, the victims' parents, that he thought Mitchell and Michael were dead. Randy and Mrs. Turner travelled to the car lot where they found the bodies of Michael and Mitchell. Michael was outside of the office with his back against the open screen door, and Mitchell was lying on the floor inside the office. The police, dispatched because of a report of gunfire, arrived while the family was in the office.

When the police entered the office, they found two packages wrapped in duct tape and containing a powdery white substance. One package had been cut open. The substance was found on the floor under Mitchell's body and on the desk. Laboratory tests revealed that the white powdery substance found on the floor and in packages in the office was starch, not cocaine. Police also discovered an electric

frying pan with a liquid in it and a bag from a video rental store in Richmond, Virginia. The bag contained a roll of duct tape and a package of baking soda. Another bag containing a package of baking soda and a beer was found in the burgundy van.

Autopsies revealed that both victims died of gunshot wounds. Michael was shot once in the head, and Mitchell was shot twice, once in the back and once in the lower abdominal region. Michael's wound to the head and Mitchell's wound to the abdomen were made with the gun placed firmly against their skin, while the shot to Mitchell's back was made while Mitchell was bent over. It was not possible to determine which of Mitchell's wounds was inflicted first. The differences in the areas around the two contact wounds, the one to Mitchell's abdomen and the one to Michael's head, suggested that the wounds were caused by different guns.

Defendant did not testify and presented no evidence during the guilt/innocence phase of his trial. Defendant's motion to dismiss, made at the close of the evidence and renewed after the jury verdicts were announced, was denied by the trial court.

As defendant's first argument, he contends that the trial court erred in denying his motion to dismiss because there was insufficient evidence as a matter of law to convict him of the first-degree murders of Mitchell and Michael Turner. We conclude that the evidence was sufficient to go to the jury and to support jury verdicts finding defendant guilty on both counts of murder in the first degree.

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 and intendment 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.

"[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653; *accord State v. Small*, 328 N.C. 175, 180-81, 400 S.E.2d 413, 415-16 (1991), *quoted in State v. Quick*, 329 N.C. 1, 19, 405 S.E.2d 179, 190-91 (1991). " '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.' " *Quick*, 329 N.C. at 19, 405 S.E.2d at 191 (quoting *Vause*, 328 N.C. at 237, 400 S.E.2d at 61).

First, we will address defendant's contention that the trial court erred by denying his motion to dismiss because there was insufficient evidence to find him guilty of first-degree murder for the death of Michael Turner. Defendant was convicted under the theories of both felony murder and premeditation and deliberation. He contends that there was insufficient evidence to convict him under either theory. We disagree.

**[1]** First, defendant contends that, as to the felony murder theory, there was no evidence presented that he was armed or that he intended to rob the victims. Defendant was found guilty of the felony of armed robbery. This Court has defined armed robbery as "the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened." *State v. Rasor*, 319 N.C. 577, 587, 356 S.E.2d 328, 334 (1987); *see also* N.C.G.S. § 14-87(a) (1993).

The State presented evidence that Michael Turner had a bag of money in his possession when he exited the burgundy van. This bag was not found when Michael's body was discovered at the door of the car lot a short time later. Defendant was last seen standing next to Michael just before a gunshot was heard. The autopsy revealed that Michael died from a gunshot wound to the head and that the gun was placed firmly against his skull when it was fired. From this evidence, a jury could reasonably infer that defendant had a gun which he placed against Michael's skull and that he took the bag containing the money either shortly before or immediately after he shot the victim. This certainly is sufficient evidence to constitute armed robbery.

Accordingly, we conclude that there was sufficient evidence of armed robbery and, therefore, that defendant's conviction under the felony murder rule was proper.

**[2]** As to the conviction under the theory of premeditation and deliberation, defendant contends that there was no evidence that he shot Michael. The State produced evidence that defendant was seen standing next to Michael seconds before the shot was heard, that Michael's gunshot wound was made with the gun placed firmly against his head, that the tall man was pursuing Clanton and the older man was inside the office with Mitchell when the shot was fired, that Michael was found with his back against the open screen door of the office, and that Michael and Mitchell were not shot with the same gun. A jury could reasonably infer from this evidence that defendant shot Michael at the door of the office.

We now turn to defendant's contention that the trial court erred in denying his motion to dismiss because there was insufficient evidence to convict him of first-degree murder for the death of Mitchell Turner. Defendant was convicted on theories of both premeditation and deliberation and felony murder. Defendant contends that there was insufficient evidence to convict him under either theory. Again, we disagree.

**[3]** At trial, the judge instructed the jury that it could find defendant guilty under a theory of premeditation and deliberation if it found that defendant had acted in concert with the other two men to murder Mitchell. Defendant argues that the State's evidence was insufficient to show that he was either actually or constructively present at the time of the murder of Mitchell; therefore, he could not have been convicted under a theory of premeditation and deliberation.

In *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *appeal dismissed and disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992), our Court of Appeals stated:

> Our Supreme Court in *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980), specifically delineated two essential elements of acting in concert: 1) presence at the scene of the crime, and 2) acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose. *Williams*, 299 N.C. at 656-57, 263 S.E.2d at 777-78. The presence required for acting in concert can be either actual or constructive.

*State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *vacated in part on other grounds*, *Westbrook v. North Carolina*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

*Wallace*, 104 N.C. App. at 504, 410 S.E.2d at 230. We have stated that "[a] person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992). It should be noted that constructive presence does not require that defendant be physically present at the scene of the crime; that would be actual presence. *See State v. Ruffin*, 90 N.C. App. 712, 370 S.E.2d 279 (1988) (defendant was down the street from the residence when the crime occurred); *State v. Hockett*, 69 N.C. App. 495, 317 S.E.2d 416 (1984) (defendant waited in the car outside the store which was robbed); *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982) (defendant dropped the codefendants off at the store to be robbed, drove some three miles, came back, and picked them up); *State v. Torain*, 20 N.C. App. 69, 200 S.E.2d 665 (1973) (defendant dropped codefendants off at country store, stayed with the car, and was later seen with the codefendants and the money), *cert. denied*, 284 N.C. 622, 202 S.E.2d 278 (1974).

In the instant case, defendant left the scene momentarily to go about a mile and a half from the crime scene. It was at defendant's suggestion that he, the tall man, Michael, and Clanton left the car lot to get baking soda despite the fact that defendant already had baking soda with him. On the ride back from the store, defendant suggested that they not return directly to the car lot. Once arriving at the car lot, he again attempted to hamper Michael's return to the office. Defendant expressed no surprise at seeing the powdery substance strewn outside the office. From the evidence, a jury could reasonably infer that defendant was providing assistance to the older man, who he knew was alone inside the office with Mitchell. The jury could infer that the shooting of Mitchell was part of defendant's and his companions' plan. The evidence showed that defendant planned to sell fake cocaine to the victims and that Mitchell intended to test the cocaine to see if it was real. A jury could infer that once it became apparent that the victims intended to test the cocaine, the men decided to kill Mitchell and Michael and that defendant provided assistance to the older man by momentarily removing Clanton and Michael from the scene but by returning to provide a means for the men to flee the scene. Accordingly, we conclude that there was suffi-

cient evidence for a jury to find that defendant was constructively present.

**[4]** Defendant also alleges that there was no evidence that he had a gun or that he intended to rob anyone; therefore, there was insufficient evidence of armed robbery, the underlying felony for his first-degree murder conviction. As we discussed above, there was sufficient evidence to convict defendant of armed robbery. Since Mitchell was killed during the perpetration of the robbery, "[w]hether there is sufficient evidence to show that the defendant either committed the killing himself, intended that the killing take place or even knew that the killing would take place is irrelevant for purposes of determining defendant's guilt under the felony murder rule." *State v. Reese*, 319 N.C. 110, 145, 353 S.E.2d 352, 372 (1987). Accordingly, we conclude that the trial judge was correct in denying defendant's motion to dismiss.

**[5]** In his second argument, defendant contends that the trial court committed reversible constitutional error by permitting the prosecutor to introduce inadmissible hearsay on the question of defendant's flight. Detective Wheeler, who was in charge of the investigation, testified that he obtained warrants for defendant's arrest and that he had defendant's name entered into the National Police Information Network so that defendant would be arrested if he was stopped for a traffic violation. He also testified that he talked to a number of law enforcement officials in his attempt to find defendant and that they had difficulty finding defendant. Defendant contends that Detective Wheeler's testimony contained inadmissible hearsay. In support of this contention, he argues that Detective Wheeler, the only witness who testified concerning defendant's alleged flight, did not go to Virginia or Georgia to apprehend defendant; therefore, his testimony was hearsay to the extent that it relied upon the statements of others.

During the exchange between Wheeler and the prosecutor quoted in defendant's brief, the trial court sustained two of defendant's objections and overruled only one. The trial court overruled defendant's objection to Wheeler's statement that defendant was not found at an address in Richmond, Virginia, when police arrived there. Assuming *arguendo* that the admission of this statement was error, we are satisfied that the error was harmless beyond a reasonable doubt. Ample evidence was presented that defendant was not apprehended until 20 May 1992, almost three years after the murder, although defendant was an immediate suspect and had already left

Northampton County for an unknown destination. Wheeler also presented admissible flight evidence that showed that he contacted law enforcement officials in at least two other states in an attempt to find defendant. *See State v. Patterson*, 332 N.C. 409, 420, 420 S.E.2d 98, 104 (1992) (holding that there was no error in the admission of statements by an officer that he had contacted thirteen law enforcement officials in six different states before apprehending defendant). Accordingly, we reject defendant's second argument.

**[6]** Defendant's third and fourth arguments concern the prosecutor's closing argument during the guilt/innocence phase of the trial. First, defendant contends that the prosecutor improperly commented on defendant's failure to testify by making the following statements in closing arguments:

> And ladies and gentlemen of the jury, he does not care. I hope you've watched his demeanor during this trial, how he's been bored with the proceedings, how at times they were comical to him. I submit to you, ladies and gentlemen, he doesn't care about what he did at that car lot on August the 6th, 1989. He didn't care then and he doesn't care now because that doesn't suit him. He does not care.
>
> We hear [a lot] about rights of defendants. That's what all of this process is about, the rights of the defendants. If defendant's [sic] didn't have certain rights, we wouldn't be here, ladies and gentlemen. And that's what this case is all about. His rights are protected throughout this trial. Mitchell and Michael Turner had no rights on August the 6th, 1989. I submit to you, ladies and gentlemen, that the most important right that any of us have [sic] is the right to live.

Defendant concedes that this Court has held that the State may comment on the demeanor of the defendant during closing arguments of a trial. *State v. Brown*, 320 N.C. 179, 199-200, 358 S.E.2d 1, 15-16, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). He calls attention, however, to the fact that in the instant case, this argument was made during the guilt/innocence phase of the trial, while in *Brown* the argument was made during the capital sentencing phase. Defendant notes that the jury may consider the remorse of the defendant during the sentencing phase as a mitigating circumstance, and therefore, an argument made during the sentencing phase regarding the defendant's demeanor is proper for showing lack of remorse. However, he continues, during the guilt/innocence phase, the argument simply

draws attention to the fact that defendant did not testify at trial; therefore, it violates the defendant's right not to testify.

In *Brown*, we relied on *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980), which held that prosecutorial statements made during closing arguments regarding defendant's demeanor were admissible. While noting that the State is given wide latitude during closing arguments, this Court said that the demeanor of the defendant was before the jury at all times. *Id.* Accordingly, we see no reason to distinguish between arguments regarding the defendant's demeanor that are made during the sentencing proceeding and those made during the guilt/innocence phase.

We hold that the State's argument was not a comment on defendant's failure to testify. As we stated in *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995), "[a] prosecutor violates [this rule] if 'the language used [was] manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be[,] a comment on the failure of the accused to testify.' " *Id.* at 95-96, 451 S.E.2d at 563 (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974)). A comment on the defendant's demeanor does not naturally or necessarily amount to a comment on the failure of the accused to take the stand. Accordingly, we reject defendant's contention.

**[7]** Defendant also assigns error to a later portion of the prosecutor's closing argument on the basis that it was a comment on defendant's failure to testify. The prosecutor argued:

> I can't tell you. You know, some things, ladies and gentlemen of the jury, the State of North Carolina is not going to be able to tell you, using your reason and your own common sense. We can say probably what happened, but there are a few things we're not going to be able to say. *The only one that knows is that man right there and his two buddies.*

(Emphasis added.)

Defendant made no objection to this argument at trial. Therefore, this Court's duty is limited as follows:

> Where defendant fails to object to an alleged impropriety in the State's argument and so flag the error for the trial court, "the

> impropriety . . . must be gross indeed in order for this court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."

*State v. Abraham*, 338 N.C. 315, 338, 451 S.E.2d 131, 143 (1994) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)) (alteration in original). In determining whether the prosecutor's argument was grossly improper, the Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers. *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3575 (1996). Before making the comments mentioned by defendant, the prosecutor argued:

> Where were the keys—where were Michael's keys? The keys to the van were scattered right here. Right down there. You saw the pictures of the keys to the van, ladies and gentlemen of the jury. You didn't see the keys. Right down there is [sic] the keys. Right down there where Dr. Ziph said he'd been killed instantly. Instantly killed, ladies and gentlemen of the jury. Instantly killed. And don't you know that when he got popped with a bullet through his brain, he didn't do anything but drop as that bullet went through his brain, curtsey [sic] of defendant. Michael with the keys—would Michael have been inside the office? I submit to you nobody knows, but I submit to you that he was getting ready to poke them in or perhaps put them in when the door got kicked in and then went into the door and fell out. I can't tell you . . . .

From examining the prosecutor's argument in context, it is clear that he was stating that he could not explain every detail of the crime to the jury and that defendant had failed to refute the State's theory of how Michael was killed. This Court has held that the prosecutor can comment on the defendant's failure to present evidence that refutes the State's theory of the case and that such an argument is not a comment on the defendant's failure to testify. *State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370-71 (1994); *State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994); *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986). Clearly, there was no gross impropriety in the prosecutor's argument.

**[8]** Defendant next assigns error to another portion of the prosecution's closing statement. The prosecutor first argued:

> Members of the jury, when you go back into the jury room, I ask that you think of these events as something that you have seen on television. You see these things in movies. You see them on news reports happening in big cities. But, this is something real, ladies and gentlemen, it is reality. This, ladies and gentlemen, is reality. This is a reality that took place on August the 6th, 1989 at Turners' Car Lot. This is reality. This is real. This is not a T.V. movie with special effects. This is real. This is reality, ladies and gentlemen. This is the reality of what took place at Turner's Auto on August the 6th, 1989. These are the real clothes that real people wore as they were gunned downed [sic] on that Sunday afternoon. So, don't think of it as something that is not real. This is real. This is as real as it gets, ladies and gentlemen, I submit to you. Mrs. Virginia Turner, ladies and gentlemen, had five children when she went to work on August the 6th, 1989. Five children. Mr. Turner had five children as he prepared to get ready to go to church that afternoon. Nancy Turner Garner had four brothers as she arose that morning to take care of her day's business. Shorty and Randy had two other brothers as they got up to take case of their personal affairs on that day. But, because of this man sitting right over here, the man famous for his gold teeth and his white tee shirts, that is gone now. Killing Mitchell and Michael Turner helped him accomplish his goal of stealing thirty four thousand dollars. Helped him fulfill his agenda that he had money for August the 6th of 1989.
>
> . . . .
>
> Many times you hear about events like this, shootings, murders and you say, well somebody ought to do something about that. Well, ladies and gentlemen, you are that somebody that everybody talks about. Today you speak for the people of Northampton County. You are Northampton County. Today you send a message, a thunderous message, to those who would even think of coming to this county and committing acts like the defendant and his friends did on August the 6th, 1989. The buck stops here, ladies and gentlemen, and you cannot pass it along. It's in your laps. The police can't do anymore, the Judge can do no more. It's up to you to decide.

Defendant contends that the purpose of this argument was to appeal to the sympathy and fears of the jury rather than to appeal to reason. He argues that in the preceding portion of the prosecutor's

closing argument, the prosecutor impermissibly urged guilty verdicts based on general deterrence and community fear of crime. Defendant also argues that the second prosecutor reenforced this theory of general deterrence and community fear by arguing:

> Ladies and gentlemen of the jury, the State of North Carolina—the State of North Carolina is not a big thing. What it amounts to is the District Attorney, is me[,] elected by the people of Hertford, Bertie and Northampton County.

Again, we note that defendant did not object at trial to these arguments. It is well established that "[c]ontrol of closing arguments is in the discretion of the trial court." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 39-40, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Moreover, "[b]ecause defendant did not object to the portions of the argument to which he now assigns error, 'review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*.' " *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989) (quoting *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)) (alteration in original), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990).

After careful examination of the prosecutors' arguments, we conclude that they were not grossly improper. The first prosecutor was commenting on the seriousness of the crime and the importance of the jury's duty. We have previously held that the prosecutor is allowed to argue the seriousness of the crime. *See State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995); *State v. Artis*, 325 N.C. 278, 329, 384 S.E.2d 470, 499 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18. It should also be noted that, in another part of his argument, the prosecutor reminded the jury that it was not to base the verdict on sympathy. Accordingly, we conclude that the prosecutors' comments were not grossly improper and that the trial court did not abuse its discretion in not intervening *ex mero motu*. Therefore, we reject defendant's argument.

Defendant next contends that he is entitled to a new sentencing proceeding because of alleged errors committed during his capital sentencing proceeding. Defendant's first argument is contingent upon this Court finding the evidence insufficient to convict him of the mur-

der of Mitchell Turner. Since this Court has found that the evidence was sufficient to convict defendant of the murder of Mitchell Turner, we need not address this argument.

**[9]** Defendant next argues that the trial court committed reversible error by permitting the State to produce evidence of defendant's prior offenses. During the sentencing phase, on cross-examination, the State questioned defendant's mother about prior bad acts of defendant. Defendant objected, stating that it was improper character evidence. The questions were allowed over defendant's objections. Defendant contends now that the submission of evidence regarding his prior criminal behavior was improper. We disagree.

This Court has held that the State, during the capital sentencing proceeding, may introduce evidence of prior bad acts where the defendant presents testimony of his good character. *State v. Williams*, 339 N.C. 1, 50, 452 S.E.2d 245, 274 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995); *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981). In the instant case, defendant's mother testified on direct examination that defendant was basically a good child who began to have problems with drug abuse because his father was absent. She stated that, despite these problems, defendant was not a murderer. The State, on cross-examination, questioned defendant's mother about rumors that defendant had killed two other people as well as wounded a third person. The evidence was being presented to rebut evidence of good character that was presented by defendant through the testimony of his mother. Accordingly, the trial court did not err by admitting this evidence.

**[10]** As defendant's third argument concerning the capital sentencing proceeding, he argues that the trial court erred in allowing the prosecutor to make biblical arguments during closing arguments. The prosecutor argued:

> You know the Almighty established certain laws of nature. There was a time to be born, there was a time to live, and there's a time to die. All in nature's way. All in nature's way. How dare Jeffrey Lee Barrett defy the laws of nature.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> How dare he defy the laws established by the Almighty. Just imagine, ladies and gentlemen of the jury, how Michael Turner

must have felt as this now convicted murder said to him, "I have decided that you will die. I have decided that you will die because it suits my purposes." Not God's purpose, not nature's purpose, but mine. I have decided. I've decided the manner in which you will die. I have decided the place which you will die. I have decided the time in which you will die. Not God, not nature, but me."

Imagine how Mitchell Turner must have felt as Barrett's partner said the same words to him. How dare Jeffrey Barrett play God and snuff the life of two brothers. Two sons. Contrary to the laws of nature.

In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, we stated:

> Neither the "law" nor the "facts in evidence" include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material. However, this Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, and it has found biblical arguments to fall within permissible margins more often than not. This Court has distinguished as improper remarks that state law is divinely inspired or that law officers are "ordained" by God.

*Id.* at 331, 384 S.E.2d at 500.

Defendant contends that the prosecutor argued that the State law is divinely inspired and, therefore, that the argument was improper. The argument in the instant case does not contain the extensive references to religion, including copious readings from the Bible urging that murderers be put to death, against which we have cautioned in the past. *See id.* (amalgamation of biblical language and statutory citation swings close to impropriety of saying the law of the State codifies divine law); *see also*, *State v. Walls*, 342 N.C. 1, 61, 463 S.E.2d 738, 770 (1995) (prosecutor's argument not improper where prosecutor clearly informed jury to make its capital sentencing decision based on the statute and not the Bible); *cf. State v. Moose*, 310 NC 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).

However, assuming *arguendo* that the prosecutor's argument constitutes error and that the error implicates defendant's constitutional rights, defendant is not entitled to relief even under the consti-

tutional standard of review. N.C.G.S. § 15A-1443(b) (1988). Given the overwhelming evidence of defendant's guilt and because the prosecutor's remarks were made in anticipation of contrasting biblical arguments actually made by defendant, we are convinced that any error was harmless beyond a reasonable doubt.

PRESERVATION ISSUES

Defendant also raises six additional arguments that he concedes have been decided contrary to his position previously by this Court: (1) the trial court erred by failing to inform jurors of parole eligibility; (2) the trial court erred by denying defendant's motion for individual jury *voir dire*; (3) the trial court's instruction that all the evidence presented in both phases of the trial was competent for the jurors' consideration violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (4) the trial court erred by allowing the prosecutor to comment on defendant's demeanor during closing arguments during the sentencing phase; (5) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and (6) the trial court's instructions permitted the jury to reject submitted mitigation on the basis that it had no mitigating value.

Defendant 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. Accordingly, we reject these arguments.

PROPORTIONALITY REVIEW

Having concluded that defendant's trial and separate capital sentencing proceeding were free of 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) (Supp. 1995).

As to both murders, the jury found as aggravating circumstances that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and that 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). None of the jurors found any of the mitigating circumstances. 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.

**[11]** 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 have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate in that none of these cases involved a double murder.

It is also proper to compare this case to those where the death sentence was found 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 our 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 our duty." *Id.* It suffices to say here that we conclude the present case is similar to certain cases in which we have found the death sentence proportionate.

The aggravating circumstances found in this case have been present in other cases where this Court has found the sentence of death proportionate. *See State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984) (death sentence proportionate in double murder where jury

found course of conduct aggravating circumstance and found that the murders were committed for pecuniary gain), *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) (death sentence proportionate where defendant burglarized home and jury found that both murders were committed for pecuniary gain and that they were part of a course of conduct involving violence against another), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). It is also relevant that no juror found the existence of any mitigating circumstances.

After comparing this case to other 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. Accordingly, we cannot conclude that the death sentences are excessive or disproportionate. Therefore, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

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VICKIE ROUSE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TRAVIS SENTEL ROUSE v. PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, LYNN G. BORCHERT, ROBERT G. BRAME, JARLATH MACKENNA, MICHAEL R. WATKINS, THOMAS J. BYRNE AND JOEL B. MCCUAIG

No. 505PA94

(Filed 10 May 1996)

**1. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence by resident physicians—negligent supervision by attending physicians—genuine issue of fact**

In an action to recover for the negligent delivery of the minor plaintiff, plaintiff's forecast of evidence was sufficient to establish a genuine issue of material fact on the issue of defendant attending physicians' negligent supervision of the obstetrics residents who provided medical care for the mother and the minor plaintiff where it tended to show that defendant McKenna had the daytime responsibility for the on-call supervision of the obstetrics residents and defendant Borchert assumed this responsibility after 5:00 p.m.; nonreassuring patterns of fetal heart rate were first documented by a nurse at 1:45 p.m. and thereafter continued to be present; the minor plaintiff was delivered by emergency cesarean section at 8:53 p.m. and suffered serious brain damage;

the obstetrics residents were negligent in failing to recognize the mother's abnormal labor pattern and the fetal heart rate abnormalities, failing properly to determine the status of the fetus during labor, and failing to intervene with a cesarian delivery at an appropriate time; neither defendant made rounds at the hospital with the residents or otherwise checked with the residents on the conditions of the patients being cared for by the residents; and defendant Borchert was at home and did not see the mother until a resident called him at 8:00 p.m. to come to the hospital.

**Am Jur 2d, Physicians, Surgeons, and Other Healers § 286.**

**Liability of one physician or surgeon for malpractice of another. 85 ALR2d 889.**

**2. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence by resident physicians—vicarious liability of attending physicians—borrowed servant rule—genuine issue of fact**

Although resident physicians were employees of a hospital, the hospital retained the authority to hire, pay, discipline and terminate resident physicians and the ultimate authority to grant hospital privileges to resident physicians to perform certain tasks, and defendant attending physicians were employed by the ECU School of Medicine, plaintiff's forecast of evidence was sufficient to establish a genuine issue of material fact as to defendant attending physicians' vicarious liability under the "borrowed servant" doctrine for the alleged negligence of obstetric resident physicians in the delivery of the minor plaintiff where it tended to show that defendant attending physicians had the responsibility for the supervision of the resident physicians who provided medical care during the mother's labor and the delivery and birth of the minor plaintiff; the hospital delegated the right to control the resident physicians' *manner* of medical services exclusively to the ECU School of Medicine faculty attending physicians who had been granted clinical privileges at the hospital; and the hospital did not employ an obstetrician.

**Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 286, 289.**

**Liability of one physician or surgeon for malpractice of another. 85 ALR2d 889.**

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 116 N.C. App. 241, 447 S.E.2d 505 (1994), reversing judgments entered by Brown (Frank R.), J., on 29 May 1990 and 1 June 1990 in Superior Court, Pitt County. Heard in the Supreme Court 9 October 1995.

*Law Offices of Grover C. McCain, Jr., by Ada F. Most and Grover C. McCain, Jr., for plaintiff-appellee.*

*Walker, Barwick, Clark & Allen, L.L.P., by Robert D. Walker, Jr., for defendant-appellant Borchert.*

*Yates, McLamb & Weyher, L.L.P., by Joseph W. Yates, III, Suzanne S. Lever, and Bruce W. Berger, for defendant-appellant MacKenna.*

ORR, Justice.

This appeal arises from a medical malpractice action brought by Vickie Rouse ("plaintiff Rouse"), individually and as guardian *ad litem* for her minor son, Travis Sentel Rouse ("the minor plaintiff"), on 30 January 1989 against defendants Pitt County Memorial Hospital Inc. ("the Hospital"), Dr. Jarlath MacKenna, Dr. Lynn Borchert, Dr. Robert Brame, Dr. Michael Watkins, Dr. Thomas Byrne, and Dr. Joel McCuaig. Defendants MacKenna, Borchert, and Brame were on-call attending physicians in the Department of Obstetrics ("OB") and Gynecology at the Hospital during plaintiff's labor and delivery. Defendants Watkins, Byrne, and McCuaig were resident OB physicians under the supervision of Dr. MacKenna and Dr. Borchert during plaintiff's labor and delivery.

Plaintiffs seek money damages for injuries allegedly caused by defendants during plaintiff Rouse's labor and the delivery and birth of the minor plaintiff at the Hospital on 12 August 1982. In the complaint, plaintiff Rouse, in her individual capacity, alleged that defendants MacKenna, Borchert, and Watkins fraudulently concealed the information that there were intraoperative complications during plaintiff Rouse's caesarean section and that she sustained intraoperative lacerations. Further, plaintiff Rouse, as guardian *ad litem*, alleged that all named defendants were negligent in their provision of

medical care and treatment during plaintiff Rouse's labor and the delivery and birth of the minor plaintiff and that defendants MacKenna and Borchert, as on-call attending physicians, were negligent in their supervision of the resident physicians.

Defendants MacKenna and Borchert answered, denying any negligence; subsequently, after discovery, they filed separate motions for summary judgment, which the trial court allowed. Plaintiff Rouse, as guardian *ad litem*, appealed the entry of both orders to the Court of Appeals, which held, on 5 November 1991, in an unpublished opinion, that plaintiff's appeal was interlocutory and premature and dismissed the appeal. *Rouse v. Pitt Co. Mem. Hosp.*, 104 N.C. App. 554, 410 S.E.2d 241 (1991), *disc. rev. denied*, 330 N.C. 852, 413 S.E.2d 553 (1992).

On 30 April 1992, plaintiff Rouse, as guardian *ad litem*, filed a notice of voluntary dismissal without prejudice in the action against defendant Dr. Brame. On 22 May 1992, plaintiff Rouse, as guardian *ad litem,* filed a Rule 54(b) motion for revision of orders allowing defendants MacKenna's and Borchert's motions for summary judgment in accordance with the guidelines set forth in this Court's opinion in *Mozingo v. Pitt Co. Mem. Hosp.*, 331 N.C. 182, 415 S.E.2d 341 (1992), in which this Court affirmed the Court of Appeals' reversal of summary judgment for the defendant Mozingo, who was the on-call attending physician and obstetrician in an obstetrical medical negligence action. On 7 August 1992, plaintiff Rouse's motion was heard before Judge Brown, who, by an order filed 9 November 1992, denied plaintiff's Rule 54(b) motion to revise the orders granting summary judgment for defendants MacKenna and Borchert.

On 31 December 1992, plaintiff Rouse, in her individual capacity, filed a notice of partial voluntary dismissal of her individual action for fraudulent concealment against defendant Watkins, with prejudice, and against defendants Borchert and MacKenna, without prejudice. Also on 31 December 1992, plaintiff Rouse, as guardian *ad litem*, filed notice of voluntary dismissal with prejudice as to the minor plaintiff's negligence claims against defendants Watkins, Byrne, and McCuaig. A settlement was reached between plaintiff Rouse, as guardian *ad litem*, and defendant Hospital, and on 31 December 1992, Judge William C. Griffin, Jr. entered a consent order approving the settlement. Plaintiff Rouse, as guardian *ad litem*, filed notice of voluntary dismissal with prejudice as to the minor plaintiff's claims against defendant Hospital.

On 8 January 1993, plaintiff Rouse, as guardian *ad litem*, filed notice of appeal to the Court of Appeals from the orders for summary judgment and from the order denying plaintiff's Rule 54(b) motion to revise the orders. On 6 September 1993, the Court of Appeals reversed the trial court's grant of summary judgment in favor of defendants MacKenna and Borchert on the issue of negligent supervision and reversed the trial court's grant of summary judgment in favor of defendants MacKenna and Borchert on the issue of vicarious liability under the "borrowed servant" doctrine.

On 9 February 1995, this Court allowed defendants MacKenna's and Borchert's petitions for discretionary review.

With respect to plaintiff Rouse's claims, as guardian *ad litem*, against Dr. MacKenna and Dr. Borchert for negligent supervision and vicarious liability based upon the "borrowed servant doctrine," the forecast of evidence before the trial court, found in allegations in the complaint, the depositions, the stipulations of counsel, and the affidavits in the record on appeal, tends to show that on 12 August 1982 at approximately 8:30 a.m., plaintiff Rouse, who was in labor, was admitted to the Hospital to the service of defendant MacKenna. While defendant Dr. Brame was the on-call attending physician from approximately 8:00 a.m. until 12:00 p.m., it was customary for indigent OB patients such as plaintiff Rouse to be admitted to the service of defendant MacKenna. From approximately 12:00 noon until approximately 5:00 p.m. that evening, as on-call attending physician, defendant MacKenna assumed the responsibility for the on-call supervision of defendants Watkins, the chief OB resident, and Thomas Byrne and McCuaig, the OB residents at the Hospital, who were providing medical care and treatment to Ms. Rouse during her labor and delivery. At 1:45 p.m., nonreassuring patterns of fetal heart rate began to appear and were first documented by a nurse on duty; however, defendant MacKenna testified that he was not consulted by any of the defendant OB residents regarding Ms. Rouse's labor progression.

At approximately 5:00 p.m., defendant Borchert assumed the responsibility for the on-call supervision of the OB residents who were providing medical care for the plaintiffs. While defendant Borchert was the on-call attending physician, the nonreassuring patterns of fetal heart rate continued to be present; however, defendant Borchert was at home and did not see plaintiff Rouse during the second stage of labor until defendant Watkins called defendant Borchert at approximately 8:00 p.m. to come to the Hospital.

The minor plaintiff was delivered at 8:53 p.m. by emergency cesarean section but did not have spontaneous respirations. He was resuscitated with oxygen and bag and mask, intubated, and then transferred to the Neonatal Intensive Care Unit. Subsequently, the minor plaintiff developed significant seizure problems, was placed on several medications, and was diagnosed as suffering from severe cerebral anoxia. Today, he is profoundly mentally retarded and suffers from cerebral palsy, severe spastic quadraparesis, and seizures.

## I.

**[1]** The first issue before this Court is whether the Court of Appeals erred in reversing the trial court's grant of summary judgment for defendants MacKenna and Borchert on the issue of negligent supervision. "Summary judgment is a drastic measure," and is rarely appropriate in negligence cases. *See Mozingo*, 331 N.C. at 187, 415 S.E.2d at 344. On a motion for summary judgment, the moving party has the burden of establishing that no triable issue of fact exists and that he is entitled to judgment as a matter of law. *Id.* at 72, 269 S.E.2d at 140. Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. *Id.* at 73, 269 S.E.2d at 140. If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper. *See Rorrer v. Cooke*, 313 N.C. 338, 354-55, 329 S.E.2d 355, 365-66 (1985).

In *Mozingo*, this Court stated that

> [m]edical professionals may be held accountable when they undertake to care for a patient and their actions do not meet the standard of care for such actions as established by expert testimony. Thus, in the increasingly complex modern delivery of health care, a physician who undertakes to provide on-call supervision of residents actually treating a patient may be held accountable to that patient, if the physician negligently supervises those residents and such negligent supervision proximately causes the patient's injuries.

*Mozingo*, 331 N.C. at 189, 415 S.E.2d at 345. " 'To recover damages for actionable negligence, a plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.' " *Mozingo*, 331 N.C. at 187, 415 S.E.2d at 344 (quoting *Waltz v. Wake Co. Bd. of Educ.*, 104 N.C. App. 302, 304-05, 409 S.E.2d 106, 107 (1991), *disc. rev. denied*, 330 N.C. 618, 412 S.E.2d 96 (1992)). To resolve this issue, we must first decide whether "there was a forecast of evidence tending to show that the defendant, in his capacity as an

on-call supervising physician, owed a duty of reasonable care to the plaintiffs." *Mozingo*, 331 N.C. at 184, 415 S.E.2d at 342.

In the present case, it is uncontested that the defendants, as on-call attending physicians, had a duty to supervise and train the resident physicians. Therefore, as the Court of Appeals correctly concluded, following *Mozingo*, we hold that the defendants owed a duty to plaintiffs to exercise reasonable care in supervising the residents.

The gravamen of the minor plaintiff's claim is that the defendants breached the standard of reasonable care by negligently supervising the obstetrics residents who cared for him and his mother during his birth and that this negligent supervision proximately caused the minor plaintiff's injuries. Thus, the question becomes whether there is a genuine issue of material fact that defendants in their role as on-call attending physicians breached their duty of reasonable care in supervising the resident physicians.

The *Mozingo* case is controlling on this issue. According to the facts in *Mozingo*, when defendant Dr. Kazior began his on-call duty for the OB resident physicians who were caring for patients, he remained at his home available to take telephone calls from the residents. Shortly before 9:45 p.m., Dr. Kazior received a telephone call from a resident physician informing him that she had encountered a problem with the delivery of baby Mozingo. The baby was suffering shoulder dystocia, a condition in which a baby's shoulder becomes wedged in the mother's pelvic cavity during delivery. Dr. Kazior stated that he would be there immediately and left his home for the hospital, which was located approximately two miles away. When Dr. Kazior arrived at the hospital, the delivery of baby Mozingo had been completed.

The plaintiff child, through his guardian *ad litem*, brought an action against defendant Dr. Kazior, as the on-call supervising physician when the plaintiff child was born, alleging negligent supervision of the OB resident physicians. The plaintiffs alleged that Dr. Kazior "failed to make reasonable effort to monitor and oversee the treatment administered by the defendant, Melinda Warren, [a second-year OB resident physician], and the agents of the Defendant, Hospital." *Id.* at 185, 415 S.E.2d at 343.

The trial court granted summary judgment in the defendant's favor. On appeal, this Court affirmed the decision of the Court of Appeals to reverse the trial court and concluded that the evidence forecast by the plaintiffs established a genuine issue of material fact

as to whether the defendant Dr. Kazior breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries.

In considering whether there was a genuine issue of material fact as to whether the defendant breached his duty of reasonable care, we noted that plaintiffs' expert's sworn affidavit stated that Dr. Kazior "should have called in at the beginning of his on-call coverage and periodically thereafter to check on the status of the patients" being treated and managed by the residents. *Id.* at 191, 415 S.E.2d at 346. We also noted that the affidavits submitted on behalf of the defendant stated that an "on-call physician may take calls at home 'unless a problem is specifically anticipated.' " *Id.* This Court then concluded that, according to defendant's own experts, "simply remaining at home and available to take telephone calls is not always an acceptable standard of care for supervision of residents." *Id.* We then held that defendant Dr. Kazior's failure to call in and periodically check on the status of the patients being treated by the residents established "a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiffs' injuries." *Id.*

Similarly, in the case at bar, defendant Dr. Borchert filed the affidavits of Dr. Ernest Brown, Jr., and Dr. Samuel Wheatley in support of his motion for summary judgment. Both affiants stated that "the care and treatment rendered to the plaintiff . . . was appropriate and in all respects in accordance with the standards of practice for physicians engaged in the practice of obstetrics who possess training and experience similar to the defendant who were engaged in such practice in the defendant's community."

Defendant MacKenna presented three affidavits, including his own, to support his motion for summary judgment. Two of the affidavits were given by Dr. Watson Bowes, Jr., and Dr. Joseph Ernest, III, faculty professors from the University of North Carolina School of Medicine and Bowman Gray School of Medicine, respectively, who are responsible for the supervision and training of OB resident physicians. These affiants stated that the protocol of their respective medical communities "did not require that an On Call Attending [P]hysician personally examine each obstetrical patient who was admitted while he was on call, nor did the applicable procedures require that he review the medical chart of such patients." Further, the affiants stated that the on-call attending physician "was permitted to afford coverage during the hours of his assignment by being immediately

accessible by telephone or pager" or "by either being present in the hospital or, unless a problem was present or specifically anticipated, by being present at his residence or other specified place" so as to be "immediately available" if his assistance was requested by a nurse or resident in obstetrics.

The plaintiff, as guardian *ad litem*, responded with the sworn affidavits of Dr. J. Patrick Lavery and Dr. Harold Schulman, who are both Board-certified obstetricians and specialists in maternal and fetal medicine. Both affiants stated that, in their opinion,

> it was the obstetrical standard of care for fully trained obstetricians, such as Dr. MacKenna and Dr. Borchert, to fully supervise and be responsible for the acts of residents working under their exclusive control and supervision. It is the duty of a fully trained attending physician (who is supervising resident physicians) to know the competency level of the training physicians that they supervise. This duty to know the competency level of a training resident working under the supervision of an attending is necessary and required in order to provide safe and adequate patient care. It is my opinion, to a reasonable degree of medical certainty, that the labor and delivery records of Vickie Rouse demonstrate that the resident physicians caring for her were not able to give, and did not give, obstetrical care that complies with appropriate standards for obstetrical practice. Since the attending physician noted on the hospital chart of Vickie Rouse was Dr. Jarlath MacKenna, and since Dr. MacKenna shared an on-call schedule with other attending physicians, the appropriate standard of care to apply for Vickie Rouse's obstetrical care is that of a fully trained attending obstetrician. Resident physicians, who manage the obstetrical care in the place of the attending physician caring for the patient, are under duty to bring to the patient the level and standard of care of an attending physician. They are working under the supervision of, and at the pleasure of, the attending physician who is responsible for the medical care delivered to the patient.

Further, they stated that

> Dr. MacKenna and Dr. Borchert . . . and the resident physicians who cared for [Ms. Rouse] at the direction and under the control of Dr. MacKenna and Dr. Borchert, deviated from the appropriate standards of practice in the following respects:
>
> (a) failure to recognize the abnormal labor pattern of Vickie Rouse and the fetal heart rate abnormalities;

(b) failure to determine the status of the fetus during labor by a scalp p.H. sample, when non-reassuring fetal heart tones continued;

(c) failure to monitor the fetal heart rate from around 8:15 p.m. when the scalp electrodes were removed until 8:53 p.m. when Travis Sentel Rouse was born;

(d) failure to intervene with a Cesarean delivery at an appropriate time[.]

Finally, the affiants stated that, in their opinion,

> the appropriate standard of care in presence of the . . . documented fetal heart tones was for the attending physician, or the resident physician acting in the place of and under the control of the attending physician, to either assure himself of fetal well being by means of scalp pH sample or otherwise, or do an earlier Cesarean section than was done. . . . [T]he appropriate standard of care was to not allow Vickie Rouse to remain in second stage of labor for 4 hours in the presence of the continuing fetal heart-tone abnormalities.
>
> . . . Dr. MacKenna and Dr. Borchert failed to adequately supervise their assistants, the resident physicians, who were managing the obstetrical care of their patient.

In addition, Dr. Robert Brame, Chairman of the Department of Obstetrics and Gynecology at the Hospital in August of 1982, testified by deposition regarding his expectations of an on-call attending physician. He explained his expectations by testifying to what he normally does as an on-call attending physician. He testified as follows:

> I sort of patrol the area when I'm on call, which means I go in, and I—a common procedure this Thursday will be for me to go back and go over with the residents back there everybody who is on the board.
>
> I may or may not go in the rooms and look at the monitor tracings, look at patients, say hello. If it's a patient who's having no problem of any sort and I've been told that and I'm comfortable with that assessment, I may not go into the room and see the patient physically.

When asked whether Dr. Brame would have expected to be informed if there was an abnormal labor, he responded, "I would expect to learn that by my patrolling in and out." Dr. Brame also testified that before leaving the patients to the nighttime on-call attending physician, he would expect a daytime on-call attending physician to have

assured himself that "the place was in proper order, that the patients were receiving proper care, and that there were no major problems that needed his attention. . . . [T]he attending should have known what was going on in the house, who was having a problem, what the anticipated problems might have been during the evening and nighttime." He also testified that he expected that the attending physician, before leaving the hospital, would have walked through the floor and assured himself that there were no ongoing problems that did not require his staying and managing the situation. Finally, the Hospital's rules and regulations state in paragraph 6 that "the attending practitioner shall be responsible for reading all [clinical entries in the medical record]. All formal entries (such as history and physical examination, operative reports, and discharge summaries) shall be countersigned (authenticated) by the attending practitioner."

Following the analysis in *Mozingo*, defendant MacKenna and others testified by deposition that the duty of an attending obstetrician is "[t]o be available for consultation to the residents." Dr. MacKenna testified that, generally, he would "make morning rounds with the residents," and "then the attending physician would sort of then be available." However, there was no evidence presented that on the day in question, 12 August 1982, defendant Dr. MacKenna followed this practice.

Likewise, defendant Dr. Borchert testified during his deposition that

> [m]y responsibility for caring for Ms. Rouse was to be available to respond to assist in her care in any way, to assist the resident in any way, if called upon, to provide care for Ms. Rouse and to respond when such request was made. Unless I had knowledge that something was irregular about her care or something presented an increased risk so far as her care is concerned or something was unusual about her care, I probably would not intervene unless asked to or notified by the resident.

While defendant Borchert maintains that he began his on-call duty, as he usually does, by checking with the resident physicians on the conditions of all the patients, the evidence presented established only his usual practice. Defendant Borchert specifically testified that he was unable to recall whether he went to the labor and delivery room to check on the status of the patients on the day that plaintiff delivered her child. Moreover, Dr. Watkins, the chief OB resident on duty on the date in question, testified by deposition that usually an attending

physician is "kept fairly well abreast of what was going on, himself[,] . . . without being asked."

Finally, plaintiffs' medical charts reveal no notations by either defendant or by any of the OB resident physicians on duty that indicate that they had toured the ward or examined Ms. Rouse. From the time of Ms. Rouse's arrival at the Hospital around 8:20 a.m. until 8:30 p.m. when the cesarean section was begun, her care was provided solely by resident physicians.

The evidence forecast by the plaintiff, as guardian *ad litem*, establishes a genuine issue of material fact as to whether the defendants breached the applicable standard of care and thereby proximately caused the plaintiff's injuries. Such issues are questions for the jury. *Mozingo*, 331 N.C. at 191, 415 S.E.2d at 346. Therefore, based on plaintiff's forecast of evidence, we conclude that the trial court erred in entering summary judgment for the defendants and affirm the decision of the Court of Appeals reversing the trial judge on this issue.

## II.

**[2]** Secondly, defendants contend that the Court of Appeals erred in reversing the trial court's granting of summary judgment in favor of defendants MacKenna and Borchert on the issue of their vicarious liability under the "borrowed servant" doctrine for the alleged negligence of the resident physicians.

This Court has previously examined the liability based on a theory of vicarious liability of medical professionals in supervisory capacities. "As a general rule, a physician who exercises due care is not liable for the negligence of nurses, attendants or interns who are not his employees." *Davis v. Wilson*, 265 N.C. 139, 146, 143 S.E.2d 107, 112 (1965). However, "[o]ne who borrows another's employee may be considered a temporary master liable in *respondeat superior* for the borrowed employee's negligent acts if [he] acquir[es] the same *right of control* over the employee as originally possessed by the lending employer." *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994).

> Whether a servant furnished by one person to another becomes the employe (sic) of the person to whom he is loaned [depends on] whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it*. . . . A servant is the employe (sic) of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually exercises that control or not.

*Id.* (emphasis in original) (alteration in original) (setting out the traditional test of liability under the borrowed servant doctrine) (quoting *Weaver v. Bennett*, 259 N.C. 16, 28, 129 S.E.2d 610, 618 (1963)).

"Residents are trained professionals and should be able to perform duties commensurate with their training without direct supervision." Stewart R. Reuter, M.D., J.D., *Professional Liability in Postgraduate Medical Education—Who is Liable for Resident Negligence?*, 15 J. Legal Med. 485, 505 (1994). "[R]esidents should be able to carry out an attending physician's orders in the physician's absence and the failure to do so in a reasonable manner should not cause the attending physician to become a borrowing employer." *Id.* "Absent evidence to the contrary, the presumption exists that the hospital intends to retain the right to control the activities of its house staff unless it specifically relinquishes such control." *Id.*; *see Harris*, 335 N.C. at 388, 438 S.E.2d at 736 ("Absent evidence to the contrary, the original employer is presumed to retain the right of control.").

Turning now to the question of whether the trial court erred in granting defendants MacKenna's and Borchert's motions for summary judgment on plaintiff's vicarious liability claims, our first task in analyzing the applicability of the "borrowed servant" doctrine is to determine whether this doctrine is implicated in the context of the on-call attending physician situation such as that under review. The threshold question is whether the resident physicians were general employees of the Hospital.

It is uncontested that the resident physicians involved in this case were employees of the Hospital. They were paid by the Hospital, spent all of their working hours under the direction of Hospital staff, and did not maintain a practice of their own. Moreover, upon the review of paragraph H of the by-laws of the medical staff of the Hospital, resident physicians are considered the "house staff" of the Hospital.

Having established that the Hospital is the resident physicians' general employer, the next matter to be determined is whether the Hospital's liability for the resident physicians' negligence shifted to defendants—that is, whether there is a sufficient forecast of evidence to prove that defendants, as the on-call attending physicians, had the right of control, *Harris*, 335 N.C. at 387, 438 S.E.2d at 735, over the resident physicians' manner of performance of their duties. Plaintiff Rouse, as guardian *ad litem*, argues that the forecast of evidence shows that although the house staff or resident physicians managed plaintiff Rouse's care, defendants MacKenna and Borchert had con-

trol over and the right to control the resident physicians' provision of her medical care and treatment because she was in fact the patient of the attending physicians, who were required to supervise and direct the resident physicians.

Plaintiff relies on the case of *Harris v. Miller*, the most recent North Carolina case discussing the "borrowed servant" doctrine. In *Harris*, this Court dealt with the liability of a surgeon for the negligence of a nurse anesthetist during an operation. *Harris* specifically addressed the issue of a surgeon's liability for operating personnel *working with him* throughout the course of an operation. *Id.* at 395, 438 S.E.2d at 740. This Court concluded that "[w]hether a surgeon may be held vicariously liable for the negligence of one assisting in the operation depends on whether, in the particular case, the surgeon had the right to control the manner in which the assistant performed." *Id.* Consequently, the Court of Appeals in the case at bar concluded that the issue of defendants' liability turned on whether the defendants "had the *right to control* the manner of the residents' performance of their duties." *Rouse*, 116 N.C. App. at 248, 447 S.E.2d at 509.

We find the circumstances in *Harris* wholly distinguishable from the instant case because the *Harris* decision was limited to deciding the proper application of the "borrowed servant" doctrine in the context of determining the liability of a surgeon for the negligence of operating room personnel over whom he had direct and actual control during the operation. This is not the situation in the case at bar.

Defendants argue that under circumstances such as when an attending physician is on-call, the "borrowed servant" doctrine is not even implicated unless the resident is in the presence of the attending physician and is acting under that attending physician's direct supervision and control. Defendant's argument is based on our decision in the case of *Davis*, 265 N.C. 139, 143 S.E.2d 107. However, we find defendants' reliance on *Davis* misplaced.

In *Davis*, the plaintiff sued the defendant physicians for the negligence of a medical technologist who had mislabeled a blood sample, which resulted in the death of a patient. Dr. Wilson, one of the defendants, was hired by Rex Hospital as chief of the laboratory department or chief pathologist and had supervisory responsibilities, under the control of the hospital director and the board of trustees, over the negligent medical technologist. This Court held that none of the defendants were vicariously liable for the technologist's negligence because of the evidence that showed that the defendants and the medical technologist were employees of and paid by the hospital; that

none of the "defendants, or any one of them, knew that Mrs. Davis was in Rex Hospital for surgery or that blood for transfusion had been requested for her and furnished by the laboratory department of the hospital"; and that "[the medical technologist] was not an agent or employee or servant of the three defendant doctors, or any one of them." *Id.* at 148, 143 S.E.2d at 113.

Unlike the case at bar, *Davis* turned on the fact that the defendants and the medical technologist were all employees of the same entity—Rex Hospital; therefore, the medical technologist could not be an employee of the defendant doctors. Here, defendants are employed by the East Carolina University ("ECU") School of Medicine as members of the faculty, and the resident physicians are employees of the Hospital.

"[W]here the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive." *Harris*, 335 N.C. at 387, 438 S.E.2d at 735 (citing *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963) ("When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the [borrowed servant] question is relatively simple."). The forecast of evidence in this case shows that the ECU School of Medicine and the Hospital entered into an "Agreement of Affiliation" whereby the Hospital delegated its responsibility to supervise and control the resident physicians' performance of duties to the ECU School of Medicine's dean and faculty members. Defendants MacKenna and Borchert were employed by the ECU School of Medicine as members of the faculty and were not employees of the Hospital. Paragraph C of the agreement provides that "medical students and house staff shall be responsibly involved in patient care under the supervision of the Dean and the faculty of the School of Medicine." The Hospital's rules and regulations specify that "a patient may be admitted to the hospital only by a member of the medical staff." The Hospital's trustee bylaws provide that "[o]nly a licensed physician with clinical privileges shall be directly responsible for a patient's diagnosis and treatment." Paragraph H of the Hospital's medical bylaws provides that "the house staff officer will only practice under the direction of the department chairman or his delegate. Each chairman is finally responsible for the action of the house staff officers in his department." The medical bylaws also provide that only physicians who are Board-certified or Board-eligible—those who have completed their residency—by the American Board of Obstetrics and Gynecology are eligible for clinical privileges.

As we have previously stated, in this case, because plaintiff Rouse was an indigent patient, she was admitted to the service of defendant MacKenna. Defendants MacKenna and Borchert hold unlimited licenses to practice medicine and are Board-certified and, therefore, had been granted clinical privileges at the Hospital; the resident physicians were not eligible for clinical privileges. In addition, Dr. Borchert gave a description of his understanding of what supervision of the resident physicians entailed:

> Supervision can vary depending upon again the extended training of the residents. At times, I think supervision can be actually doing a task in the form of teaching. That's also supervision. I think supervision could be holding someone's hand while they do something. I think supervision could be observing them while they do something and commenting about their performance. I think supervision could say please don't do that; let me do that. I think supervision could be a combination of all these things, but basically I think supervision involves being able to respond when called on to help. Supervision involves being certain that the patient is being cared for well.

Finally, plaintiff's experts averred in their affidavits that the resident physicians worked "under the supervision of, and *at the pleasure of*, the attending physician who is responsible for the medical care delivered to the patient." (Emphasis added.)

While there is evidence in the record that the Hospital retained the authority to hire, pay, discipline, and terminate the resident physicians and the ultimate authority to grant hospital privileges to residents to perform certain tasks (i.e, emergency cesarean sections by fourth-year resident physicians), there is also evidence that tends to show that the Hospital delegated the right to control the resident physicians' *manner* of performance related to the provision of medical services to patients exclusively to the ECU School of Medicine's department chairperson or his delegates (i.e., ECU faculty attending physicians who had been granted clinical privileges at the Hospital), thereby allowing the resident physicians' negligence to be imputed to the attending physicians. This conclusion is further supported by the fact that the Hospital did not employ an obstetrician and thus presumably did not itself have the means of controlling obstetrical decisions. *See Harris*, 335 N.C. at 397, 438 S.E.2d at 741. Therefore, based on the foregoing, we must conclude that plaintiff's forecast of the evidence is sufficient to raise a genuine issue of material fact as to whether defendants MacKenna and Borchert had the right to control

the resident physicians' performance of their duties. We hold that the trial court improperly entered summary judgment for defendants on the claims of the negligent supervision and vicarious liability based on the "borrowed servant" doctrine. The decision of the Court of Appeals is

AFFIRMED.

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

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STATE OF NORTH CAROLINA v. NORMAN LEE OLIVER, JR.

No. 378PA95

(Filed 10 May 1996)

1. **Automobiles and Other Vehicles § 115 (NCI4th); Constitutional Law § 172 (NCI4th)— DWI arrest—administrative revocation of driver's license—subsequent criminal prosecution—no double jeopardy**

The ten-day administrative revocation of defendant's driver's license under N.C.G.S. § 20-16.5 after his arrest for DWI and the $50 restoration fee constitute a remedial highway safety measure and not punishment for purposes of double jeopardy analysis; therefore, defendant's subsequent conviction for DWI did not amount to a second punishment for the same offense in violation of the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. U.S. Const. amend. V; N.C. Const. art. I, § 19.

**Am Jur 2d, Automobile Insurance § 71; Automobiles and Highway Traffic § 310; Criminal Law §§ 258 et seq.**

**Validity and application of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of, or ability to operate, motor vehicle. 18 ALR5th 542.**

2. **Evidence and Witnesses §§ 1831, 2311 (NCI4th)— chemical analysis of breath—notice of rights by arresting officer—admissibility of results**

In enacting N.C.G.S. § 20-16.2(a), the legislature did not intend to require an officer, other than the arresting officer, to

notify a person charged with DWI of his rights regarding chemical analysis of the breath in order for the test results to be admissible in the criminal prosecution for DWI; rather, the legislature intended to permit a qualified arresting officer to notify defendant of his rights, orally or in writing, regarding a chemical analysis of the breath. The requirements governing the admissibility of a chemical breath analysis were satisfied in this DWI case where the arresting officer notified defendant of his rights; defendant and the State stipulated that the arresting officer was certified as a chemical analyst by the N.C. Department of Human Resources at the time he conducted the chemical analysis of defendant's breath; and defendant's alcohol concentration was tested by an automated instrument which prints the results of the chemical analysis. N.C.G.S. §§ 20-139.1(a) and (b).

**Am Jur 2d, Automobiles and Highway Traffic §§ 305-307; Evidence §§ 1021, 1022.**

**Driving while intoxicated—duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law. 95 ALR3d 710.**

**Necessity and sufficiency of proof that tests of blood alcohol concentration were conducted in conformance with prescribed methods. 96 ALR3d 745.**

**Drunk driving—Motorist's right to private sobriety test. 45 ALR4th 11.**

**3. Automobiles and Other Vehicles § 852 (NCI4th); Criminal Law § 904 (NCI4th)— impaired driving—disjunctive instruction—unanimity of verdict**

The trial court did not allow a nonunanimous verdict in violation of Art. I, § 24 of the N.C. Constitution and N.C.G.S. § 15A-1237(b) by its instruction allowing the jury to find defendant guilty of impaired driving if it found beyond a reasonable doubt that defendant drove a vehicle on a highway in this state while he was under the influence of an impairing substance *or* had an alcohol concentration of 0.08 or more at a relevant time after driving, since N.C.G.S. § 20-138.1 creates one offense which may be proved by either or both theories detailed in subsections (1) and (2), and the jury could unanimously find defendant guilty of the single offense of impaired driving even though some of the jurors may have found that defendant was under the influence of an impairing substance and other jurors may have found that

defendant's alcohol concentration was 0.08 or more at some relevant time after driving.

**Am Jur 2d, Criminal Law § 892; Trial §§ 1750 et seq.**

**Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense. 16 ALR3d 1373.**

Justice WEBB dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of defendant's conviction for driving while impaired entered by Allen (J.B., Jr.), J., at the 26 June 1995 Criminal Session of Superior Court, Alamance County. 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.*

*Hunt and White, by George E. Hunt and Octavis White, Jr., for defendant-appellant.*

*Wyatt & Cunningham, by James F. Wyatt, III, and John R. Cunningham, III; and Rawls & Dickinson, by Eben T. Rawls, on behalf of The North Carolina Academy of Trial Lawyers, amicus curiae.*

LAKE, Justice.

Defendant appeals his conviction and sentence for driving while impaired ("DWI") in violation of N.C.G.S. § 20-138.1. Defendant contends his conviction must be reversed because: (1) the administrative license revocation proceeding which resulted in defendant's driver's license being revoked for ten days barred defendant's subsequent criminal prosecution for DWI under the principles of double jeopardy; (2) the arresting officer informed defendant of his rights regarding the chemical analysis of his breath for alcohol concentration rather than allowing another officer to do so, which violated N.C.G.S. § 20-16.2(a) and required the suppression of defendant's breath test result in his criminal prosecution for DWI; and (3) the trial court instructed the jury in such a way as to allow a nonunanimous verdict, which violated the North Carolina Constitution and N.C.G.S. § 15A-1237(b). For the reasons which follow, we affirm defendant's conviction and sentence.

On 24 June 1994, Trooper E.L. Morris charged defendant with DWI in violation of N.C.G.S. § 20-138.1. Defendant submitted to a

chemical analysis of his breath to determine his alcohol concentration using an Intoxilyzer 5000, and prior to the chemical analysis, Trooper Morris notified defendant of his rights regarding the Intoxilyzer 5000. At the time defendant was tested, Trooper Morris was a certified chemical analyst with the North Carolina Department of Human Resources. The chemical analysis of defendant's breath revealed defendant's alcohol concentration was 0.08. Trooper Morris completed and filed an affidavit and revocation report regarding the analysis result. Upon review by a magistrate, a revocation order was entered 24 June 1994 revoking defendant's driver's license for ten days. The Division of Motor Vehicles restored defendant's driver's license at the expiration of the ten days upon defendant's payment of a $50 restoration fee.

On 4 May 1995, defendant was found guilty of DWI in district court; defendant appealed to superior court. Defendant filed a motion to dismiss the DWI charge against him on the ground that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prevented his prosecution for DWI and filed a motion to suppress the result of the Intoxilyzer 5000 test on the ground that Trooper Morris failed to take defendant before another officer to inform defendant of his rights in accord with N.C.G.S. § 20-16.2(a). Both motions were denied by Judge J.B. Allen, Jr. On 28 June 1995, a jury found defendant guilty of DWI.

I.

**[1]** Defendant contends that the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution prohibited defendant's conviction for DWI because he allegedly had already been punished for this offense.

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969) (footnotes omitted), *companion case overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989). The Law of the Land Clause incorporates similar protections under the North Carolina Constitution. *See* N.C. Const. art. I, § 19. In this case, defendant contends that the guarantee against double jeopardy has been implicated because he was doubly punished in separate proceedings which were based on the same offense. More specifically, defendant argues that

the ten-day administrative revocation of his driver's license constitutes punishment for purposes of double jeopardy analysis, and thus, his subsequent criminal conviction for DWI amounts to a second punishment for the same offense. The State responds that the ten-day driver's license revocation is a highway safety measure, not punishment; therefore, according to the State, there is no double jeopardy violation. We agree with the State in this regard.

Defendant relies upon three cases from the United States Supreme Court: *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989); *Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488 (1993); and *Department of Revenue v. Kurth Ranch*, — U.S. —, 128 L. Ed. 2d 767 (1994). Under these cases, defendant contends that the term "punishment" for purposes of double jeopardy analysis is now to be afforded a much broader definition than that traditionally employed. Defendant states that *Halper* began this trend of broadly interpreting punishment and that a sanction must now be classified as punishment when the sanction, though serving remedial goals, also serves the twin aims of punishment—deterrence and retribution.

In *United States v. Halper*, the United States Supreme Court phrased the dispositive question as "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U.S. at 436, 104 L. Ed. 2d at 494. The Court noted first that in identifying the inherent nature of a proceeding, labels of "criminal" and "civil" were not of paramount importance and "that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7, 104 L. Ed. 2d at 501 n.7. The Court announced what it termed as a "rule for the rare case," *id.* at 449, 104 L. Ed. 2d at 502, and explained:

> [A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> . . . [P]unishment serves the twin aims of retribution and deterrence. . . . [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second

sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

*Id.* at 448-49, 104 L. Ed. 2d at 501-02 (citations omitted).

Next, the Supreme Court decided *Austin v. United States*, 509 U.S. 602, 125 L. Ed. 2d 488. Citing *Halper's* formula for determining whether a sanction constitutes punishment, the Court held that a civil forfeiture of property under 21 U.S.C. § 881(a)(4) and (7), as applied in *Austin*, equaled punishment and was, therefore, "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at ——, 125 L. Ed. 2d at 506. The Supreme Court later decided *Department of Revenue v. Kurth Ranch*, —— U.S. ——, 128 L. Ed. 2d 767. Again, relying on *Halper*, the Court determined that Montana's Dangerous Drug Tax Act, as applied in *Kurth Ranch*, was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." *Kurth Ranch*, —— U.S. at ——, 128 L. Ed. 2d at 781.

Thus, the narrow issue before this Court is whether the ten-day driver's license revocation under N.C.G.S. § 20-16.5 cannot fairly be said to serve a remedial purpose because the revocation also serves the goals of punishment such that defendant's subsequent criminal conviction for DWI amounts to a second punishment for the same offense in violation of the Double Jeopardy Clause. For the following reasons, we conclude that the ten-day driver's license revocation does not constitute punishment as such, and consequently, defendant's criminal conviction for DWI did not violate the Double Jeopardy Clause.

Historically, this Court has long viewed drivers' license revocations as civil, not criminal, in nature. *See Seders v. Powell*, 298 N.C. 453, 462, 259 S.E.2d 544, 550 (1979) ("[R]evocation proceedings are civil because they are not intended to punish the offending driver but to protect other members of the driving public."); *State v. Carlisle*, 285 N.C. 229, 232, 204 S.E.2d 15, 16 (1974) ("The purpose of a revocation proceeding is not to punish the offender, but to remove from the highway one who is a potential danger to himself and other travelers."); *Joyner v. Garrett*, 279 N.C. 226, 234, 182 S.E.2d 553, 559 (1971) ("Proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil and not criminal in nature, and the revocation of a license is no part of the punishment for the crime for which the licensee was arrested."); *Honeycutt v. Scheidt*, 254 N.C. 607, 610, 119 S.E.2d 777, 780 (1961) ("The purpose of the suspension or revocation of a driver's license is to protect the public and not to

punish the licensee."); *Harrell v. Scheidt*, 243 N.C. 735, 739, 92 S.E.2d 182, 185 (1956) ("[T]he revocation of a license to operate a motor vehicle is not a part of, nor within the limits of punishment to be fixed by the court, wherein the offender is tried.").

In *Henry v. Edmisten*, 315 N.C. 474, 340 S.E.2d 720 (1986), this Court reviewed the statute presently at issue, N.C.G.S. § 20-16.5, and held that it did not offend the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution or the Law of the Land and the Equal Protection Clauses of the North Carolina Constitution. In the Court's analysis under the Law of the Land Clause, the Court labeled N.C.G.S. § 20-16.5 as remedial rather than punitive and noted:

> After a person charged with impaired driving fails a breath test, prompt remedial action by the [S]tate is needed. Such a person . . . represents a demonstrated present as well as [an] appreciable future hazard to highway safety. The safety of the impaired driver and other people using the [S]tate's highways depends upon immediately denying the impaired driver access to the public roads.

*Henry*, 315 N.C. at 494, 340 S.E.2d at 733. While the Court explicitly recognized that the substance of the law, not the label given to it by the legislature, governed, the Court cited as additional support for its decision the fact that N.C.G.S. § 20-16.5(o) provides: " 'Proceedings under this section are civil actions, and must be identified by the caption "In the Matter of ———." ' " *Id.* at 495, 340 S.E.2d at 734 (quoting N.C.G.S. § 20-16.5(o)).

Defendant, however, argues that *Henry* is inapplicable to the present case for a variety of reasons. After careful consideration of each, we must disagree. While *Henry* did not present the Court, as we have previously noted, with an issue involving the principles of double jeopardy, we nevertheless find persuasive the Court's analysis and conclusion that N.C.G.S. § 20-16.5 is remedial.

Defendant cites the following legislative commentary on N.C.G.S. § 20-16.5 and contends the commentary establishes that the ten-day driver's license revocation has deterrent and retributive purposes, and consequently, the statute cannot be said to serve solely remedial purposes:

> This [revocation] provision serves a couple of functions important to the Governor and the proponents of the bill. First, it provides an immediate "slap in the face" to virtually all drivers

charged with DWI. Second, the fact that it is imposed independent of the trial on the criminal charge makes it more certain that a sanction will be imposed, regardless of the defendant's status or his lawyer's expertise.

Ann L. Sawyer, *North Carolina Legislation 1983: A Summary of Legislation in the 1983 General Assembly of Interest to North Carolina Public Officials*, "Impaired Driving: The Safe Roads Act," 117 (Institute of Government, Univ. of N.C. at Chapel Hill, 1983). However, the Court in *Henry*, confronted by this same legislative commentary, rejected defendant's argument:

> We conclude, nevertheless, that the summary revocation procedure of § 16.5 is not a punishment but a highway safety measure. Whatever the intent of individual proponents of the bill, the bill as finally enacted reflects an intent by the legislature for the revocation provision to be a remedial measure. . . . Revocation is not added punishment for a criminal act but a finding that a driver is no longer fit to hold and enjoy the driving privilege which the [S]tate has granted under its police power.

*Henry*, 315 N.C. at 495-96, 340 S.E.2d at 734.

We are not persuaded in light of *Halper*, *Austin* or *Kurth Ranch* to depart from the repeated holdings of this Court characterizing the purpose of drivers' license revocations as remedial rather than as punishment. *Halper* did not hold that every civil sanction be viewed as punishment, as defendant urges; rather, the Court labeled its holding as a "rule for the rare case" and noted that the sanction of more than $130,000 Halper faced was "overwhelmingly disproportionate to the damages he has caused." *Halper*, 490 U.S at 449, 104 L. Ed. 2d at 502. In contrast, the temporary ten-day driver's license revocation provided for in N.C.G.S. § 20-16.5 and the $50 restoration fee are neither excessive nor overwhelmingly disproportionate responses to the immediate dangers an impaired driver poses to the public and himself. An impaired driver presents an immediate, emergency situation, and swift action is required to remove the unfit driver from the highways in order to protect the public. We do not pretend to ignore that a driver's license revocation, even of short duration, may, for some, have a deterrent effect. However, as the United States Supreme Court recognized, whether a particular sanction constitutes punishment need not be determined from the defendant's perspective since "even remedial sanctions carry the sting of punishment." *Halper*, 490 U.S. at 447 n.7, 104 L. Ed. 2d at 501 n.7. Indeed, any deterrent effect a driver's

license revocation may have upon the impaired driver is merely incidental to the overriding purpose of protecting the public's safety. By our decision, we join with the majority of states which have considered this issue and held that a DWI conviction after a defendant has had his or her driver's license revoked does not violate the Double Jeopardy Clause.[1]

Moreover, this Court has long held that a driver's license "is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked." *Joyner*, 279 N.C. at 235, 182 S.E.2d at 559; *see Harrell*, 243 N.C. 735, 92 S.E.2d 182. The ten-day driver's license revocation provided for in N.C.G.S. § 20-16.5 merely signifies the failure of the driver to adhere to the conditions imposed by the legislature on the driver's license. As such, it is not punishment.

In conclusion, we hold that the ten-day driver's license revocation provided for under N.C.G.S. § 20-16.5 and the $50 restoration fee do not constitute punishment for purposes of double jeopardy analysis. Consequently, defendant's subsequent prosecution for DWI did not violate the Double Jeopardy Clause. This assignment of error is overruled.

II.

**[2]** In another assignment of error, defendant contends that N.C.G.S. § 20-16.2(a) requires an officer, other than the arresting officer, to notify a person charged with an implied-consent offense of his rights regarding chemical analysis of the breath in order for the test results to be admissible in a criminal prosecution for DWI. Defendant argues that Trooper Morris informed defendant of his rights rather than hav-

1. *See State v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995); *State v. Nichols*, 169 Ariz. 409, 819 P.2d 995 (Ct. App. 1991); *Ellis v. Pierce*, 230 Cal. App. 3d 1557, 282 Cal. Rptr. 93 (1991); *Davidson v. MacKinnon*, 656 So. 2d 223 (Fla. Dist. Ct. App.), *disc. rev. denied*, 662 So. 2d 931 (Fla. 1995); *Gomez v. State*, 621 So. 2d 578 (Fla. Dist. Ct. App. 1993); *Freeman v. State*, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992), *disc. rev. denied*, 623 So. 2d 493 (Fla.), *cert. denied*, — U.S. —, 126 L. Ed. 2d 361 (1993); State v. Higa, 79 Haw. 1, 897 P.2d 928 (1995); *State v. Funke*, 531 N.W.2d 124 (Iowa 1995); *State v. Maze*, 16 Kan. App. 2d 527, 825 P.2d 1169 (1992); *Butler v. Department of Public Safety*, 609 So. 2d 790 (La. 1992); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *Johnson v. State*, 95 Md. App. 561, 622 A.2d 199 (1993); *State v. Hanson*, 543 N.W.2d 84 (Minn. 1996) (en banc); *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996); *State v. Cassady*, 140 N.H. 46, 662 A.2d 955 (1995); *Helber v. State*, 915 S.W.2d 955 (Tex. Ct. App. 1996); *State v. Strong*, 158 Vt. 56, 605 A.2d 510 (1992).

ing another officer do so, and thus, the results of the chemical analysis of defendant's breath should have been inadmissible at his DWI trial.

Defendant relies upon *Nicholson v. Killens*, 116 N.C. App. 473, 448 S.E.2d 542 (1994), as support for his contention. *Nicholson* involved an appeal of a superior court's order rescinding the administrative revocation of Nicholson's driver's license for willfully refusing to submit to a chemical breath analysis pursuant to N.C.G.S. § 20-16.2(d). The Court of Appeals affirmed and held that N.C.G.S. § 20-16.2 requires an arresting officer to take a defendant before another officer who is to inform defendant, both orally and in writing, of the rights enumerated in N.C.G.S. § 20-16.2(a). *Nicholson*, 116 N.C. App. at 477, 448 S.E.2d at 544. In the present case, defendant acknowledges that the Court of Appeals limited its holding in *Nicholson* to "the governing statutes relating to the statutorily mandated twelve (12) month administrative revocation of petitioner's driver's license for refusal to submit to breath analysis pursuant to G.S. 20-16.2." *Id.* at 478-79, 448 S.E.2d at 545. With regard to the failure of the arresting officer to take defendant before another officer to inform defendant of his rights, the court stated that:

> This failure has no adverse effect whatever on any subsequent criminal prosecution for driving while impaired . . . . Likewise [the court's] decision here has no adverse effect whatever on the admissibility of the results of the breath analysis using an automated breath instrument that prints the result of its analysis, where a driver has agreed to submit to the breath analysis.

*Id.* at 478, 448 S.E.2d at 544. However, defendant nevertheless urges this Court to apply *Nicholson* to the facts of the present case even though the present case does not involve a driver's license revocation for refusal to submit to a chemical breath analysis. We decline to do so.

N.C.G.S. § 20-16.2 sets forth the procedures for notifying a defendant of his rights with respect to chemical analysis of the breath as well as for notifying a defendant of his rights with respect to chemical analysis of the blood. The portion of N.C.G.S. § 20-16.2(a), in effect at the time of defendant's trial, dealing with chemical analysis of the breath provides in pertinent part:

> [B]efore any type of chemical analysis is administered the person charged must be taken before a chemical analyst authorized to administer a test of a person's breath, who must inform the per-

> son orally and also give the person a notice in writing [of the rights enumerated in N.C.G.S. § 20-16.2(a)].

N.C.G.S. § 20-16.2(a) (1993) (amended 1995). However, the portion of N.C.G.S. § 20-16.2(a) dealing with chemical analysis of the blood provides that "the charging officer *or* the arresting officer may give the person charged the oral and written notice of rights required." *Id.* (emphasis added). Thus, N.C.G.S. § 20-16.2(a) arguably implies a rather oblique internal discrepancy or ambiguity in that when a chemical analysis of the blood is performed, the arresting officer is permitted to notify defendant of his rights regarding the test, yet when a chemical analysis of the breath is performed, an inference arises from the language "the person charged must be taken before a chemical analyst" that the arresting officer may not notify defendant of his rights regarding the test, even if such officer is authorized to administer the test.

A cardinal principle governing statutory interpretation is that courts should always give effect to the intent of the legislature. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). The will of the legislature "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *State ex rel. N.C. Milk Comm'n v. National Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967).

> We should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent.

*State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 400, 269 S.E.2d 547, 561 (1980) (citations omitted). In this regard, we note that N.C.G.S. § 20-139.1, relating to procedures governing chemical analysis and its admissibility, explicitly refers to the terms of N.C.G.S. § 20-16.2 several times, and N.C.G.S. § 20-16.2 likewise references N.C.G.S. § 20-139.1.

N.C.G.S. § 20-139.1(b1) was recently amended to provide: "A chemical analysis of the breath may be performed by an arresting officer *or* by a charging officer when . . . [t]he officer possesses a current permit issued by the Department of Environment, Health, and

Natural Resources . . . [and the] officer performs the chemical analysis by using an automated instrument that prints the results." N.C.G.S. § 20-139.1(b1) (1993) (emphasis added). Thus, under the provisions of N.C.G.S. § 20-139.1(b1), an arresting officer can administer a chemical analysis of the breath, provided that other stated requirements are additionally met. Similarly, under the provisions of N.C.G.S. § 20-16.2(a), an arresting officer can notify defendant of his rights regarding a chemical analysis of the blood. We find these two provisions, which do not restrict the abilities of the arresting officer, reflective of the true legislative intent. Accordingly, as to any disparity or ambiguity contained in N.C.G.S. § 20-16.2(a), we conclude that the legislature intended to permit a qualified arresting officer to notify defendant of his rights, orally and in writing, regarding a chemical analysis of the breath, and we so construe the statute. Indeed, logic dictates that if an arresting officer is duly qualified and authorized to administer a chemical analysis of the breath, such arresting officer should also be duly qualified to notify defendant of his rights regarding that test, and a defendant's rights cannot be impaired by such notification. Reason further dictates that if an arresting officer can inform a defendant of his rights regarding one method of chemical analysis, the arresting officer should also be able to inform a defendant of his rights regarding another.

Moreover, we note that "[i]n any implied-consent offense . . . a person's alcohol concentration as shown by a chemical analysis is admissible in evidence." N.C.G.S. § 20-139.1(a). In order for a chemical analysis to be valid, the analysis must be performed in accord with "methods approved by the Commission for Health Services," N.C.G.S. § 20-139.1(b), and the analysis must be performed "by an individual possessing a current permit issued by the Department of Environment, Health, and Natural Resources," *id.* The defendant and the State stipulated that Trooper Morris was a certified chemical analyst with the North Carolina Department of Human Resources at the time he conducted the chemical analysis of defendant's breath. The parties also stipulated that defendant's alcohol concentration was tested with the Intoxilyzer 5000, and defendant does not argue that the Intoxilyzer 5000 is not an automated instrument which prints the results of the chemical analysis. It is plain, then, that the requirements governing the admissibility of the chemical breath analysis were satisfied in the instant case, and the results of the analysis were properly admitted at defendant's DWI trial. This assignment of error is overruled.

III.

**[3]** In his last assignment of error, defendant contends that the trial court instructed the jury in such a way as to allow a nonunanimous verdict in violation of the North Carolina Constitution and N.C.G.S. § 15A-1237(b). The trial court instructed the jury in pertinent part as follows:

> So . . . I charge you that if you find from the evidence beyond a reasonable doubt that . . . defendant . . . drove a vehicle on a highway within the [S]tate and that when he did so he was under the influence of an impairing substance *or* had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of [0.08] or more it would be your duty to return a verdict of guilty of impaired driving.

(Emphasis added.) Defendant objected to these instructions based on the disjunctive phrasing and requested that the trial court instruct the jury that in order for it to find defendant guilty of DWI pursuant to N.C.G.S. § 20-138.1, it must either unanimously agree that defendant drove a vehicle on a highway within this State while he was under the influence of an impairing substance or unanimously agree that at any relevant time after the driving, defendant had an alcohol concentration of 0.08 or more. The trial court denied defendant's request. Defendant argues that the instructions given were fatally ambiguous in that the jury could have returned a guilty verdict without all twelve jurors agreeing that defendant was either appreciably impaired or had an alcohol concentration of 0.08 or more at a relevant time after driving. We note first that the trial court instructed the jury in accord with the pattern jury instructions. *See* N.C.P.I.—Crim. 270.00 (1994).

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24; *see* N.C.G.S. § 15A-1237(b) (1988). In *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), the trial court instructed the jury that "[a]n indecent liberty is an immoral, improper or indecent touching or act by the defendant upon the child, *or* an inducement by the defendant of an immoral or indecent touching by the child." *Id.* at 563, 391 S.E.2d at 178 (emphasis added). Defendant Hartness contended that because the instruction was phrased in the disjunctive, a nonunanimous verdict could have been returned by the jury. In rejecting defendant's contention, this Court reasoned that "[t]he risk of a nonunanimous verdict does not arise in

cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive." *Id.* at 564, 391 S.E.2d at 179. We find *Hartness* controlling on this issue.

The relevant statute in the present case provides, in part:

> (a) Offense.—A person commits the *offense of impaired driving* if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C.G.S. § 20-138.1 (1993) (emphasis added). As is indicated by the plain language of the statute, N.C.G.S. § 20-138.1 proscribes the single offense of driving while impaired which may be proven in one of two ways. *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) ("[W]e interpret N.C.G.S. 20-138.1 as creating one offense which may be proved by either or both theories detailed in N.C.G.S. 20-138.1(a)(1) & (2).") Even accepting defendant's argument as true, that some jurors may have found defendant was under the influence of an impairing substance and that some jurors may have found defendant's alcohol concentration was 0.08 or more at some relevant time after driving, the fact remains that jurors unanimously found defendant guilty of the single offense of impaired driving. Thus, as with the indecent liberties statute at issue in *Hartness*, we conclude that the disjunctive phrasing of the instruction was not a fatal ambiguity which resulted in a nonunanimous jury verdict. This assignment of error is overruled.

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

NO ERROR.

Justice Webb dissenting.

I dissent from the majority because I believe that when the defendant was tried for driving while impaired after his license had been revoked for having a blood alcohol content of .08 percent, he was twice put in jeopardy for the same offense.

As I read the cases cited by the majority, if a person has been punished for an offense in one proceeding, the Fourteenth Amendment to the Constitution of the United States prohibits his punishment again for the same offense in another proceeding. The majority says the rule does not apply in this case because the ten-day suspension of the driver's license was a remedial and not a punitive action. The majority says the revocation was for the public safety rather than for punishment.

I disagree with the majority. The loss of a driver's license for ten days is a harsh penalty. I believe the impact on public safety from the revocation of a license for ten days is slight. If the person whose license is revoked is a danger on the highways, a ten day revocation will have little effect on such a danger. He or she will be on the highways again after ten days. If a person whose license is revoked is not dangerous, the only effect of revocation is punishment.

I believe the revocation of the defendant's driver's license for ten days was punitive, and the defendant may not be punished a second time for the action that caused him to lose his driver's license.

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STATE OF NORTH CAROLINA v. CHARLES WALKER

No. 76A95

(10 May 1996)

**1. Evidence and Witnesses § 789 (NCI4th)— capital murder—letters impeaching witness—required to be introduced—best evidence rule**

The trial court did not err in a capital murder prosecution by requiring that certain letters be admitted into evidence before their contents could be read aloud where a prosecution witness who testified extensively about defendant's role in the murder apparently wrote a series of letters to defendant in which she said she lied to police about defendant's involvement, defense counsel sought to use the letters on cross-examination for impeachment purposes, and defendant contended that he was coerced into introducing the letters, which contained highly prejudicial material that was otherwise inadmissible. At the beginning of her cross-examination, the witness was not asked if she remembered if she wrote the letters, if she remembered what was said in the letters, or if the contents of the letters refreshed her recollection, but was handed the letters and asked to identify and read from them.

Under the best evidence rule, the original writing is required to prove the content of a writing. N.C.G.S. § 8C-1, Rule 1002.

**Am Jur 2d, Evidence § 1049.**

**2. Homicide § 552 (NCI4th)— first-degree murder—failure to instruct on second-degree—no error**

The trial court did not err in a first-degree murder prosecution by failing to instruct the jury on second-degree murder where a careful review of the evidence shows no conflicting evidence regarding defendant's intent to kill the victim.

**Am Jur 2d, Homicide § 530.**

**Lesser-related state offense instructions: modern status. 50 ALR4th 1081.**

**3. Jury § 114 (NCI4th)— capital murder—jury selection—individual voir dire denied**

The trial court did not abuse its discretion in a capital murder prosecution by denying defendant's motion for an individual *voir dire* of prospective jurors where defendant simply stated in his brief that individual *voir dire* is necessary because potential jurors could well be tainted by hearing the responses of others on the sensitive areas dealing with death-qualification. A defendant does not have a right to examine jurors individually merely because the case is being tried capitally.

**Am Jur 2d, Jury § 199.**

**Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.**

**4. Criminal Law § 1349 (NCI4th)— capital murder—mitigating circumstance—submitted over defendant's objection**

There was no prejudicial error in a capital sentencing proceeding where defendant specifically requested that the mitigating circumstance of no significant history of prior criminal activity not be submitted, but the trial court chose to include it *ex mero motu*. The trial court has no discretion and the circumstance must be submitted if a rational jury could conclude that defendant had no significant history of prior criminal activity. Here, defendant had been convicted of attempted second-degree murder when he was eighteen years old, this killing took place

when he was twenty-seven years old, and, while the prior attempted second-degree murder conviction was the only conviction on defendant's record, there was evidence that defendant was selling drugs. Assuming that it was error for the trial court to submit the circumstance and that defendant objected to its submission, there was no prejudice. Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless. However, prosecutors must not argue to the jury that a defendant has requested that a particular circumstance be submitted or has sought to have the jury find that circumstance when the defendant has objected to the submission of that circumstance. The better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted and to inform the jury that the submission of the circumstance is required because there is some evidence from which the jury could, but is not required to, find the mitigating evidence to exist.

**Am Jur 2d, Criminal Law §§ 598, 599, 628; Trial § 1441.**

**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.**

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

**5. Criminal Law § 1318 (NCI4th)— capital murder—*Enmund* instruction—reckless indifference omitted**

There was no prejudice in a capital sentencing proceeding by instructing the jury that before the death penalty could be imposed, it would have to find from the evidence that defendant himself delivered the fatal shot or that defendant himself, while acting in concert with others, intended to kill the victim. Failure to give an instruction on reckless indifference worked to the benefit of defendant.

**Am Jur 2d, Trial § 1444.**

**6. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate**

A death sentence in a first-degree murder prosecution was not disproportionate where the record fully supports the aggravating circumstances found by the jury, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration, this case is not substantially similar to any case in which the North Carolina Supreme Court has found the death penalty disproportionate, and this case is more similar to certain cases in which the sentence of death was found proportionate.

**Am Jur 2d, Criminal Law § 628.**

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

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

Justice FRYE concurring in the result.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Greeson, J., on 7 February 1995 in Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction for conspiracy to commit murder was allowed 19 July 1995. Heard in the Supreme Court 14 February 1996.

*Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.*

*J. Clark Fischer for defendant-appellant.*

MITCHELL, Chief Justice.

Defendant was indicted on 1 December 1993 for the first-degree murder and conspiracy to commit murder of Elmon Tito Davidson, Jr. He was tried capitally at the 23 January 1995 Criminal Session of Superior Court, Guilford County. The jury found defendant guilty of

premeditated and deliberate murder and conspiracy to commit murder. After a capital sentencing proceeding, the jury recommended a sentence of death for the murder, and the trial court sentenced defendant accordingly. In addition, the trial court imposed a consecutive thirty-year sentence of imprisonment for the conspiracy to commit murder conviction.

The State's evidence tended to show *inter alia* that defendant met Pamela Haizlip on 29 February 1992 at Haizlip's apartment. They formed a relationship, and defendant moved in with Haizlip and her one-year-old daughter about June of 1992.

On 12 August 1992, defendant, Sabrina Wilson, Antonio Wrenn, Pamela Haizlip, Rashar Darden, and Jesse (Jay) Thompson were at Nicki Summers' apartment, directly across from Haizlip's apartment. Summers and Wilson told defendant and Haizlip that Davidson attempted to take money and drugs from Haizlip's apartment the preceding night. Defendant told Haizlip to lure Davidson into her apartment and keep him there. Thereafter, defendant, Darden, and Thompson entered Haizlip's apartment through the back door and found Davidson sitting on the couch. As they entered, defendant said that they were going to kill Davidson. Defendant and Darden were armed with pistols, and defendant told Haizlip to leave.

Defendant and Darden then pulled their guns, pointed them at Davidson, and made him sit down on the floor. Thompson tied Davidson's hands with duct tape and radio wire. Defendant talked to Davidson; then Davidson's mouth was taped, and his feet were tied with rope or string. Defendant hit Davidson on his knee caps at least three times with a hammer. Davidson's hands came loose and were then secured by handcuffs. Defendant gave a .380-caliber pistol to Thompson and left the apartment. Davidson was laid on the floor. Thompson cut Davidson's throat three times and then shot him through a pillow in the little finger and in the arm. Darden also shot Davidson several times with a .22-caliber pistol. Afterwards, Darden left and talked with defendant at Summers' apartment. Darden told defendant, "He ain't dying." Defendant then reentered Haizlip's apartment, took the gun from Thompson, and shot Davidson in the neck. After the shooting and when Davidson ceased to move, defendant left the apartment.

**[1]** By his first assignment of error, defendant contends that the trial court committed prejudicial error by prohibiting him from cross-examining a key prosecution witness about prior inconsistent state-

ments contained in letters written to defendant by the witness without introducing the letters themselves into evidence. Defendant argues that this coerced him into introducing the letters, which contained highly prejudicial material that was otherwise inadmissible.

Pamela Haizlip apparently wrote a series of letters to defendant in which she said she lied to the police about defendant's involvement in the murder. On direct examination, Haizlip testified extensively about defendant's role in the murder. On cross-examination, defense counsel sought to use the letters for impeachment purposes. However, at the beginning of her cross-examination, Haizlip was not asked if she remembered if she wrote the letters, if she remembered what was said in the letters, or if the contents of the letters refreshed her recollection. Rather, Haizlip was handed the letters and was asked to identify them and to read from them.

The "best evidence rule," Rule 1002 of the North Carolina Rules of Evidence, states: "To prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." N.C.G.S. § 8C-1, Rule 1002 (1992). Therefore, the trial court did not err in requiring that the writings be admitted into evidence before Haizlip could read their contents aloud. This assignment of error is overruled.

**[2]** By his next assignment of error, defendant contends that the trial court erred by failing to instruct the jury on the lesser included offense of second-degree murder because the evidence of premeditation and deliberation was equivocal. Defendant argues that most of the evidence against him came from cooperating codefendants, primarily Pamela Haizlip, Antonio Wrenn, and Rashar Darden. While there were numerous inconsistencies in the testimony presented by these witnesses, a common theme was that the confrontation with Tito Davidson arose over Davidson's attempted robbery of Haizlip's residence the preceding evening. However, defendant contends that conflicting evidence was presented regarding defendant's intent to kill Davidson.

In *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995), this Court stated:

> "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."

*Id.* at 26, 446 S.E.2d at 265 (quoting *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990)).

A careful review of the transcript shows that there is no conflicting evidence regarding defendant's intent to kill Davidson. The State's evidence was that witnesses Wilson, Darden, and Haizlip heard defendant say that he was going to kill Davidson. They saw defendant arm himself with a pistol and heard him tell Haizlip to lure Davidson into her apartment and keep him there. Defendant supervised Thompson's and Darden's actions, and when Thompson and Darden were unable to kill Davidson, defendant returned, took a pistol from Thompson, and shot Davidson in the neck. Thus, all of the evidence tended to show premeditation and deliberation, and there was no conflicting evidence. This assignment of error is overruled.

**[3]** By another assignment of error, defendant contends that the trial court abused its discretion by denying his motion for individual *voir dire* of prospective jurors. The granting of a motion for individual *voir dire* lies in the sound discretion of the trial court, and the trial court's decision will not be reversed on appeal without a showing of an abuse of discretion. *State v. Burke*, 342 N.C. 113, 122, 463 S.E.2d 212, 218 (1995). In this case, defendant has not argued or shown that the trial court abused its discretion in not allowing individual *voir dire*. Defendant simply argues in his brief that individual *voir dire* is necessary because potential jurors could well be tainted by hearing the responses of others on the sensitive areas dealing with death-qualification. A defendant does not have a right to examine jurors individually merely because the case is being tried capitally. *State v. Short*, 322 N.C. 783, 370 S.E.2d 351 (1988). This assignment of error is overruled.

**[4]** By another assignment of error, defendant contends that the trial court erred by submitting as a mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), where defendant had been previously convicted of attempted second-degree murder and had a history of drug dealing. Defendant specifically requested that this circumstance not be submitted, but the trial court chose to include it *ex mero motu*.

The test governing the decision to submit the (f)(1) mitigator is "whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Evidence in the present case tended to show that defendant had been convicted of attempted second-degree murder when he was eighteen years old. The killing that forms the basis of this appeal took place in the summer of 1992 when defendant was twenty-seven years old. The attempted second-degree murder conviction was the only conviction on defendant's record, although there was evidence that defendant was selling drugs in Greensboro. Based on the evidence of record, the trial court concluded that a reasonable juror could find that defendant had "no significant history of prior criminal activity" within the meaning of the statute and, therefore, that it was required to submit the (f)(1) statutory mitigating circumstance for the jury's consideration.

It is unclear whether defendant in the present case objected to the submission of the (f)(1) mitigating circumstance to the jury or merely objected to the trial court discussing it first among the many possible mitigating circumstances submitted to the jury. Assuming *arguendo*, however, that it was error for the trial court to submit the (f)(1) no significant history mitigating circumstance based on the evidence in this case and that defendant objected to its submission, we conclude that it was not prejudicial to defendant. The fact that a statutory mitigating circumstance has been erroneously submitted by the trial court, but rejected by the jury, is not tantamount to the jury having found an aggravating circumstance.

Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless. We caution our trial courts and prosecutors, however, that prosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct

the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

In the present case, the prosecutor never argued that defendant had requested the (f)(1) no significant history mitigating circumstance. In ten pages of the transcript before us in this case, the prosecutor listed the twenty-three mitigating circumstances before the jury for its consideration. He did refer to "all of these circumstances the defendant is submitting," but in no way focused on the (f)(1) mitigating circumstance as having been requested by defendant. We conclude that the prosecutor's arguments cannot realistically be deemed to have misled the jury as to whether the defendant requested the submission of the (f)(1) mitigating circumstance. For the foregoing reasons, this assignment of error is without merit and is overruled.

**[5]** By another assignment of error, defendant contends that the trial court erred by submitting the *Enmund* issue in an incomplete manner that misstated applicable law and had the effect of lowering the State's burden of proof.

The trial court instructed the jury during the capital sentencing proceeding that before the death penalty could be imposed, it would have to find from the evidence either that defendant himself delivered the fatal shot or that defendant himself, while acting in concert with others, intended to kill the victim. The instructions were required by the interpretation of the Eighth Amendment in *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982). 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." *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 151 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). A later case, *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987), limited the holding in *Enmund* to exclude defendants who were major participants in a felony that results in death when their actions constituted reckless indifference to human life.

As set forth in the Issues and Recommendations as to Punishment worksheet given to the jury, however, the jury was only given the following on Issue One-A:

> Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself:
>
> (1) Did the Defendant himself deliver the fatal shot that killed the victim? Answer No
>
> (2) Did the Defendant himself, while acting in concert with others, intend to kill the victim? Answer Yes

Defendant argues that it was error for the trial court to fail to give an instruction on reckless indifference. We find that failure to give this instruction worked to the benefit of defendant. If the instruction had been given, it would have provided the jury with a lower standard by which to find culpability because it eliminates the requirement of a specific intent to kill. All the jury would have had to find under defendant's proposed instruction would be that defendant exhibited reckless indifference to human life. This assignment of error is overruled.

**[6]** Having concluded that defendant's trial and separate capital sentencing proceeding were free of 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 the defendant. N.C.G.S. § 15A-2000(d)(2) (Supp. 1995). 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.

In the present case, defendant was convicted of premeditated and deliberate first-degree murder and of conspiracy to commit murder. The jury found the aggravating circumstances that defendant had been previously convicted of a violent felony, N.C.G.S.

§ 15A-2000(e)(3), 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 was under the influence of mental or emotional disturbance at the time of the crime, N.C.G.S. § 15A-2000(f)(1); (2) defendant's mental and emotional disturbances were caused in part by the emotional instability of his family members during his early developmental stages; (3) defendant's mother was so overprotective of the defendant that she would not let him suffer the consequences or accept responsibility for any mischievous actions as a child; (4) defendant's mental and/or emotional disturbances were aggravated through his childhood and early adulthood by the actions and interactions of his mother; (5) defendant was deprived of the family nurturing necessary to properly develop; (6) defendant has no insight into his mental illness and does not believe that he needs medication or treatment; (7) defendant never developed a normal mother-son relationship with his mother; and (8) defendant is treatable in a prison setting.

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. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. 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 five of the seven cases in which this Court has concluded that the death penalty was 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 (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. 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 concluded that the death penalty was 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-seven years old at the time of the murder. The evidence tended to show that witnesses Wilson, Darden, and Haizlip heard defendant say that he was going to kill Davidson; that they saw him arm himself with a pistol; that defendant instructed Haizlip to lure Davidson into her apartment and keep him there; that defendant supervised Thompson's and Darden's actions; and that when the others were unable to kill Davidson, defendant returned, took a pistol, and shot Davidson in the neck. Thus, there is substantial evidence that defendant planned the killing, assisted others in its initial stages, and fired the fatal shot. Finally, this case is distinguishable from *Stokes* because the jury in the present case found an additional aggravating circumstance—that defendant had been previously convicted of a violent felony.

In *State v. Bondurant*, the defendant shot the victim but then immediately directed the driver of the car in which they had been riding 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, defendant decided to kill the victim in revenge for the victim's attempted robbery of an apartment where defendant had drugs and money stashed. Defendant deliberately lured the victim into a trap, and the victim suffered for some considerable period of time before he was killed. No remorse was shown by defendant, whose only objective after the killing was to dispose of the body, clean up the apartment, and avoid apprehension.

We conclude that this case is not similar to any of the above cases where we 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 to those in which juries have consistently returned recommendations of life imprisonment. The jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate. *See, e.g., State v. Harris*, 338 N.C. 129, 449 S.E.2d 371 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995). We also recently noted that none of the cases in which the death sentence was found to be disproportionate has included this aggravating circumstance. *See State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994). 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 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 FRYE concurring in the result.

I concur in the result reached by the Court in this case. However, I write separately to explain why the erroneous submission of the (f)(1) mitigating circumstance was harmless in this case and why I think the majority's language is too broad.

In the instant case, the evidence upon which the trial court submitted the (f)(1) mitigating circumstance of no significant history of prior criminal activity consisted of defendant's previous conviction of attempted second-degree murder and defendant's history of drug dealing. Evidence of defendant's conviction of attempted second-degree murder was properly admitted at the capital sentencing proceeding to establish the (e)(3) statutory aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence. Evidence of defendant's drug dealing was properly admitted during the trial. Thus, the jury, in making its final recommendation as to sentence, would have had this evidence before it regardless of whether the (f)(1) mitigating circumstance was submitted for its consideration.

The trial court *ex mero motu* submitted this mitigating circumstance after the close of the evidence at the capital sentencing proceeding. Since neither the prosecutor nor the defense attorneys expected the (f)(1) mitigating circumstance to be submitted to the jury, it was not an issue during the presentation of evidence at the capital sentencing proceeding and was not emphasized by either party. Furthermore, the submission of the (f)(1) mitigating circumstance did not prompt the introduction of any new or rebuttal evidence. Thus, considering all of the circumstances of this case, I agree with the majority that, assuming error *arguendo*, the error was not prejudicial.

I have a problem, however, with this sentence in the majority opinion: "Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless." I am not sure what is meant by this sentence. Does it mean that this Court will find the erroneous submission of a mitigating circumstance harmless beyond a reasonable doubt unless the defendant can show, for example, that the erroneous submission of the circumstance prompted the admission of rebuttal evidence not otherwise admissible at a capital sentencing proceeding? If so, this would have the effect of shifting the burden of proof on an issue with constitutional underpinnings. *See State v. Wilson*, 322 N.C. 117, 145, 367 S.E.2d 589, 605 (1988). This we should not do.

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STATE OF NORTH CAROLINA v. EDDIE LOYD HOWELL

No. 562A94

(Filed 10 May 1996)

**1. Evidence and Witnesses § 3230 (NCI4th)— capital murder—identification testimony—admissible—credibility for jury**

The trial court did not err in a first-degree murder prosecution by admitting the testimony of a State's witness, Farabee, where Farabee had been in the courtroom when another witness identified defendant from a photographic line-up in which the witness identified photograph number three; Farabee also identified photograph number three, but the photographic lineup shown to Farabee did not include a picture of defendant; and

defendant contended that the mistaken identification was a result of Farabee's copying the previous witness and so seriously undermined her testimony as to make it unreliable and unduly prejudicial. The trial court conducted a hearing on the admissibility of Farabee's testimony and ruled that there were no pretrial identification procedures which were unnecessarily suggestive or conducive to irreparable mistaken identification so as to violate due process and defendant does not contest that ruling. Once such evidence is deemed admissible, the credibility of a witness's identification is a matter for the jury's determination. Here defense counsel fully explored the credibility of the testimony during cross-examination and in closing arguments.

**Am Jur 2d, Witnesses §§ 1029-1033.**

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

**2. Evidence and Witnesses § 365 (NCI4th)— capital murder—similar events—admissible**

The trial court did not err in a first-degree murder prosecution in which the victim was a prostitute by admitting testimony from another prostitute about an encounter with defendant where the victim was last seen near the site where defendant had picked up the witness, Farabee; both women were taken to defendant's bus, where he lived, at night; both were bound by defendant, one with wire, one with duct tape; and defendant inserted a twenty-dollar bill into Farabee's vagina and a shirt into the victim's. These facts are so strikingly similar as to permit Farabee's testimony for the purpose of proving defendant's identity as well as showing a common opportunity, plan, and *modus operandi,* to defendant's attacks. Additionally, the similarity tends to negate defendant's claim that he killed the victim by mistake. The testimony was relevant to a fact or issue other than defendant's character and was properly admitted pursuant to N.C.G.S. § 8C-1, Rule 404(b).

**Am Jur 2d, Homicide §§ 310-312.**

**Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed. 781.**

**3. Criminal Law § 538 (NCI4th)— capital murder—sequestered witness in courtroom—mistrial denied**

The trial court did not abuse its discretion in a first-degree murder prosecution by denying a mistrial where the trial court had granted defendant's motion to sequester a State's witness, Farabee; defense counsel notified the court during the trial that Farabee had been in the courtroom for over an hour; the prosecutor stated that he did not know Farabee and had not been aware that she was in the courtroom; and she was removed from the courtroom with the prosecutor's full cooperation as soon as her presence was discovered. Although defendant argues that overruling his request for a mistrial was reversible error in view of Farabee's subsequent in-court misidentification of defendant, possibly copying a previous witness, and of the crucial importance of her testimony to the State, there is neither evidence that Farabee heard the previous testimony concerning the identification of defendant nor evidence that her identification was tainted as a result of the previous testimony.

**Am Jur 2d, Trial §§ 245-251.**

**Effect of witness' violation of order of exclusion. 14 ALR3d 16.**

**Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR4th 705.**

**Exclusion of witnesses under Rule 615 of Federal Rules of Evidence. 48 ALR Fed. 484.**

**4. Searches and Seizures § 25 (NCI4th)— capital murder—search of defendant's former living quarters—ownership—standing**

The trial court did not err in a capital murder prosecution by denying defendant's motion to suppress evidence obtained during a search of a bus in which he had lived where there was substantial competent evidence to support the findings of the court that defendant had said that he was not coming back; defendant had sold the bus in payment of debts; the purchaser resold the bus; the final purchaser allowed the search; and, while there was some evidence that the bus was left as collateral, it was clear that defendant was leaving the state and that the persons to whom he was indebted had authority to sell the bus to satisfy the indebt-

edness. The court then concluded that defendant had no standing to object to the search. Conclusions of law that are correct in light of the findings are binding on appeal.

**Am Jur 2d, Evidence § 646.**

**Comment Note.—Nature of interest in, or connection with, premises searched as affecting standing to attack legality of search. 78 ALR2d 246.**

**Interest in property as basis for accused's standing to raise question of constitutionality of search or seizure—Supreme Court cases. 123 L. Ed. 2d 733.**

**5. Criminal Law § 1323 (NCI4th)— capital murder—sentencing—instructions—value of statutory mitigating circumstances**

The trial court erred in a capital sentencing proceeding by instructing the jury to determine whether statutory mitigating circumstances have mitigating value if found to exist. The court instructed the jury on three statutory mitigators, fifty-seven nonstatutory mitigators, and the catchall circumstance; it could not be determined whether jurors found some of the statutory mitigating circumstances to exist but chose to give them no mitigating value.

**Am Jur 2d, Criminal Law §§ 598, 628; Trial §§ 1441-1444.**

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Ferrell, J., at the 6 September 1994 Criminal Session of Superior Court, Burke County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 April 1996.

*Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, and Valerie B. Spalding, Assistant Attorney General, for the State.*

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

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder of Mary Belle Adams. The jury found him guilty of first-degree murder on the theories of premeditation and deliberation and torture with malice. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death, and the trial court sentenced him accordingly.

The victim was a twenty-nine-year-old black prostitute from Hickory whose body was found burning in a Dumpster in eastern Burke County at approximately 4:00 a.m. on 6 June 1992. The body was burned and charred, and fire had destroyed a considerable portion of it. There was duct tape around the victim's neck and part of her face, including the mouth and nose area. A sock had been stuffed deeply down her throat and a cord tied around her neck. A shirt had been stuffed into the victim's vagina, and there was a one-inch-deep laceration at the back of the vagina caused by a sharp object such as a knife. Hemorrhaging along this wound indicated that the victim's heart was still beating when the wound was inflicted. Dr. John Butts, Chief Medical Examiner for the State, testified that the cause of death was asphyxiation due to ligature strangulation from the cord around the victim's neck.

Defendant, a thirty-four-year-old white male, resided in a converted school bus on the premises of a junkyard in Icard, North Carolina. The junkyard was located approximately nine miles from the Dumpster where the victim was found. The owner, Ralph Maynard, employed defendant as a night watchman in lieu of having defendant pay rent. In June 1992, law enforcement officers began questioning defendant about Adams' murder. Defendant left North Carolina several weeks later. He was subsequently arrested in Needles, California, on 20 July 1992.

The State's evidence connecting defendant to the murder tended to show the following:

Janet Farabee, a black prostitute in Hickory and a longtime friend of the victim's, testified that several months before the murder she had an encounter with a white male whom she believed was defendant. The man picked her up late one evening, and they agreed that he would pay her sixty dollars to have sex with him. The man drove Farabee to a junkyard in Icard. Inside, they proceeded to a bus, entered it, and sat at a table. The lighting was sufficient for her to see

the man, and she identified him as defendant. The man requested that she engage in anal sex with him and shave her pubic area, but she refused. They had oral sex and intercourse, and the man then left for several minutes. When he returned, he tied Farabee's hands with wire and forced her to have anal sex with him. Afterwards, he untied her and told her to get dressed. Farabee asked if the man was going to pay her. The man folded a twenty-dollar bill and forced it into Farabee's vagina, pushing it far inside her. He then returned her to Hickory and threatened to kill her if she said anything about their encounter.

In September 1993, Farabee guided a prosecutor and two law enforcement officers to the junkyard and the bus where she had been assaulted. It was defendant's bus. The officers did not give Farabee any directions or coach her.

Donna Prewitt, a clerk at Enola Grocery in Burke County, testified that on 6 June 1992, a man entered the store and appeared very nervous. He was a white male, approximately thirty-five years old, with a slight beard. The man bought a soda and then left it on the counter. Prewitt called out to him, and he returned for the soda. He then asked if she had heard about a body being found in a Dumpster. The man's hands shook the entire time he was talking. He left the store shortly thereafter. In July, Prewitt was shown a photographic lineup in which she identified a photograph of defendant as depicting the man who had been in the store. She also so identified defendant in court.

David Reeves, an inmate with defendant in the Burke County jail, testified that he asked defendant why he had killed Adams. In response, defendant explained that Adams had tried to rob him. He had smoked crack and fallen asleep, and when he awoke, Adams was going through his pockets. He started beating her, and the next thing he knew she was dead.

Ralph Maynard testified that defendant became nervous after law enforcement officers began questioning him about the murder. Defendant told Maynard he "could not put up with it" and was leaving for Oklahoma to visit his parents. Defendant told David Moore, who worked for Maynard, that if he did not return to North Carolina, Moore could have the bus and its contents. Maynard further testified that shortly after defendant left, Moore received a telephone call from defendant requesting that Moore wire him two hundred dollars in California.

Testimony from several FBI forensics experts tended to show that cord discovered in defendant's bus was similar to the cord used to bind the victim. Blood and hair samples found on defendant's sofa matched those of the victim, as did blood found on defendant's bean-bag chair and sofa cushions. A roll of duct tape also was discovered in the bus, although it was not the roll used on the victim.

**[1]** By his first assignment of error, defendant contends that Farabee's testimony was not credible, that the danger of unfair prejudice substantially outweighed the probative value, and that the trial court erred in admitting it. Defendant's attack on Farabee's credibility is based in part on her in-court identification of defendant. At trial, during an in-court photographic lineup, Prewitt identified photograph number three as defendant's photograph. Farabee was in the courtroom during this identification. Thereafter, Farabee also identified the man in photograph number three as defendant. However, as the photographic lineup Farabee was shown did not include a picture of defendant, her selection was incorrect. Defendant argues that Farabee's mistaken identification was a result of her effort to "copy-cat" Prewitt. Because this identification seriously undermined Farabee's credibility, defendant contends her testimony should have been excluded as unreliable and unduly prejudicial under Rule 403 of the North Carolina Rules of Evidence. We disagree.

The trial court conducted a hearing in the absence of the jury on the admissibility of Farabee's testimony. With regard to her identification testimony, it ruled that there were no pretrial identification procedures which were unnecessarily suggestive or conducive to irreparable mistaken identification so as to violate due process and that her in-court identification of defendant was therefore admissible. Defendant does not contest this specific ruling, and we are satisfied from the record that the trial court did not err in allowing Farabee's in-court identification. Once such evidence is deemed admissible, the credibility of a witness' identification is a matter for the jury's determination. *State v. Paige*, 316 N.C. 630, 653, 343 S.E.2d 848, 862 (1986). Defense counsel fully explored the credibility of Farabee's testimony during cross-examination of the witness and in closing arguments. The jury heard the identification testimony, considered the arguments on misidentification, and made its own credibility determination. We conclude that allowing the testimony was not an abuse of the trial court's discretion under Rule 403. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 434-35 (1986).

**[2]** Defendant further contends that Farabee's testimony concerning her encounter with defendant was inadmissible under Rules 403 and 404(b) because the State's purpose in introducing the testimony was to show defendant's criminal propensity and because there were insufficient similarities between her experience and the evidence regarding Adams' murder. Again, we disagree.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). Hence, evidence is admissible under this rule so long as it is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried. *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). The test for determining whether evidence of crimes, wrongs, or acts other than those specifically at issue is admissible is whether the incidents are sufficiently similar and not so remote in time that they are more probative than prejudicial under the Rule 403 balancing test. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). The similarities between the incidents need not rise to the level of the unique and bizarre but simply must tend to support a reasonable inference that the same person committed both the earlier and the later acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991).

The evidence tended to show that both Farabee and the victim here were black prostitutes in Hickory. The victim was last seen near the site where defendant had picked up Farabee. Both women were taken to defendant's bus at night. Defendant bound both, one with wire, the other with duct tape. Defendant inserted a twenty-dollar bill into Farabee's vagina and a shirt into the victim's. These facts are so strikingly similar as to permit Farabee's testimony for the purpose of proving defendant's identity as well as showing a common opportunity, plan, and *modus operandi* to defendant's attacks. Additionally, the similarity tends to negate defendant's claim that he killed the victim by mistake. We therefore conclude that Farabee's testimony was relevant to a fact or issue other than defendant's character and was properly admitted pursuant to Rule 404(b). Further, the incident with

Farabee was not so remote that it should have been excluded under Rule 403. In light of the obvious relevance of the testimony, the trial court did not abuse its discretion under Rule 403 in admitting it. *Mason*, 315 N.C. at 731, 340 S.E.2d at 434-35.

**[3]** Defendant next argues that the trial court erred in denying defendant's motion for a mistrial based upon the State's purported violation of the court's order to sequester witness Farabee. Following jury selection, the trial court granted defendant's motion to sequester Farabee. However, immediately after the examination of prosecution witness Prewitt, defense counsel notified the court that Farabee had been in the courtroom for over an hour. Defendant then moved for a mistrial, which the court denied. He argues that in view of Farabee's subsequent in-court misidentification of defendant and of her crucial importance to the State's case, the ruling is reversible error.

Upon defendant's motion for mistrial, the prosecutor stated that he did not know Farabee and had not been aware that she was in the courtroom. She had been told to appear in court and was simply following instructions. As soon as her presence was discovered, she was removed from the courtroom with the prosecutor's full cooperation. There is neither evidence that Farabee heard Prewitt's testimony concerning the identification of defendant nor evidence that her identification was tainted as a result of Prewitt's testimony. The record shows without contradiction that any violation of the sequestration order was unintentional.

Upon a defendant's motion, the trial court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (1988). Whether to grant a mistrial rests in the sound discretion of the trial court, and its decision will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 315 N.C. 40, 56, 337 S.E.2d 808, 821 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). We cannot hold on this record that the clearly inadvertent violation of the sequestration order so prejudiced defendant as to render the denial of a mistrial an abuse of discretion. This assignment of error is overruled.

**[4]** By another assignment of error, defendant contends that the trial court erred in denying his motion to suppress evidence obtained dur-

ing a search of the bus in which defendant formerly lived. The evidence tended to show that in June 1992, defendant was living in a converted school bus on the junkyard premises of Ralph's Used Cars & Parts in Icard. This business was owned and operated by Ralph Maynard, who had sold the bus to defendant. On 8 July 1992, with Maynard's consent, officers searched the bus. Defendant filed a pretrial motion to suppress the fruits of this search. The trial court conducted a hearing, made findings of fact, and concluded as a matter of law based on these findings that defendant had voluntarily surrendered possession of the bus and authorized its sale in satisfaction of certain indebtedness.

In particular, the trial court made the following relevant findings:

> On 7 July [1992], Mr. Maynard told Detective James Pruett that the Defendant had left the state, and said he was not coming back and that the police would have to shoot him.
>
> According to Mr. Maynard, the Defendant sold the bus to David Moore, an employee at the junkyard, and Mr. Maynard subsequently purchased it from Mr. Moore.
>
> With respect to $600 the Defendant owed Mr. Moore, Mr. Moore said that the Defendant told him, "When I leave you can have the bus and contents," and Mr. Moore subsequently sold the bus to Mr. Maynard for $400.
>
> On 8 July 1992, Detective Pruett spoke to Mr. Maynard and learned that the Defendant had owed money to Mr. Maynard and Mr. Moore, and had left the bus "to be sold for an indebtedness owed by the defendant."
>
> There was some evidence tending to show that the bus was left as collateral, but, nonetheless, "it was clear from the evidence that the defendant was leaving the state of North Carolina and that the persons to whom he was indebted had authority from him to sell the bus . . . to satisfy any such indebtedness."

In light of these findings, the trial court concluded that defendant had no standing to object to the search; therefore, his Fourth Amendment search and seizure rights had not been violated, and the evidence resulting from the search was admissible. Defendant concedes that if he agreed to sell the bus to David Moore before 8 July 1992, he lacks standing to challenge the search. He argues, however, that the record does not support the findings that he in fact sold the bus to Moore

before 8 July and that therefore the conclusion of law that he had ceased to possess the bus is erroneous.

When supported by competent evidence, the trial court's findings of fact following a suppression hearing are conclusive and binding on appellate courts. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). Having reviewed the evidence and the findings, we conclude that substantial competent evidence supports the findings. Conclusions of law that are correct in light of the findings are also binding on appeal. *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995). The trial court's conclusions that defendant had ceased to possess the bus and therefore lacked standing to contest the search are correct as a matter of law. *See State v. Hauser*, 342 N.C. 382, 464 S.E.2d 443 (1995); *State v. Mlo*, 335 N.C. 353, 377-79, 440 S.E.2d 98, 110-11, *cert. denied*, —— U.S.——, 129 L. Ed. 2d 841 (1994). This assignment of error is therefore overruled.

For the foregoing reasons, we conclude that the guilt-phase of defendant's trial was free of prejudicial error.

**[5]** Defendant contends that the trial court erred in the sentencing phase by instructing the jury to determine whether statutory mitigating circumstances have mitigating value if found to exist. We agree.

The court instructed the jury to consider three statutory mitigators, fifty-seven nonstatutory mitigators, and the catchall circumstance. In response to a juror's question about the meaning of mitigation and the procedure for determining whether a proffered mitigating circumstance exists, the trial court thrice instructed the jury to decide whether any of the sixty-one mitigating circumstances had mitigating value. Specifically, it instructed:

> What you are instructed to do is consider the series of them, that is one right after another each of these questions, and decide whether one or more of you find that that mitigating factor listed is deemed by one or more of you to have mitigating value. And if one or more of you deems that that's so, then you answer it.

Shortly thereafter, it further instructed:

> The question is— The question is for you to say, if you deem [the circumstance] to have mitigating value.
>
> . . . .

> . . . Then—If one of you does, then you would indicate so by saying "yes." If all of you do not as to any one of the 61 enumerated circumstances for your consideration as to each one of them, then you would answer "no" as to that one.

In *State v. Jaynes*, 342 N.C. 249, 284-86, 464 S.E.2d 448, 469-70 (1995), we concluded that the trial court committed reversible error in giving a jury instruction substantively identical to the one given here. That decision clearly controls. As in *Jaynes*, the instruction told jurors they could give no weight to statutory mitigating circumstances they found to exist. This is contrary to the intent of N.C.G.S. § 15A-2000(f) and is an incorrect statement of the law. *State v. Fullwood*, 329 N.C. 233, 238, 404 S.E.2d 842, 845 (1991); *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988). Because we cannot determine whether jurors found some of the statutory mitigating circumstances to exist but chose to give them no mitigating value, we cannot conclude that the error was harmless. *Jaynes*, 342 N.C. at 286, 464 S.E.2d at 470.

Accordingly, we vacate defendant's sentence of death and remand to the Superior Court, Burke County, for a new capital sentencing proceeding.

GUILT PHASE: NO ERROR.

SENTENCING PHASE: NEW CAPITAL SENTENCING PROCEEDING.

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STATE OF NORTH CAROLINA v. ARCHIE FURMAN McLEMORE, III

No. 56A95

(Filed 10 May 1996)

**1. Robbery § 71 (NCI4th)— taking of car as part of murder—evidence insufficient**

The trial court erred by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon arising from the killing of his mother where the evidence was insufficient to show that defendant used a weapon to force the victim to give him her car. The State's evidence shows no more than that the defendant already had possession and use of the vehicle before the killing and retained the vehicle afterwards.

**Am Jur 2d, Robbery §§ 5, 22, 62 et seq.**

**2. Evidence and Witnesses § 172 (NCI4th)— murder—victim's statements—relevant**

The trial court did not err in a prosecution for first-degree murder by admitting statements made by the victim which defendant admits fall under N.C.G.S. § 8C-1, Rule 803(3) but contends are not relevant. Evidence that the victim intended to decrease the financial benefits flowing to her son, the defendant, as well as evidence that she was angry and intended to give her son an ultimatum, was relevant to show the status of their relationship just prior to the victim's death. Both statements also were relevant as they related to a potential confrontation with the defendant, and whether defendant knew of the statements is irrelevant.

**Am Jur 2d, Evidence §§ 556, 667.**

**3. Evidence and Witnesses § 172 (NCI4th)— murder—victim's statements—admissible**

The trial court did not err in a first-degree murder prosecution by admitting statements by the victim where the statements were not admitted to prove the truth of the matter asserted, the relevance was so remote as to render admission harmless, or the statements were admissible in light of the admissibility of other statements.

**Am Jur 2d, Evidence §§ 556, 667.**

**4. Evidence and Witnesses §§§ 923, 929, 1162 (NCI4th)— murder—defendant's statement to wife—instruction to call father and police—admissible**

The trial court in a first-degree murder prosecution properly admitted testimony from the defendant's father and from a detective that defendant's wife had told them of a telephone call in which defendant had told her that he had shot his mother and asked her to call his father and have him call the police. Defendant did not intend that his statement to his wife be confidential; he specifically told her to let other people know what he had told her. Although the testimony of the father and the detective was hearsay, the father's testimony fits easily under the excited utterance exception because the wife called him approximately three minutes after her conversation with defendant, when she would have been under the influence of an undoubtedly startling event. As to the detective, even if the rule applies that

the hearsay statement of an agent cannot be used to establish agency, the rule is satisfied through the testimony of the father, admitted under another exception. N.C.G.S. § 8C-1, Rules 803(2),801(d)(C).

**Am Jur 2d, Evidence § 865; Witnesses §§ 309-319.**

**Marital privilege under Rule 501 of Federal Rules of Evidence. 46 ALR Fed. 735.**

**When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed. 451.**

**5. Homicide § 253 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient**

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where defendant did not make any statement as to how the killing occurred other than a telephone call to his wife in which he said that he had killed his mother and that she should tell his father to call the police; the victim was shot several times in the head and back and was stabbed in the back; the trigger on the rifle found to have fired the casings at the scene had to be pulled each time the weapon was fired; there is no evidence that the victim had a weapon or offered any threat to defendant; and she was unarmed and lying in her bed wearing headphones when she was killed.

**Am Jur 2d, Homicide § 439.**

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

**6. False Pretenses, Cheats, and Related Offenses § 70.1 (NCI4th)— financial transaction card theft—sufficiency of evidence**

Judgment on the charges of financial transaction card theft and fraud was arrested in a prosecution arising from the killing of defendant's mother where there was no direct evidence that defendant did not have permission to use the card, defendant knew the correct combination of numbers to receive money from the machine, and must have learned the combination from his mother, which shows she could have allowed him to use the card, he used the card at least two days before the death of his mother,

which shows he had the card in his possession while his mother was alive, and there is no indication that she objected to his having it.

**Am Jur 2d, Fraud and Deceit §§ 468 et seq.; Larceny §§ 28 et seq.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Guice, J., at the 4 April 1994 Criminal Session of Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder based on premeditation and deliberation and felony murder. The defendant's motion to bypass the Court of Appeals on other judgments was allowed 2 February 1995. Heard in the Supreme Court 16 November 1995.

The defendant was tried for first-degree murder in a case in which the State sought the death penalty. In the same action, the defendant was tried for robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud. The State's evidence showed that at the end of May 1993, the defendant had been separated from his wife for approximately six months and had been living with his mother, Melinda McDowell, during that time. Melinda McDowell worked as a nurse for the State Department of Environment, Health, and Natural Resources and also operated a business called "A Relaxing Practice." The defendant helped his mother operate this business.

Mrs. McDowell was last known to be alive on 31 May 1993, when she had a telephone conversation about her health with co-worker Fran Jones. At some time around 1 June 1993, Mrs. McDowell was shot to death in her bedroom. On 3 June 1993, the defendant called his estranged wife, Robin McLemore, and told her that he had shot his mother. The defendant asked his wife to call his father, Archie McLemore, Sr., and tell him to call the police. The defendant would not reveal his whereabouts to his wife, but said the police would find him in a few days. The defendant's wife called her father-in-law, who called the police. The police went to Mrs. McDowell's home and found her body. She had been shot several times in the head and stabbed in the back. A forensic pathologist testified that Mrs. McDowell died at least one and possibly seven days before he performed the autopsy on 4 June 1993. Videotape of the automated teller machines at two separate locations revealed that the defendant with-

drew $200.00 from his mother's State Employees' Credit Union account on 29 May, 30 May, and 1 June.

On 5 June 1993, the defendant again called his estranged wife and told her he was at her stepfather's farm outside Bristol, Virginia. He said he would surrender to Darold Long, a bail bondsman in Asheville. Mr. Long drove to the farm of Robin McLemore's stepfather and found the defendant. Mr. Long then took the defendant to meet with an agent of the Tennessee Bureau of Investigation, who placed the defendant under arrest.

The defendant had driven his mother's automobile to Kingsport, Tennessee, on 1 June 1993 and spent two days in a motel. He then drove to Bristol, Virginia. The officers recovered from a pond on the farm of Robin McLemore's stepfather five weapons, including a Marlin 60 .22-caliber semiautomatic rifle. These weapons had been stolen from Jarod Turner's residence in Blountville, Tennessee, at a time the defendant was living next door to him. A ballistics expert testified that cartridge casings found in the victim's home were fired from the Marlin 60 .22-caliber semiautomatic rifle retrieved from the pond.

The defendant was found guilty of all the charges against him. After a capital sentencing proceeding, the jury recommended he be sentenced to life in prison, and this sentence was imposed. The defendant was also sentenced to forty years in prison on the robbery with a dangerous weapon conviction and three years in prison for each of the credit card offenses. The sentences are to run consecutively.

The defendant appealed.

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

*David G. Belser for the defendant-appellant.*

WEBB, Justice.

**[1]** The defendant first assigns error to the denial of his motion to dismiss the charge of robbery with a dangerous weapon. We believe this assignment of error has merit.

The evidence in this case was insufficient to show that the defendant used a weapon to force the victim to give him her car. The record is devoid of any evidence that the defendant's use of a firearm

preceded or was concomitant with his taking possession of the victim's Cadillac or induced the victim to part with her property. *See State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983). In addition, there is no evidence that the taking of the Cadillac was part of a single continuous transaction that involved the use of a firearm. *See State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986). To the contrary, evidence elicited from the State's own witnesses indicated that the defendant had permission to use the car and had often done so in the past to visit his wife and probation officer in Tennessee and in working with his mother in her business. The State concedes in its brief that the defendant had the victim's consent on previous occasions to drive the victim's Cadillac. The State's evidence shows no more than that the defendant already had possession and use of the vehicle before the killing and retained the vehicle afterwards.

For the foregoing reasons, we arrest judgment on the conviction and sentence for robbery with a dangerous weapon.

**[2]** The defendant's next two assignments of error concern alleged hearsay testimony of two witnesses. In his second assignment of error, the defendant contends that the admission of statements that the victim made to Fran Jones in mid-May was unduly prejudicial and violated his Sixth Amendment right to confrontation. Fran Jones, an employee at the North Carolina Department of Environment, Health, and Natural Resources, testified at trial that the victim spoke with her about her intention to make changes in her will, retirement account, and hospitalization plan. The victim allegedly declared her intention to do the following: (1) change the beneficiary of her retirement account from the defendant as sole beneficiary to the defendant and his sister as co-beneficiaries; (2) change her hospitalization plan to cover herself only, and not the defendant; and (3) change her will in some unspecified way. The defendant also contends that the trial court improperly admitted the testimony of Melissa McLemore, the victim's daughter, that shortly before the killing, the victim told her in a phone conversation that she was angry with the defendant and was planning to "lay down the law," to give the defendant a choice between living with her and fulfilling his responsibilities or moving back in with his wife.

The defendant apparently concedes that the statements to Fran Jones fell under N.C.G.S. § 8C-1, Rule 803(3), but argues that the statements were not admissible because they were not relevant to the case. Under Rule 803(3), hearsay evidence may be admitted to show

the declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." N.C.G.S. § 8C-1, Rule 803(3) (1992). 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 and its probative value is not outweighed by potential prejudice to the defendant. *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). The victim's state of mind is relevant to show the status of the relationship between the victim and the defendant. *State v. Alston*, 341 N.C. 198, 230-31, 461 S.E.2d 687, 704 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990). Furthermore, we recently held that a victim's state of mind is relevant if it relates directly to circumstances giving rise to a potential confrontation with the defendant. *State v. Corbett*, 339 N.C. 313, 332, 451 S.E.2d 252, 262 (1994).

In the case *sub judice*, evidence that the victim intended to decrease the financial benefits flowing to her son, as well as evidence that she was angry and intended to give her son an ultimatum, was relevant to show the status of their relationship just prior to the victim's death. Both statements also were relevant as they related to a potential confrontation with the defendant. Whether the defendant knew of the statements is irrelevant. Such evidence supported the State's theory of motive for the killing and was properly admitted. *See State v. Greene*, 324 N.C. 1, 16, 376 S.E.2d 430, 440 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

**[3]** The defendant also assigns error to the admission of other hearsay statements made by the victim to her daughter just days before the killing. The defendant argues that certain of the statements were unfairly prejudicial to him.

The defendant again argues the impropriety of admitting statements the victim made during the 23 May 1993 conversation concerning her intention to "lay down the law." As discussed above, this statement was admissible under Rule 803(3). During a 29 May 1993 conversation, the victim, who was at the time sick with asthmatic bronchitis, stated that the defendant had asked her to call to tell her that if she died of the condition, it was not his fault. The witness testified that the defendant was in the room with the victim at the time. This testimony was not admitted to prove the truth of the matter asserted and was therefore not hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992). Assuming that the evidence should not have been admitted, its

relevance was so remote that its admission was harmless. N.C.G.S. § 15A-1443(a) (1988). Finally, Melissa McLemore testified to several conversations she had with the decedent between Christmas of 1992 and the date of her death concerning financial matters. The defendant argues that the absence of evidence as to exactly when these conversations occurred renders their admission even more objectionable than the admission of the conversation with Fran Jones. In light of the admissibility of the latter conversation, the admission of the victim's statements to her daughter concerning her financial matters was proper.

These assignments of error are overruled.

**[4]** The defendant next assigns error to the admission of testimony of Archie McLemore, Sr., the defendant's father, and H.B. Oxner, a detective with the City of Asheville Police Department. These two witnesses were allowed to testify that Robin McLemore had told them of the telephone call the defendant had made to her in which he told her he had shot his mother and asked her to call his father.

The defendant made a motion to suppress the testimony of Det. Oxner, and a hearing was held outside the presence of the jury. Robin McLemore stated at the hearing that she would not testify against her husband. The court held that the statement of the defendant to his wife was meant to be conveyed to the defendant's father and the police and was not a confidential communication.

The defendant contends that the statement he made to his wife was a confidential communication and should not have been introduced against him. He says further that if we should hold it was not a confidential communication, it was hearsay and should not have been admitted.

An extrajudicial confidential statement made by one spouse to another may not be used against the spouse who made the statement. *State v. Rush*, 340 N.C. 174, 182, 456 S.E.2d 819, 823 (1995). In this case, the defendant told his wife he had shot his mother and asked her to tell his father and ask him to call the police. He did not intend that his statement to his wife be confidential. He told her specifically to let other people know what he had told her. The testimony of Det. Oxner and Archie McLemore, Sr. as to what Robin McLemore said the defendant told her was admissible unless it was barred by the hearsay rule.

The testimony of Det. Oxner and Archie McLemore, Sr. that Robin McLemore told them the defendant said that he had shot his mother was hearsay because it was introduced to prove the truth of the matter asserted, that the defendant shot his mother. N.C.G.S. § 8C-1, Rule 801(c) (1992). It was error to admit the testimony of either witness unless his testimony could be admitted under an exception to the hearsay rule.

The testimony of Archie McLemore, Sr. fits easily under N.C.G.S. § 8C-1, Rule 803(2), the excited utterance exception to the hearsay rule. Robin McLemore called her father-in-law approximately three minutes after she had talked to her husband. The telephone conversation in which the defendant told his wife he had shot his mother was undoubtedly a startling event. Robin McLemore would have been under its influence three minutes after it occurred. There is little likelihood that she fabricated this message to her father-in-law. This testimony by Archie McLemore, Sr. was admissible. *See State v. Sneed*, 327 N.C. 266, 272, 393 S.E.2d 531, 534 (1990).

As to the testimony of Det. Oxner, we hold it was admissible under N.C.G.S. § 8C-1, Rule 801(d)(C). This rule provides in part:

> A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a person authorized by him to make a statement concerning the subject.

N.C.G.S. § 8C-1, Rule 801(d)(C) (1992). In this case, the statement was introduced against the defendant, and he had authorized Robin McLemore to make a statement concerning the subject.

Doubt has been raised as to the continuing validity of the rule that agency may not be proven by the hearsay statement of the agent. *See* 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 201 (4th ed. 1993). However, if the rule applies that the hearsay statement of an agent cannot be used to establish the agency, *see Jocie Motor Lines, Inc. v. International Broth. of Teamsters*, 260 N.C. 315, 327, 132 S.E.2d 697, 705 (1963), we believe the rule is satisfied by proof of Robin McLemore's authority to make the statement through the testimony of Archie McLemore, Sr. Although Mr. McLemore used hearsay testimony to prove Robin McLemore's authority, we have held it was properly admitted under another exception to the hearsay rule. It was therefore properly before the jury as proof of Robin McLemore's authority.

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 murder. He was found guilty based on the felony murder rule and on the theory of premeditation and deliberation. We have held that there was not sufficient evidence to convict the defendant of the underlying felony of robbery with a dangerous weapon. For this reason, the conviction of felony murder cannot stand. Although the defendant should not have been convicted of felony murder, the verdict cannot be disturbed if the evidence supports a conviction based on premeditation and deliberation. *See State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989).

The defendant did not make any statement as to how the killing occurred other than the statement to his wife. The victim was shot several times in the head and back and was stabbed in the back. The trigger on the rifle found to have fired the casings at the scene had to be pulled each time the weapon was fired. These repeated assaults are evidence that the defendant intended to kill his mother and did so after premeditation and deliberation. *State v. Austin*, 320 N.C. 276, 357 S.E.2d 641, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). There is also no evidence that the victim had a weapon or offered any threat to the defendant. The victim was unarmed and lying in her bed wearing headphones when she was killed. This is evidence that there was no provocation for the shooting of defendant's mother. This evidence was sufficient for the jury to find the murder of defendant's mother was with premeditation and deliberation. *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

This assignment of error is overruled.

**[6]** The defendant next assigns error to the denial of his motion to dismiss the charges of financial transaction card theft, N.C.G.S. § 14-113.9(a)(1) (1993), and financial transaction card fraud, N.C.G.S. § 14-113.13(a)(1) (1993). He contends the State did not prove he did not have the consent of his mother to use the card. We believe this assignment of error has merit.

There was no direct evidence that defendant did not have permission to use the card. The defendant knew the correct combination of numbers to receive money from the machine. He must have learned this combination from his mother, which shows she could have allowed him to use the card. He used the card at least two days before the death of his mother, which shows he had the card in his possession while his mother was alive, and there is no indication that

she objected to his having it. We hold that there was not substantial evidence from which the jury could find the defendant did not have permission to use the card. We arrest judgment on the charges of financial transaction card theft and fraud.

In his last assignment of error, the defendant contends there was error in the charge on robbery with a dangerous weapon. We have arrested judgment on this offense, and this assignment of error is moot.

NO. 93-CRS-4012, ROBBERY WITH A DANGEROUS WEAPON: JUDGMENT ARRESTED;

NO. 93-CRS-57506, FIRST-DEGREE MURDER: NO ERROR;

NO. 93-CRS-4011, FINANCIAL TRANSACTION CARD THEFT AND FRAUD: JUDGMENTS ARRESTED.

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STATE OF NORTH CAROLINA v. KEITH ANTONIA WAGNER

No. 338A95

(Filed 10 May 1996)

**1. Evidence and Witnesses § 1353 (NCI4th)— detective's notes of confession—unsigned by defendant—admissibility**

A detective's handwritten notes of an interview of defendant containing the detective's questions and defendant's answers was properly admitted into evidence in defendant's murder trial, although the notes were not reviewed and signed by defendant, where the detective testified that the notes constituted an exact word-for-word rendition of his interview of defendant, and any unrecorded conversation that took place between the detective and defendant was unrelated to the questioning of defendant. Furthermore, the notes were not inadmissible because they contained a comment by the detective that defendant appeared to be bragging when he stated that he would have used a more powerful gun if he had intended to kill anyone, since the detective could testify as to what he observed about defendant's demeanor during the interrogation.

**Am Jur 2d, Evidence §§ 716, 717.**

**Admissibility in evidence of unsigned confession. 23 ALR2d 919.**

**2. Criminal Law § 497 (NCI4th)— exhibit in jury room—objection by defendant—harmless error**

The trial court erred by allowing four of the five pages of a handwritten narrative of defendant's statements to a detective to be taken into the jury room during deliberations in a first-degree murder trial over defendant's objection and without his consent. However, this error was not prejudicial where the exhibit had already been admitted into evidence and was consistent with defendant's trial testimony, and there were no comments favorable to defendant on the fifth page of the exhibit that defendant had not made earlier in his statements to the detective. N.C.G.S. § 15A-1233(b).

**Am Jur 2d, Trial §§ 1665 et seq.**

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

**3. Homicide § 706 (NCI4th)— first-degree murder—failure to instruct on voluntary manslaughter—error cured by verdict**

Even if it was error for the trial court to fail to instruct the jury on voluntary manslaughter in this first-degree murder prosecution, this error was harmless where the trial court properly instructed on first-degree and second-degree murder, and the jury found defendant guilty of first-degree murder.

**Am Jur 2d, Homicide §§ 529 et seq.**

**Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Griffin, J., at the 23 January 1995 Criminal Session of Superior Court, Pender County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment for discharging a firearm into occupied property was allowed 23 August 1995. Heard in the Supreme Court 13 March 1996.

*Michael F. Easley, Attorney General, by Ronald M. Marquette and Thomas F. Moffitt, Special Deputy Attorneys General, for the State.*

*Neil D. Weber and Daniel Shatz for defendant-appellant.*

FRYE, Justice.

Defendant, Keith Antonia Wagner, was indicted on 30 August 1993 for first-degree murder and discharging a firearm into occupied property. In a noncapital trial, the jury found defendant guilty of discharging a firearm into occupied property and first-degree murder on the theories of premeditation and deliberation and felony murder. On 26 January 1995, the trial court entered judgments imposing sentences of three years' imprisonment for discharging a firearm into occupied property and life imprisonment for the first-degree murder conviction.

On appeal to this Court, defendant makes three arguments. After reviewing the record, transcript, briefs, and oral arguments of counsel, we conclude that defendant received a fair trial, free of prejudicial error.

The evidence presented at trial tended to show the following facts and circumstances: In the early morning hours of 17 August 1993, Annette Miller (the victim) died from a gunshot wound to her right temple. Defendant, who had been "romantically involved" with the victim, resided with his mother in a trailer approximately one thousand feet from the scene of the crime. The bullet removed from the victim's temple was consistent with having been fired by a .22-caliber rifle found in defendant's mother's trailer shortly after the victim was shot. Defendant admitted to the police that he had fired the rifle "in the air" from a roadway near Bernadette McKnight's trailer, where the victim's body was found.

Defendant and the victim had been involved in a quarrel earlier that evening at McKnight's trailer. The victim and McKnight confronted defendant about their belief that he had made a pass at Theresa Jordan, who was also present at McKnight's trailer. After speaking alone with the victim and denying that the accusations were true, defendant became angry and decided to leave McKnight's trailer. Witnesses testified that, as defendant was leaving the trailer, he said "I'm going to kill all you m—— f——s in here" and that defendant looked at Theresa Jordan and said, "Especially you, bitch."

McKnight followed defendant as he left the trailer and said, "Please don't shoot my house. My kids are in there. . . . Calm down, calm down, please calm down." McKnight pulled on defendant's clothing, and he came out of his shirt and his jogging pants. Operaus McKnight, McKnight's brother, and Edison Jordan came outside of the trailer a few minutes later. A fight ensued. Operaus McKnight and Edison Jordan knocked defendant to the ground and punched him. As McKnight asked her brother and Edison Jordan to stop fighting, defendant ran away.

When defendant departed, McKnight made everyone, except the victim and her (McKnight's) children, leave the trailer. McKnight then went to find someone to watch her children and to telephone the police. When McKnight left the trailer, the victim was watching television. McKnight heard one gunshot while she was walking to her sister's house and heard at least two gunshots after she entered her sister's house. McKnight called the police and then returned to her trailer.

On the way back to her trailer, McKnight saw defendant at a neighbor's trailer. Defendant was carrying a rifle. Defendant told McKnight, "I done shot up some s—- in your trailer and you're next." When McKnight returned to her trailer, she found the victim on the floor. McKnight observed two bullet holes in her trailer, one in the front window and another near the front door light switch.

Shortly thereafter, defendant rode up to the trailer with his mother, who asked McKnight what had happened. When McKnight told defendant's mother that defendant had shot the victim, his mother responded that defendant could not have shot the victim because he was at home with her. Witnesses testified that when defendant exited his mother's car, he yelled, "Any other of you m——— f———s wanna die tonight?" Everyone ran because they thought defendant may have had a gun.

Defendant and his mother left the crowd at the trailer park at about 4:30 a.m. Defendant's mother drove defendant to the Pender County Sheriff's Department to report the assault on defendant by Operaus McKnight and Edison Jordan that took place earlier that morning at McKnight's trailer. Defendant gave the following statement to the police about the assault:

> When [McKnight's] brother and the other guy approached me and jumped on me, then they told me if I came back, don't come back

shooting B.B.s, so I went home and got a .22 shooting in the air. I didn't see anyone. Whatever happened after I got home. I don't know.

Meanwhile, officers had responded to McKnight's trailer to investigate the shooting. While defendant and his mother were at the Sheriff's Department, an officer called and asked defendant's mother if she would come home and give them the rifle that defendant had been carrying earlier that morning. Defendant's mother left the Sheriff's Department, went to her trailer, consented to a search by an officer, retrieved the rifle for the officer, and gave it to him. The officer, Detective Ezzell, gave defendant's mother a receipt for the rifle. Defendant's mother and Detective Ezzell then returned to the Sheriff's Department.

Defendant's mother and Detective Ezzell arrived at the Sheriff's Department with the .22-caliber rifle at about 6:20 a.m. Detective Ezzell arrested defendant and charged him with murder. Detective Ezzell then questioned defendant about the shooting of Annette Miller and recorded in longhand his questions and defendant's answers. Defendant stated that he shot his rifle "in the air" but that he had not intended to shoot anyone; that he had heard voices inside the trailer before and after the shots were fired; that, after the second shot, he entered the trailer and saw the victim lying on the floor but that he did not think she was dead or had been shot; that, if he did shoot her, he was sorry; that he did not think a .22-caliber bullet could do so much damage; and that, if he had intended to shoot someone, he would have used a more powerful gun.

Defendant testified at trial that he had been drinking on the evening of 16 August 1993 and had smoked marijuana prior to arriving at McKnight's trailer at about 9:00 p.m. He admitted that he and the victim were both "in a rage" over her accusation that he had made advances toward Theresa Jordan. He testified that all he wanted was to go home and "chill out." Defendant further testified that, when he left the trailer, he was intoxicated and did not recall exactly what he said as he was leaving but that he may have told Theresa Jordan that he was going "to get her."

Defendant also testified that, after McKnight attempted to restrain him and after Operaus McKnight and Edison Jordan beat him, he ran home, got his rifle, returned to McKnight's trailer after about five minutes, and fired his rifle twice into the air. Defendant admitted telling Detective Ezzell that he heard voices coming from the trailer

and stated that it could have been the television. He testified that he was angry but did not see anyone at whom he was angry and did not intend to kill anyone. Defendant admitted to telling McKnight when he saw her shortly after he had fired the rifle that he had "shot up something." However, he did not recall making any hostile statement to the crowd outside of the trailer when he arrived with his mother and did not recall telling McKnight that he was going to shoot her next.

Defendant's mother testified that, when she first saw defendant on 17 August 1993, he had been badly beaten and was swollen and scratched. She further testified that defendant did not have a gun. She also testified that she left her trailer with defendant to report the assault to the police.

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]** Defendant first assigns as error the trial court's admission into evidence, over defendant's objection, of State's Exhibit 29, a handwritten rendition of defendant's interview with Detective Ezzell containing Detective Ezzell's questions and defendant's answers. In addition to moving to suppress the statement on *Miranda* grounds, defendant objected to the admission of the detective's notes on the grounds that the notes were not acknowledged by defendant, contained editorial comments by the detective, and did not constitute a complete word-for-word rendition of the interview. Defendant argues that he was never afforded the opportunity to review the notes from the interview or to sign the notes to acknowledge their accuracy.

In *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967), this Court set out the legal principles for the admissibility of a statement reduced to writing. This Court stated:

> "A confession which has been wholly or partially reduced to writing is ordinarily admissible against an accused where it was freely and voluntarily made by him, regardless of the fact that it was reduced to writing by another person, where it was read over to or by accused, or was translated to him, and signed or otherwise admitted by him to be correct." 23 C.J.S., Criminal Law 833(a).
>
> "If a statement purporting to be a confession is given by accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written con-

> fession of accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to accused, and is not signed by accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of accused; and it is not admissible in evidence as the written confession of accused." 23 C.J.S., Criminal Law 833(b).

*Walker*, 269 N.C. at 139, 152 S.E.2d at 137. We further stated, "There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretative narration of what the officer understood to be the purport of statements made by the accused." *Id.* at 141, 152 S.E.2d at 138.

Defendant acknowledges that the Court of Appeals has noted a limited exception where an officer's notes are a verbatim record of the questions and answers between the officer and the defendant and are not merely the officer's impression of the import of defendant's statements. *See State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992). However, defendant argues that the notes admitted into evidence did not constitute an exact word-for-word rendition of his interview with Detective Ezzell in that it was incomplete. Defendant notes that Detective Ezzell admitted on *voir dire* that additional conversations took place between himself and defendant which were not reduced to writing. Defendant argues that to allow an officer to determine which portions of a defendant's statement to reduce to writing amounts to editorial input into the contents of the writing.

Additionally, defendant argues that the notes contain an editorial comment by the detective that defendant "appear[ed] to be bragging" when he stated that if he had intended to kill anyone, he would have used a more powerful gun. Defendant contends that Detective Ezzell's interpretation of defendant's words, which tend to support his claim that he had no specific intent to kill or discharge a firearm into the dwelling, completely undercuts the impact of defendant's statement. Defendant further notes that when the jury requested the statement be sent into the jury room during deliberations, the court removed the page containing Detective Ezzell's editorial comment, stating, "I don't think that would be appropriate."

In the instant case, unlike in *Walker*, Detective Ezzell testified that the exhibit introduced into evidence was an exact word-for-word rendition of his interview of defendant. We conclude that *Walker* does

not preclude admission of an unsigned statement taken in longhand of a defendant's actual responses to the recorded questions. After carefully reviewing the transcript of the *voir dire* of Detective Ezzell, we conclude that any unrecorded conversation that took place between Detective Ezzell and defendant was unrelated to the questioning of defendant. Detective Ezzell testified that defendant was belligerent and accused the officers of framing him. This conversation, which took place prior to the conclusion of defendant's statement, was not a part of the questioning. Further, we conclude that Detective Ezzell could testify as to what he observed about defendant's demeanor during the interrogation when he commented that defendant appeared to be bragging. Accordingly, we reject this assignment of error.

**[2]** Defendant next assigns as error the trial court's allowing the jury to take four of the five pages of State's Exhibit 29 into the jury room during deliberations. The jurors had sent a note to the trial court requesting that they be given photographs, diagrams, reports, and statements to take into the jury room for use in their deliberations. Defendant objected to State's Exhibit 29, the handwritten narrative of defendant's statement given to Detective Ezzell, being sent into the jury room because it contained Detective Ezzell's editorial comment that defendant appeared to be bragging when he said that if he had intended to kill anyone, he would have used a more powerful gun. The trial court determined that it would be inappropriate for the jury to have the fifth page of the five-page statement since it contained the detective's comment. Accordingly, the trial court gave the jury the first four pages of the statement. Defendant contends that giving this material to the jury, over his objection, was prejudicial error.

N.C.G.S. § 15A-1233 provides in pertinent part:

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

N.C.G.S. § 15A-1233(b) (1988).

Defendant contends that the judge may permit the jury to take exhibits into the jury room only with the consent of *all* parties. In *State v. Platt*, 85 N.C. App. 220, 228, 354 S.E.2d 332, 337, *disc. rev. denied*, 320 N.C. 516, 358 S.E.2d 529 (1987), the Court of Appeals said:

> N.C. Gen. Stat. § 15A-1233(b) authorizes a judge to allow the jury to take into the jury room exhibits and writings which have been admitted into evidence when the jury so requests and the parties give their consent. *State v. Taylor*, 56 N.C. App. 113, 287 S.E.2d 129 (1982). Defendant here objected to the jury's taking this statement into the jury room, and the court thus violated G.S. § 15A-1233(b) in allowing the exhibits to go into the jury room. *Id.*

In the instant case, defendant objected to State's Exhibit 29 being allowed into the jury room during deliberations. We conclude that the trial court erred in allowing the exhibit to be taken into the jury room during deliberations over defendant's objection and without his consent.

We now consider whether this error was prejudicial. Such error is prejudicial only if defendant can meet his burden of showing that there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988). Defendant argues that this error was compounded by the fact that in allowing the jury to take State's Exhibit 29 into the jury room during deliberations, the trial court removed a page from the exhibit which, along with Detective Ezzell's inappropriate editorial comment, contained several statements which supported defendant's contentions regarding his lack of intent to shoot the deceased or anyone else. We disagree.

Defendant's objections at trial to allowing the exhibit to go to the jury room were based on grounds that the statement constituted hearsay and that it was not a signed statement of defendant. We conclude that defendant has failed to show prejudice. The statement submitted to the jury during its deliberations had already been admitted into evidence and was consistent with defendant's testimony at trial. Further, there were no comments favorable to defendant on the fifth page of the statement that defendant had not made earlier in the statement. Accordingly, we find no prejudicial error.

**[3]** Defendant next assigns as error the trial court's failure to instruct the jury on voluntary manslaughter. We conclude that it is unnecessary to decide whether the evidence supported a voluntary

manslaughter instruction. Assuming *arguendo* it was error not to instruct the jury on voluntary manslaughter, a review of the possible verdicts submitted to the jury and the jury's ultimate verdict reveals that such error was harmless. The trial court instructed the jury that it could find defendant (1) guilty of first-degree murder, based either on the theory of malice, premeditation, and deliberation or the theory of felony murder; (2) guilty of second-degree murder; or (3) not guilty. After deliberations, the jury returned a verdict finding defendant guilty of first-degree murder on both theories submitted. "Since the jury rejected second-degree murder, it would also have rejected the lesser offense of voluntary manslaughter." *State v. Lyons*, 340 N.C. 646, 664, 459 S.E.2d 770, 779 (1995). Thus, even if it was error to fail to instruct the jury in this case regarding voluntary manslaughter, such error was not prejudicial.

NO ERROR.

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MARY B. BLACKMON, ADMINISTRATRIX OF THE ESTATE OF BOBBY T. BLACKMON, DECEASED v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER; AND/OR NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 235A95

(Filed 10 May 1996)

**Workers' Compensation §§ 41, 57 (NCI4th)— death of inmate while working on road crew—recovery limited to workers' compensation**

The Court of Appeals correctly held that the provisions of the Workers' Compensation Act bar plaintiff's wrongful death action where plaintiff, a prison inmate, died while working with a minimum custody road crew assigned to the Department of Transportation. N.C.G.S. § 97-13(c) permits the dependents or next of kin of a prisoner killed while working for the State to apply for workers' compensation benefits and states that the exclusive remedy provision of N.C.G.S. § 97-10.1 applies to prisoners entitled to compensation under N.C.G.S. § 97-13(c). Although *Ivey v. N.C. Prison Dep't*, 252 N.C. 615 (1960) determined that an award of burial expenses alone did not constitute compensation, the subsequent legislative decision to afford the dependents and next of kin of a deceased prisoner a weekly monetary benefit is properly interpreted as entitling such claimants to "compensation." Plaintiff argues that the maximum benefit of

thirty dollars per week is not sufficient to constitute compensation, but the amount of compensation to be awarded is based on lost earning capacity, which is greatly limited by incarceration. Finally, the use of the word "may" in N.C.G.S. § 97-13(c) does not give a plaintiff a choice of proceeding under either the Workers' Compensation Act or the Tort Claims Act, but merely permits plaintiff to file a workers' compensation claim.

**Am Jur 2d, Workers' Compensation § 162.**

**Workers' compensation law as precluding employee's suit against employer for third person's criminal attack. 49 ALR4th 926.**

**Workers' compensation: incarceration as terminating benefits. 54 ALR4th 241.**

**Workers' compensation: injuries incurred during labor activity. 61 ALR4th 196.**

Justice FRYE dissenting.

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. 666, 457 S.E.2d 306 (1995), reversing a decision and order of the Industrial Commission, filed 15 March 1994, awarding plaintiff damages. Heard in the Supreme Court 15 February 1996.

*Griffin, Caldwell, Helder, Lee & Helms, P.A., by W. David Lee and R. Kenneth Helms, Jr., for plaintiff-appellant.*

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

*Patterson, Harkavy & Lawrence, by Martha A. Geer, on behalf of The American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.*

PARKER, Justice.

Plaintiff appeals a decision of the Court of Appeals reversing a decision and order of the Industrial Commission awarding plaintiff damages under the Tort Claims Act. For the reasons stated herein, we conclude that provisions of the Workers' Compensation Act bar plaintiff's wrongful death action. Accordingly, we affirm the Court of Appeals.

**BLACKMON v. N.C. DEPT. OF CORRECTION**

[343 N.C. 259 (1996)]

On 6 November 1990 decedent Bobby Blackmon was an inmate incarcerated within the Department of Correction ("DOC") at Yancey Correctional Center. Decedent worked with a minimum custody road crew which was assigned to the Department of Transportation ("DOT"). The DOT foreman supervising decedent's crew assigned them the task of breaking up and removing road salt from a double storage bin, a wooden structure located on the side of a mountain immediately above the DOT maintenance yard.

The double storage bin consisted of two large compartments, each capable of holding seventy-five tons of road salt. The bin was raised eight feet from the ground on stilts and measured thirty-four feet from side to side, seventeen feet from front to back, and fourteen feet from top to bottom. Salt was removed from the bin by backing a truck beneath the bin and opening the doors to a vertical metal chute which provided access to the bottom of the bin.

The salt stored in the bin tended to crystallize and often would not flow through the chute. The standard DOT procedure for dealing with this circumstance was to have workers stand inside the bin on top of the salt and break up the crystallized salt with crowbars until the salt was granulated enough to pass through the chute.

In the process of cleaning the bin, decedent, another inmate, and a correctional officer stepped on top of the salt in the bin. A short time later decedent walked across the surface of the salt, the crystallized salt suddenly broke beneath him, and decedent dropped into the salt pile. Other inmates and a correctional officer attempted to rescue decedent, but the salt gave way and pulled decedent under the salt. Further rescue efforts failed, and decedent died from asphyxiation.

Plaintiff Mary Blackmon, decedent's mother and administratrix of decedent's estate, instituted this action on 11 February 1991 by filing an affidavit with the Industrial Commission alleging a tort claim against the DOT and the DOC and seeking $100,000 in damages for wrongful death. On 11 March 1991 defendants answered, denying that decedent was injured as a result of the negligence of DOT or DOC employees and disavowing any liability.

In its answer and in a motion to dismiss filed 4 April 1991, defendants asserted that provisions of the Workers' Compensation Act barred plaintiff from proceeding under the Tort Claims Act. Deputy Commissioner Edward Garner, Jr. denied defendants' motion to dismiss on 13 August 1991.

Deputy Commissioner Gregory Willis heard plaintiff's claim on the merits on 18 March 1992. Willis concluded that plaintiff failed to show that defendants' employees injured decedent as a result of their negligence. Accordingly, Willis did not award plaintiff any damages.

The Industrial Commission reversed. In an order written by Commissioner James J. Booker, the Commission concluded that the Workers' Compensation Act does not preclude a working prisoner from bringing a wrongful death action under the Tort Claims Act, that defendants' negligence caused the wrongful death of decedent, and that plaintiff was entitled to compensation. The Commission awarded plaintiff $73,685 in damages.

The Court of Appeals, with one judge dissenting, reversed. *Blackmon v. N.C. Dep't of Correction*, 118 N.C. App. 666, 457 S.E.2d 306 (1995). The Court of Appeals concluded that N.C.G.S. § 97-13(c) entitles plaintiff to compensation and that N.C.G.S. § 97-10.1 thus precludes plaintiff's wrongful death action. We agree and affirm the Court of Appeals.

N.C.G.S. § 97-13(c) permits the dependents or next of kin of a prisoner killed while working for the State to apply for workers' compensation benefits. This subsection states that the exclusive remedy provision of N.C.G.S. § 97-10.1 applies to prisoners "entitled to compensation" under N.C.G.S. § 97-13(c). N.C.G.S. § 97-13(c) provides in pertinent part:

> This Article shall not apply to prisoners being worked by the State . . . except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer . . . accidental death arising out of and in the course of the employment to which he had been assigned, if there be death . . . the dependents or next of kin . . . may have the benefit of this Article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to . . . the dependents or next of kin of any deceased prisoner shall not exceed thirty dollars ($30.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. . . . The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

N.C.G.S. § 97-13(c) (1991).

N.C.G.S. § 97-10.1 states:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C.G.S. § 97-10.1 (1991).

In the instant case decedent is a prisoner who suffered an accidental death arising out of and in the course of the employment to which he had been assigned. For this reason plaintiff is entitled to workers' compensation benefits by N.C.G.S. § 97-13(c). The Court of Appeals concluded that the monetary benefit afforded to plaintiff by N.C.G.S. § 97-13(c) entitles her to "compensation" and that N.C.G.S. § 97-10.1 thus applies to bar plaintiff's wrongful death action. We agree.

Plaintiff contends that *Ivey v. N.C. Prison Dep't*, 252 N.C. 615, 114 S.E.2d 812 (1960), requires a contrary result. In *Ivey* the administrator of inmate Ivey's estate initiated an action against the North Carolina Prison Department for wrongful death. The Prison Department moved to dismiss on the grounds that the workers' compensation remedy was exclusive. *Id.* at 616, 114 S.E.2d at 812-13. This motion was allowed by the hearing commissioner and affirmed by the Industrial Commission and the Superior Court. *Id.* at 617, 114 S.E.2d at 813. This Court in *Ivey* determined that N.C.G.S. § 97-13(c), as it was then written, did not withdraw a prisoner's right to bring a tort claim against the State and reversed. *Id.* at 620, 114 S.E.2d at 815-16.

At the time *Ivey* was decided, N.C.G.S. § 97-13(c) limited the dependents and next of kin of a deceased prisoner to an award of burial expenses alone. *Ivey*, 252 N.C. at 618, 114 S.E.2d at 814. The question presented to the *Ivey* Court was whether the legislature had withdrawn the right of the plaintiff to bring a tort claims action by amending N.C.G.S. § 97-13(c) to provide that the exclusive remedy provision of the Workers' Compensation Act applied to prisoners "entitled to compensation." The Prison Department argued that the payment of burial expenses constituted the payment of compensation. *Id.* at 619, 114 S.E.2d at 815. The *Ivey* Court disagreed, stating that

> it takes the whole to constitute compensation and not one of its parts. A vest is a part of a suit of clothes, but a vest cannot be called a suit. Surely compensation for wrongful death involves more than the burial of the body.

*Id.* at 620, 114 S.E.2d at 815. The *Ivey* Court questioned whether the legislature intended the amendment to withdraw a prisoner's right to bring an action under the Tort Claims Act. The Court stated:

> If the Legislature intended to withdraw altogether a prisoner's right to pursue a tort claim, the logical procedure would be by amendment to the section of the Tort Claims Act which gave the right. No valid reason is suggested why the withdrawal, if such were intended, should be by an amendment tucked away in a jumbled and confusing subsection . . . .

*Id.* at 619, 114 S.E.2d at 815. The Court concluded that it could not presume that the legislature intended to withdraw a prisoner's right to assert a tort claim as a result of the amendment providing that workers' compensation was the exclusive remedy for prisoners "entitled to compensation" under N.C.G.S. § 97-13(c). *Id.* at 620, 114 S.E.2d at 815.

In 1971 the General Assembly amended N.C.G.S. § 97-13(c) to delete the burial expenses limitation on workers' compensation relief for the dependents and next of kin of a deceased prisoner and to afford such claimants a weekly monetary benefit. The subsection now provides that this benefit "shall not exceed thirty dollars . . . per week." N.C.G.S. § 97-13(c). The Court of Appeals determined that the legislative decision to amend the subsection to delete the limitation on benefits to burial expenses and to afford the dependents and next of kin of deceased prisoners a weekly monetary benefit entitled plaintiff to "compensation" under N.C.G.S. § 97-13(c). *Blackmon*, 118 N.C. App. at 673, 457 S.E.2d at 310.

In his dissent Judge Greene argued that the concerns expressed by the *Ivey* Court continue to exist because (i) the legislature has not taken the *Ivey* Court's suggestion to amend the Tort Claims Act to withdraw the right of prisoners to bring a tort claim and (ii) the legislature has not changed the Workers' Compensation Act to treat working prisoners like regular employees. Judge Greene stated that

> if the Legislature desires the Workers' Compensation Act to be the exclusive remedy for prisoners accidentally injured or killed while on assigned work, it either needs to amend the Tort Claims

> Act as suggested by the Court in *Ivey* or change Section 97-13(c) to treat working prisoners as regular employees rather than as an exception to the Workers' Compensation Act.

*Id.* at 676, 457 S.E.2d at 312. We disagree and conclude that the legislature withdrew the plaintiff's right to bring a tort claim by amending N.C.G.S. § 97-13(c) to entitle the dependents and next of kin of a deceased prisoner to a weekly monetary benefit.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. *Derebery v. Pitt Co. Fire Marshall*, 318 N.C. 192, 196, 347 S.E.2d 814, 817 (1986). In determining legislative intent, we may "assume that the legislature is aware of any judicial construction of a statute." *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). The *Ivey* Court determined that an award of burial expenses alone did not constitute compensation. *Ivey*, 252 N.C. at 620, 114 S.E.2d at 815. We agree with the Court of Appeals that the subsequent legislative decision to afford the dependents and next of kin of a deceased prisoner a weekly monetary benefit is properly interpreted as entitling such claimants to "compensation."

Plaintiff argues that the maximum benefit of thirty dollars per week afforded under N.C.G.S. § 97-13(c) is not sufficient to constitute "compensation." The Workers' Compensation Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein." N.C.G.S. § 97-2(11) (Supp. 1995). In this context "compensation" refers to " 'money relief afforded according to a scale established and for the person designated in the Act.' " *Ivey*, 252 N.C. at 619-20, 114 S.E.2d at 815 (quoting *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943)). The amount of "compensation" to be awarded is based on the claimant's lost earning capacity. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 83, 155 S.E.2d 755, 761 (1967). A prisoner's earning capacity is greatly limited by the fact of his incarceration. For this reason a benefit of thirty dollars per week is more than sufficient to comport with the statutory definition of "compensation."

Plaintiff also argues that the use of the word "may" in N.C.G.S. § 97-13(c) gives plaintiff a choice of proceeding either under the Workers' Compensation Act or under the Tort Claims Act at plaintiff's election. We disagree. N.C.G.S. § 97-13(c) uses mandatory language in

stating that the exclusive remedy provision of N.C.G.S. § 97-10.1 "shall apply to prisoners . . . entitled to compensation." The use of the word "may" merely permits plaintiff to file a workers' compensation claim and cannot reasonably be construed as granting plaintiff the option of filing a claim under the Tort Claims Act.

*Amicus curiae* American Civil Liberties Union of North Carolina Legal Foundation presents this Court with a constitutional argument alleging a denial of plaintiff's rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. "Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are . . . specifically set out in the dissenting opinion as the basis for that dissent . . . ." N.C. R. App. P. 16(b); *accord State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987). Because Judge Greene's dissent is not based upon a violation of plaintiff's constitutional rights, the equal protection argument is not before us, and we do not address it.

We conclude that plaintiff is "entitled to compensation" under N.C.G.S. § 97-13(c) and that N.C.G.S. § 97-10.1 thus applies to bar plaintiff's wrongful death action under the Tort Claims Act. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice FRYE dissenting.

For the reasons stated in Judge Greene's dissenting opinion, I respectfully dissent.

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STATE OF NORTH CAROLINA v. PATRICK HESTER

No. 362A91-2

(Filed 10 May 1996)

**1. Evidence and Witnesses § 1005 (NCI4th)— hearsay—family history exception—inapplicability to events during marriage**

The family history exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 804(b)(4) merely allows testimony about

the existence of a marriage or other personal relationships and does not permit hearsay testimony about events, activities, or emotional states occurring within the marital relationship between a murder victim and her husband which suggest that the husband, rather than defendant, may have murdered the victim.

**Am Jur 2d, Evidence § 691.**

**2. Evidence and Witnesses §§ 115, 1008 (NCI4th)— suggestion crime committed by another—motive—residual hearsay exception inapplicable**

Testimony by a murder victim's sister-in-law which suggested that the victim's husband, rather than defendant, might have committed the crime was not admissible under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 804(b)(5) since (1) defense counsel failed to give the prosecutor timely written notice of her intent to use this testimony as required by the rule, and (2) the proffered evidence was not relevant because it did no more than arouse a suspicion as to the husband's guilt on the basis that he might have had a motive to murder the victim and thus did not point directly to the guilt of a person other than defendant.

**Am Jur 2d, Evidence § 587.**

**3. Criminal Law § 426 (NCI4th)— prosecutor's closing argument—absence of explanation during interrogation—no comment on exercise of right to silence**

The prosecutor's comment during closing argument in a first-degree murder trial that defendant, who had confessed to the murder, did not explain how the victim's pants were removed was not an improper reference to defendant's exercise of his right to silence during custodial interrogation but was a proper comment on the evidence adduced at trial.

**Am Jur 2d, Trial §§ 557-559.**

**4. Criminal Law §§ 423, 425 (NCI4th)— prosecutor's closing argument—no improper comments on silence, failure to testify**

The prosecutor's comments during closing argument that "[t]here are a lot of unanswered questions in this case," that defendant did not subpoena a relative he claimed to have seen the night of the crime to testify in his defense, and that defendant's

"confession is unrebutted" were not improper comments on defendant's exercise of his right to silence and his failure to testify and did not require the trial court to intervene *ex mero motu*.

**Am Jur 2d, Trial §§ 590, 599.**

**Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases. 80 ALR4th 337.**

**5. Criminal Law § 378 (NCI4th)— repetitive questioning—comments by court—no expression of opinion**

The trial court did not express an opinion on questions of fact in the jury's presence and did not abuse its discretion to limit repetitive questioning by comments emphasizing that defense counsel's questioning was repetitive and indicating that it would like to move on.

**Am Jur 2d, Trial §§ 302-306.**

**6. Criminal Law § 375 (NCI4th)— comments by court and prosecutor—jury not present—absence of prejudice**

Defendant was not prejudiced by several comments the trial court and the prosecutor made out of the jury's presence which indicated impatience with defense counsel's repetitive cross-examinations, concern about counsel's last-minute motion for a fingerprint expert and last-minute subpoenas, and frustration about counsel's refusal to be straightforward as to the relevance of her inquiries and where her questioning was leading.

**Am Jur 2d, Trial § 284.**

Appeal of right pursuant to N.C.G.S § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brannon, J., at the 22 February 1993 Criminal Session of Superior Court, Person County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 April 1996.

*Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.*

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

WHICHARD, Justice.

In April 1990 defendant was convicted of the first-degree murder of Lynn Stainback, an employee of the Fast Fare on Nicholas and Williams Streets in Henderson, and sentenced to life imprisonment. This Court granted defendant a new trial. *State v. Hester*, 330 N.C. 547, 411 S.E.2d 610 (1992). Upon retrial, defendant was again convicted, and he now appeals from his conviction and sentence. We find no prejudicial error.

The State's evidence tended to show that at approximately 7:30 p.m. on 10 December 1989, Officer D.H. Edwards of the Henderson Police Department drove past the Fast Fare and noticed a young, black male on a bicycle in front of the store. Officer Andrew Carter, who arrived at the Fast Fare at approximately 8:18 p.m. in response to a call, saw a young, black male on a bicycle across the street from the Fast Fare. Both officers testified that the young man wore a black and white checkered coat and that the bicycle had white "Mag" wheels.

Officers W.E. Vick and R.N. Stancill, who arrived at the Fast Fare at approximately 8:17 p.m., found the store's front glass doors locked and observed a great deal of blood on the floor. Officers Carter and Vick noticed someone in the storage area at the rear of the store and repeatedly shouted for her to come out. Lynn Stainback, the victim, emerged from the storage area covered in blood and nude from the waist down; she staggered toward the front doors, falling twice. Because Stainback could not reach the latch on the front doors to open them, Officer Vick kicked the right-hand door until the left-hand door popped open. After Stainback had been removed by emergency medical technicians, the officers searched the store and determined that no one else was inside. Stainback died on the way to the hospital without identifying her assailant. The autopsy revealed that she had been stabbed twice in the back and once each in the stomach and chest. No evidence of rape was detected.

State Bureau of Investigation (SBI) crime scene specialist Pat Matthews testified that she noticed a great deal of popcorn and blood on the floor and observed blood smears leading from the popcorn machine to the cash register and back to the storage area. A dagger-type hunting knife with an eight- or nine-inch blade was found lying on the floor between the store's two counters. Agent Matthews found numerous footwear impressions in blood on the store's tile floor. SBI Agent Ricky Navarro testified that approximately twenty of these

prints were consistent with the Adidas athletic shoes recovered from defendant the day after the murder and that the footprints must have been made by shoes of the same design, size, and amount of wear as those worn by defendant. Agent Matthews also found a bloody fingerprint on the inside thumb latch of the front door dead-bolt lock which was later determined to match the fingerprint on defendant's left index finger.

Defendant, then sixteen years old, was arrested at approximately 3:00 p.m. on 11 December 1989 and taken to the Henderson Police Department. Lieutenant Tim Robinson read defendant his juvenile rights, and defendant indicated that he understood his rights. After Lieutenant Robinson informed defendant that he was a suspect in the Fast Fare homicide, SBI Special Agent Richard Sims asked defendant about his shoes. Defendant then became nervous and asked to speak to Lieutenant Robinson alone; after Agent Sims left the room, defendant confessed that he had stabbed and killed Stainback. Agent Sims returned to the interview room, and defendant gave a statement describing the circumstances of the killing in which he acknowledged that he had stabbed Stainback, dragged her into the storage room, and locked the front door by turning the latch on the inside. When Lieutenant Robinson inquired why he had killed Stainback, defendant responded that "it was just something that he wanted to do."

Defendant first assigns as error the trial court's exclusion of the testimony of Jewel Journigan, Stainback's sister-in-law, which suggested that Stainback's husband, rather than defendant, might have committed the crime. At trial, defendant called Journigan to testify about Stainback's relationship with her husband, Randall Stainback. Journigan testified on *voir dire* that Randall was a member of Hell's Angels and was nicknamed "Cowboy," that Stainback and Randall did not get along very well, that Randall physically abused Stainback and her children from a former marriage, and that Stainback often hid from Randall by spending the night at Journigan's house. Journigan testified that according to Stainback, Randall had killed a man in 1988 whose death had been ruled a suicide, and Randall knew Stainback had been talking about the other man's death. Journigan further testified that Stainback said her husband had threatened several times to kill her and that Journigan had seen a black person named "Patrick" talking to Randall in the Stainback home two days after the murder. The trial court excluded Journigan's evidence, noting that it did not fall within the two hearsay exceptions asserted as bases for its admission: the family history exception of Rule 804(b)(4) of the North

Carolina Rules of Evidence, and the residual hearsay exception of Rule 804(b)(5). N.C.G.S. § 8C-1, Rule 804(b)(4), (b)(5) (1992).

**[1]** Defendant's reliance on Rule 804(b)(4) is misplaced. That rule merely allows testimony about the existence of a marriage or other personal relationship. It has no bearing on events, activities, or emotional states occurring within those relationships. The trial court correctly noted that this witness had shown that she herself could testify as to the fact of the marital relationship between Randall and the victim, the only portion of the proffered evidence pertinent under this rule. Further, the State did not dispute the fact of the marital relationship. It thus was not necessary to introduce hearsay evidence for this purpose, and the trial court did not err in declining to admit this proffered testimony under Rule 804(b)(4).

**[2]** Nor was the evidence admissible under Rule 804(b)(5). The trial court correctly noted that defense counsel had failed to give the prosecutor timely, written notice of her intent to use Journigan's testimony, which is a prerequisite to admission of evidence under Rule 804(b)(5). Further, it is well settled that "to be both relevant and admissible, evidence tending to show the guilt of one other than the defendant must point directly to the guilt of a specific person or persons." *State v. Larrimore*, 340 N.C. 119, 144, 456 S.E.2d 789, 802 (1995). It must do more than create mere conjecture of another's guilt. *State v. McNeill*, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990). The proffered evidence did no more than arouse suspicion as to Randall's guilt on the basis that he might have had a motive to murder the victim. There was no evidence linking him directly to the crime, and the evidence was not inconsistent with defendant's guilt. The trial court thus properly excluded the evidence. *See Larrimore*, 340 N.C. at 144-45, 456 S.E.2d at 802.

Defendant contends for the first time on appeal that Journigan's evidence was admissible under the state of mind exception to the rule against hearsay, N.C.G.S. § 8C-1, Rule 803(3) (1992), and that its exclusion violated certain of his constitutional rights. Defendant's failure at trial to raise these bases for the admission of Journigan's testimony bars their assertion here. As we noted in *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), defendant "may not swap horses after trial in order to obtain a thoroughbred upon appeal." This assignment of error is therefore overruled.

In his next assignment of error, defendant contends that he is entitled to a new trial because the prosecutor improperly commented

during closing argument on defendant's exercise of his right to silence. Referring to the fact that Stainback was found nude from the waist down, the prosecutor stated: "Now how that happened back here we do not know. The defendant did not tell the officers what his role was in stripping Lynn Stainback from the waist down." At another point, the prosecutor stated, "There are a lot of unanswered questions in this case." The prosecutor further noted that defendant did not subpoena Ada Henderson, a relative he claimed to have seen at the Fast Fare the night of the crime, to testify in his defense. Finally, the prosecutor argued that defendant's "confession is unrebutted."

Defendant did not object to these statements at trial but now contends that they amounted to plain error. The correct standard of review, however, is not plain error but whether the arguments were "so prejudicial and grossly improper as to require corrective action by the trial judge ex mero motu." *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988).

**[3, 4]** None of these comments referred to defendant's invocation of his right to silence. Defendant argues that *State v. Baymon*, 336 N.C. 748, 757-58, 446 S.E.2d 1, 6 (1994), supports his argument that the prosecutor's statement questioning defendant's role in stripping Stainback improperly referred to defendant's exercise of his right to silence during custodial interrogation. *Baymon*, however, is distinguishable. In that case the prosecutor commented *directly* upon defendant's failure to testify about the charged crimes, stating "The defendant knows, but he's not going to tell you" about the sexual assaults. *Id.* at 757, 446 S.E.2d at 6. Here, the prosecutor merely pointed out that defendant, who had confessed to the murder, did not explain how Stainback's pants were removed. This was a proper comment on the evidence adduced at trial. *See State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (counsel entitled to argue to jury facts in evidence and all reasonable inferences to be drawn therefrom). Nor was the prosecutor's statement that defendant failed to subpoena Henderson to testify on his behalf improper. A prosecutor may argue to the jury the defendant's failure to produce exculpatory evidence or evidence which contradicts the State's case. *State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994); *State v. Erlewine*, 328 N.C. 626, 633, 403 S.E.2d 280, 284 (1991). This Court repeatedly has held that a prosecutor may argue that the State's evidence was uncontradicted and that such an argument is not an improper reference to defendant's failure to testify. *See Erlewine*, 328

N.C. at 633, 403 S.E.2d at 284. The prosecutor's comment that defendant's confession was unrebutted thus was not improper. We hold that none of the comments complained of required corrective action by the trial court *ex mero motu*.

**[5]** In his final assignment of error, defendant contends that he is entitled to a new trial because the trial court engaged in improper and disrespectful conduct toward defendant's trial counsel. He further contends that the trial court improperly expressed its opinion on questions of fact in the jury's presence, in violation of N.C.G.S. § 15A-1222. Defendant raises six instances in which he contends that the trial court made abusive comments about defense counsel in the jury's presence. In each of these instances, the trial court emphasized that defense counsel's questioning was repetitive and indicated that it would like to move on.

The decision whether to allow repetitive questioning is within the trial court's discretion, and that decision will not be overturned on appeal absent a showing that the ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Having reviewed the contested comments, we conclude that the trial court did not express its opinion on questions of fact in the jury's presence and did not abuse its discretion to limit repetitive questioning.

**[6]** Defendant also cites as improper several comments the trial court and the prosecutor made out of the jury's presence which indicated impatience with defense counsel's repetitive cross-examinations, concern about counsel's last-minute motion for a fingerprint expert and last-minute subpoenas, and frustration about counsel's initial refusal to be straightforward as to the relevance of her inquiries and where her questioning was leading. If the trial court uses language which tends to bring an attorney into contempt before the jury, it commits an error of law which may require reversal of the judgment. *State v. Lynch*, 279 N.C. 1, 11, 181 S.E.2d 561, 567 (1971). The comments defendant considers most egregious here, however, were made outside the jury's presence. After reviewing the entire record, we hold that while trial courts should abstain from language directed to counsel which can reasonably be construed as abusive in nature, the comments by the trial court and the prosecutor here did not result in prejudice to defendant.

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

NO ERROR.

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STATE OF NORTH CAROLINA v. KENNETH DONNELL GRAVES

No. 167A95

(Filed 10 May 1996)

**1. Evidence and Witnesses § 2403 (NCI4th)— list of witnesses read to prospective jurors—name perhaps omitted—no prejudice to defendant**

The trial court did not abuse its discretion in a first-degree murder prosecution where defendant contended that a witness should not have been allowed to testify because her name was not on the list of witnesses read to prospective jurors by the State prior to *voir dire*. There are no findings of fact, there is no transcript of the *voir dire* proceedings, and the record merely documents conflicting statements by the defense counsel and the prosecutor as to whether the name was left off the list. Without a showing that the witness was in fact left off the list, the defendant cannot demonstrate that he was prejudiced. Furthermore, the prosecution was not ordered to provide defendant with a list of its witnesses and, even assuming that the prosecutor did volunteer a list of witnesses to defendant by reading the list to prospective jurors and that the witness's name was omitted, defendant has shown nothing more than an inadvertent omission.

**Am Jur 2d, Criminal Law §§ 774, 1010, 1011; Pretrial Conference and Procedure §§ 35, 59, 80; Witnesses §§ 60, 62.**

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

**Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.**

**2. Homicide § 250 (NCI4th)— first-degree murder—sufficiency of evidence**

The trial court did not err in a first-degree murder prosecution by denying defendant's motions to dismiss where, although defendant argues that the State's evidence was inconsistent and contradictory, defendant's use of a firearm satisfies the malice requirement and the evidence was clearly sufficient to establish that the defendant acted with premeditation and deliberation when it is viewed in the light most favorable to the State. Any contradictions or discrepancies in the evidence were for the jury to resolve.

**Am Jur 2d, Malice § 7; Trial §§ 820, 1237.**

**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 by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Webb, J., at the 5 December 1994 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 December 1995.

*Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State.*

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

LAKE, Justice.

The defendant was indicted on 18 April 1994 for the first-degree murder of Joseph Lamont Clinard. The defendant was tried noncapitally, and the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. The defendant was sentenced to the mandatory term of life imprisonment.

At trial, the State presented evidence tending to show that on 12 November 1993, Joseph Clinard died as a result of a gunshot wound inflicted on 8 November 1993. Several witnesses testified that they saw a man in a green jacket talking to the victim moments before the shooting. Some of these witnesses, including Crystal Boyd, identified the man in the green jacket as the defendant. Crystal Boyd testified that she saw the defendant talking to the victim. Boyd testified that she witnessed the defendant grab the victim by the neck and step

behind the victim. The defendant kept his left arm around the victim's neck. Boyd stated that even though the victim's arms were hanging straight down, the defendant raised a gun with his right hand, placed it against the victim's head and fired. The defendant fled the scene after the shooting. According to the reports and testimony of the responding police officers, live .22-caliber rounds were found in the victim's pocket, but no weapon was found at the scene or on the victim.

Dr. Deborah Radisch, a forensic pathologist, performed an autopsy on the victim's body. Dr. Radisch testified that the cause of death was a gunshot wound to the victim's head. Dr. Radisch confirmed that the gunman fired the gun from close range.

The defendant presented evidence which tended to show that while he was talking to the victim, the victim chastised him for allegedly selling drugs in the area. The defendant testified that he told the victim, "F—- you. I'll sell what I want to sell." The defendant then testified that as he walked away, the victim pulled out a gun and pointed it at him. The defendant stated that thinking the victim was going to kill him, he pulled out his gun and shot the victim. On cross-examination, the defendant admitted that he shot the victim on the left side of the head, but added that he was terrified and that his only thought was to protect his life.

**[1]** In his first assignment of error, the defendant contends that the trial court erred by allowing Crystal Boyd to testify. Specifically, the defendant argues that Boyd should not have been allowed to testify because her name was not on the list of witnesses read to the prospective jurors by the State prior to the jury *voir dire*.

The only argument made by defense counsel in support of his objection to witness Boyd's testimony was that "I took notes of the persons that they listed, and in the notes that I had . . . I do not have Ms. Boyd. And because of that, that was the reason I objected." The prosecutor responded, "I had my own witness list here that had her name on from the very beginning, and I know I used that list in doing the *voir dire*, where I read off the witnesses' names at the very beginning, and I am relatively sure that that name was given out at the very beginning of this case." The trial court then overruled the defendant's objection. We find no error with the trial court's ruling. The record on appeal does not support the defendant's contention that Boyd's name had been omitted from the list of witnesses read by the prosecutor

prior to the jury *voir dire*. There are no findings of fact, and there is no transcription of the *voir dire* proceedings to substantiate the defendant's assertion that Boyd's name was left off the prosecutor's oral list of witnesses. The record merely documents conflicting statements by defense counsel and the prosecutor. Without a showing that the witness was in fact left off the prosecutor's list, the defendant cannot demonstrate that he has been prejudiced in any manner by the trial court's ruling.

Furthermore, a defendant is ordinarily not entitled to a list of the prosecution's witnesses prior to trial. *State v. Hoffman*, 281 N.C. 727, 734, 190 S.E.2d 842, 847 (1972). In cases where the prosecutor provides a witness list to the defendant, whether it be voluntary or by court order, a decision by the trial court to allow testimony by a witness not on the list is reviewable only for an abuse of discretion. *State v. Carter*, 289 N.C. 35, 42, 220 S.E.2d 313, 317-18 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211 (1976).

In the case *sub judice*, the record reveals that the prosecution was not ordered by the trial court to provide defendant with a list of its witnesses. We also note that this is not a situation where the prosecutor voluntarily provided the defendant with a list of the State's witnesses. The record only shows that the prosecutor read a list of witnesses to the prospective jurors. Even assuming, *arguendo*, that by doing so, the prosecutor did volunteer a list of witnesses to the defendant and that Boyd's name was left off that list, the defendant has failed to show anything more than an inadvertent omission by the prosecutor. The defendant has failed to show that the prosecutor acted in bad faith or that he has been prejudiced by the trial court's ruling. The failure of the trial court to exclude witness Boyd's testimony, without more, does not rise to the level of an abuse of discretion. Accordingly, this assignment of error is overruled.

**[2]** In his next 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 evi-

dence. *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 (1994). 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).

Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that the defendant acted with premeditation and deliberation. Several witnesses testified that the victim was seen talking to a man identified as the defendant. The evidence showed that shortly after the defendant and the victim began talking, the defendant, without provocation, grabbed the victim around the neck from behind and shot him in the head. When the defendant grabbed the victim around the neck, the victim's hands were hanging straight down, indicating that the victim was not the aggressor. The defendant testified that the victim chastised him for selling drugs in the area, to which defendant responded, "F— you. I'll sell what I want to sell." This testimony provided evidence from which the jury could infer motive or even ill will on defendant's part. After the shooting, the defendant fled the scene and according to his own testimony, disposed of the weapon, abandoned the car he was driving and checked into a hotel under an assumed name. These actions all support an inference of guilt. Finally, the defendant admitted shooting the victim, thereby eliminating any question regarding whether the defendant was in fact the perpetrator. Any contradictions or discrepancies in the evidence were for the jury to resolve. Based on all the evidence, we hold there was 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. This assignment of error is, therefore, overruled.

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

NO ERROR.

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STERLING J. ROYSTER, EMPLOYEE v. CULP, INCORPORATED, EMPLOYER

No. 353PA95

(Filed 10 May 1996)

**1. Workers' Compensation § 141 (NCI4th)— "coming and going" rule**

Under the "coming and going" rule applicable in this state, an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment. A limited exception to this rule applies when an employee

is injured when going to or coming from work but is on the employer's premises.

**Am Jur 2d, Workers' Compensation §§ 296-310.**

**Workers' compensation: coverage of injury occurring in parking lot provided by employer, while employee was going to or coming from work. 4 ALR5th 443.**

**Workers' compensation: coverage of injury occurring between workplace and parking lot provided by employer, while employee is going to or coming from work. 4 ALR5th 585.**

**2. Workers' Compensation § 154 (NCI4th)— employer-owned parking lot—injury while crossing public highway—non-compensable injury**

An employee injured when he was struck by a car while attempting to walk across a public highway that separated his place of employment from a parking lot owned and operated by defendant employer did not sustain an injury by accident arising out of and in the course of his employment with defendant where defendant did not own or control the public highway on which plaintiff employee was injured, and plaintiff was not performing any duties for defendant at the time of the injury and was not exposed to any greater danger than that of the public generally.

**Am Jur 2d, Workers' Compensation § 310.**

Justice WHICHARD dissenting.

Justice WEBB joins in this dissenting opinion.

Justice FRYE 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. 598, 459 S.E.2d 65 (1995), reversing an opinion and award of the Industrial Commission entered 10 May 1994. Heard in the Supreme Court 11 March 1996.

*J. Rufus Farrior, P.A., by J. Rufus Farrior, for plaintiff-appellee.*

*Smith Helms Mulliss & Moore, L.L.P., by Caroline H. Lock and Christine T. Nero, for defendant-appellant.*

MITCHELL, Chief Justice.

Plaintiff-employee, Sterling Julius Royster, was injured on 23 October 1991 when he was struck by a car while attempting to walk across a public highway that separated his place of employment from a parking lot which was owned and operated by defendant-employer, Culp, Inc. Deputy Commissioner Jan N. Pittman issued an opinion and award concluding that plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant. The Industrial Commission affirmed the Deputy Commissioner's opinion and award on 10 May 1994. Plaintiff appealed to the Court of Appeals, which, in a unanimous opinion, reversed the Commission. On 5 October 1995, this Court allowed defendant's petition for discretionary review.

On appeal, defendant contends that the Court of Appeals erred in allowing compensation for injuries sustained as a result of street risks while the employee was crossing a public street not owned or controlled by his employer. We agree and reverse the Court of Appeals.

An injury must arise out of and in the course of employment in order to be compensable under the Workers' Compensation Act. N.C.G.S. § 97-2(6) (1991). The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the Industrial Commission's findings and conclusions are supported by sufficient evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977).

**[1]** The general rule in this state is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980). This is known as the "coming and going" rule. A limited exception to the "coming and going" rule applies when an employee is injured when going to or coming from work but is on the employer's premises. *Id.*

The Court of Appeals, relying on *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931) (holding that injuries sustained while an employee is traveling to his place of employment and is on the employer's premises are covered under the Workers' Compensation Act), and

*Mauer v. Salem Co.*, 266 N.C. 381, 146 S.E.2d 432 (1966) (holding that parking lots owned and maintained by the employer are considered to be on the employer's premises), concluded that plaintiff in this case was injured while traveling to his place of employment on the employer's premises. The Court of Appeals failed, however, to cite or discuss *Barham*, the most recent Supreme Court precedent dealing with the issue arising in this case. In *Barham*, this Court denied compensation to a grocery store employee who was injured when she slipped and fell on ice in a loading zone in front of the employer's store in a shopping center. The employee was walking to her work site after parking her car in the shopping center parking lot. The employer did not own the parking lot or the loading zone, but the lease gave it access to the entire parking lot of the shopping center for use by the employer's customers and employees. This Court emphasized that the employer did not own, maintain, or provide control over the parking lot and that the employee was not performing any duties of her employment at the time of the injury, so she was not exposed to any danger greater than that of the general public. 300 N.C. at 333-34, 266 S.E.2d at 679-80.

**[2]** The present case is analogous to *Barham* because defendant did not own or control the public street on which plaintiff was injured. Furthermore, as in *Barham*, plaintiff was not performing any duties for defendant at the time of the injury and was not exposed to any greater danger than that of the public generally.

*Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957), relied upon by the Court of Appeals, is also distinguishable. In *Hardy*, a thirteen-year-old boy was killed while crossing a public highway to go to his home after laboring at his employer's barn. The employer's farm included the land on both sides of the highway. The employee lived in a farmhouse on the employer's property, across a public highway from the employer's barn. The employer provided housing to the employee and his family rent-free so that the members of the family would be available at various times of the day and night to assist with farm chores and emergencies. The employee was struck on the highway while en route home from the barn after tending to the animals. In holding that the death was compensable in *Hardy*, this Court emphasized the fact that feeding the livestock was a part of the operation of the farm as a whole, such that the trip across the farm between the area of the house and the barn, including the public highway, could reasonably be considered within the terms of the boy's employment:

> The fact that he was injured while in such employment and on a mission for his employer affords sufficient factual basis for the determination that his injury arose out of and in the course of his employment.

*Id.* at 586, 99 S.E.2d at 867.

The *Hardy* decision falls within the "special errand" exception to the "coming and going" rule. Under the "special errand" exception, an injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty, errand, or mission thereto. *See Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982). Hardy was "on a mission for his employer." In addition, Hardy lived on his employer's premises, and the employer furnished the house to the employee's family so they could be constantly available for work. Unlike Hardy, plaintiff in this case was not on a mission or "special errand" for defendant, and he did not reside on defendant's premises for the benefit of his employer.

Since the injury sustained by plaintiff here did not occur on the employer's premises, and plaintiff has failed to bring his case within any exception to the "coming and going" rule, we conclude that plaintiff did not suffer an injury arising out of and in the course of his employment. Therefore, the injury was not compensable under the Workers' Compensation Act.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Industrial Commission for reinstatement of its opinion and award.

REVERSED.

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

Justice WHICHARD dissenting.

I disagree with the majority's interpretation and application of *Hardy*. There the employer provided housing for the employee in a location that necessitated the employee's crossing a public highway, not under the employer's ownership or control, in order to perform

the tasks of the employment. Here the employer provided parking for the employee in a location that equally necessitated the employee's crossing a public highway, not under the employer's ownership or control, in order to perform the tasks of the employment. In *Hardy* this Court, in allowing payment of workers' compensation, properly recognized that "[t]he fact that [the employee] had to *cross* the highway on his way to and from the farm constituted an additional hazard of his employment." *Hardy v. Small*, 246 N.C. 581, 586, 99 S.E.2d 862, 867 (1957). Here plaintiff encountered the identical "additional" hazard as he crossed the public highway separating the employer-owned parking lot from the workplace. The cases thus merit identical treatment for purposes of determining the employee's right to workers' compensation payments.

I also disagree with the majority's interpretation and application of *Barham*. There the employee slipped, fell, and was injured in a loading zone in front of her employer's store after parking in a shopping center parking lot. The employer owned or controlled neither the parking lot nor the loading zone. The employee therefore had not yet reached the employer's premises and thus had not entered the course of employment when she was injured. Here, by contrast, the employee was injured while moving between one portion of the employer's premises (the parking lot) and another (the workplace). An employee injured while going to and from work on premises owned or controlled by the employer is covered by the Workers' Compensation Act. *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 679 (1980); *Maurer v. Salem Co.*, 266 N.C. 381, 382, 146 S.E.2d 432, 433-34 (1966). Defendant-employer's employees here who parked in the on-premises lots thus would recover for injuries sustained while going to and from the workplace after they had entered the lots. Both logic and fairness dictate that employees parking in the off-premises lot, which is also owned and controlled by the employer, be accorded the same treatment.

To so hold would accord with the majority rule in the country. See 1 Arthur Larson, *The Law of Workmen's Compensation* § 15.14(b) (1995) ("most courts . . . hold that an injury in a public street or other off-premises place between the plant and the parking lot is in the course of employment, being on a necessary route between the two portions of the premises"), and cases cited. It would also accord with the familiar rule that "the Workers' Compensation Act should be liberally construed so that its benefits are not denied by narrow, techni-

cal or strict interpretation." *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 98, 348 S.E.2d 336, 341 (1986).

I therefore vote to affirm the decision of the Court of Appeals, and I respectfully dissent.

Justice WEBB joins in this dissenting opinion.

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STATE OF NORTH CAROLINA v. COYE HAVEN KIRKPATRICK

No. 447PA95

(Filed 10 May 1996)

**Forgery § 28 (NCI4th)— uttering a forged check—check passed but not cashed—no variance between allegation and verdict**

There was not a material variance between an allegation and a verdict and judgment where defendant attempted to cash a check with an endorsement on the back; the clerk at the convenience store knew the person to whom the check was payable, called her and learned that she had not authorized anyone to cash the check; the clerk then called the police who arrested defendant upon their arrival; and the clerk turned the check over to the police without cashing it. Both the plain language of N.C.G.S. § 14-120 and the clear precedent established by *State v. Greenlee*, 272 N.C. 651, mandate the conclusion that uttering is accomplished either when an individual passes or delivers a forged instrument or attempts to pass or deliver a forged instrument. The use of "utter" in the context of the information set forth in the indictment did not alter the charge of uttering otherwise properly alleged in the indictment and therefore did not invalidate the indictment.

**Am Jur 2d, Forgery §§ 20, 33, 34.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 405, 462 S.E.2d 557 (1995), vacating a judgment entered by Allen (J.B., Jr.), J., on 21 April 1994 in Superior Court, Alamance County. Heard in the Supreme Court 9 April 1996.

*Michael F. Easley, Attorney General, by J. Mark Payne, Assistant Attorney General, for the State-appellant.*

*Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellee.*

MITCHELL, Chief Justice.

Defendant, Coye Haven Kirkpatrick, was convicted of uttering a check with a forged endorsement and was given an enhanced sentence pursuant to our habitual felon statute, *see* N.C.G.S. § 14-7.6 (1993), of a term of imprisonment of forty-six years. The Court of Appeals acting *ex mero motu* concluded that there was a material variance between the allegation and the verdict and judgment, reasoning that defendant was convicted of the substantive crime of uttering an instrument bearing a forged signature but was only indicted for the attempt to commit that crime. As a result, the Court of Appeals vacated the verdict and judgment against defendant without reaching the assignments of error presented by defendant. We allowed the State's petition for discretionary review on 7 December 1995, and now reverse and remand.

Evidence presented at trial tended to show that on 7 November 1993, defendant attempted to cash a check for $24.05, payable to Sherri Mann, at a convenience store in Burlington. The check was endorsed on the back. The clerk at the convenience store knew Mann and called her to see whether she had authorized anyone to cash the check. Mann told the clerk that she had not. The clerk then called the police, who arrested defendant upon their arrival. The clerk did not cash the check, but did turn it over to the police.

On 29 November 1993, defendant was charged in an indictment bearing the caption "UTTERING CHECK FORGED ENDORSEMENT" and alleging a violation of N.C.G.S. § 14-120. The indictment alleged that

> the defendant named unlawfully, willfully and feloniously did attempt to utter, publish, pass and deliver as true to JIMMY CLAYTON D/B/A CAR SHOP #2 . . . a check of FOLKS OF NORTH CAROLINA, INC., in the amount of $24.05 . . . payable to SHERRI C. MANN and dated 10/25/93, which contained a forged and falsely made endorsement of SHERRI C. MANN. The defendant knew at the time that the endorsement was falsely made and forged and acted for the sake of gain and with the intent TO [sic] injure and defraud.

The jury returned a guilty verdict for the offense of uttering a check bearing a forged endorsement.

The version of N.C.G.S. § 14-120 in effect at the time of the crime provided that the offense of "Uttering forged paper or instrument containing a forged endorsement" is committed when

> any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited instrument as is mentioned in G.S. 14-119 [defining forgery], or *shall pass or deliver, or attempt to pass or deliver*, any of them to another person (knowing the same to be falsely forged or counterfeited) . . . [or when] any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, *shall pass or deliver or attempt to pass or deliver* any such instrument containing a forged endorsement to another person . . . .

N.C.G.S. § 14-120 (1993) (emphasis added). In *State v. Greenlee*, 272 N.C. 651, 159 S.E.2d 22 (1968), this Court upheld the conviction of a defendant charged under this statute, noting that uttering "consists in offering to another the forged instrument with the knowledge of the falsity and with intent to defraud," *id.* at 657, 159 S.E.2d at 26, and that " 'the mere offer of the false instrument with fraudulent intent constitutes an uttering or publishing, the essence of the offense being, as in the case of forgery, the fraudulent intent regardless of its successful consummation,' " *id.* (quoting 23 Am. Jur. *Forgery* § 5, at 677 (1939)).

Both the plain language of N.C.G.S. § 14-120 and the clear precedent established by this Court's interpretation of that statute in *Greenlee* mandate the conclusion that uttering is accomplished either when an individual passes or delivers a forged instrument or *attempts* to pass or deliver a forged instrument. While the Court of Appeals determined that the indictment in this case was for the offense of "attempted uttering," N.C.G.S. § 14-120 provides only for the offense of uttering, which was committed by the "mere offer" of the forged check in this case.

We find further support in other authorities for our conclusion that the crime of "uttering" includes an attempt to offer a forged instrument. *Black's Law Dictionary* defines "utter" as

> [t]o put or send (as a forged check) into circulation; to publish or put forth; to offer. To utter and publish an instrument, as a counterfeit note, is to declare or assert, directly or indirectly, by words or action that it is good, uttering it is a declaration that it is good, with an intention or offer to pass it. To utter, as used in a statute against forgery and counterfeiting, means *to offer, whether accepted or not*, a forged instrument, with the representation, by words or actions, that the same is genuine.

*Black's Law Dictionary* 1547 (6th ed. 1990) (emphasis added). Uttering is defined in *Corpus Juris Secundum* as "the offering of a forged instrument, knowing it to be such, with a representation that it is genuine, and with an intent to defraud. *It is not essential that . . . the instrument be accepted as genuine . . . .*" 37 C.J.S. *Forgery* § 37, at 57 (1943) (emphasis added). Finally, *Wharton's Criminal Law* informs us that "[a] forged instrument is uttered when it is offered to another as genuine, *without regard to whether it is so accepted.*" 4 Charles E. Torcia, *Wharton's Criminal Law* § 515, at 153 (14th ed. 1981) (emphasis added and footnote omitted).

With respect to the allegation in defendant's indictment stating that defendant "unlawfully, willfully and feloniously did attempt to utter, publish, pass and deliver" the check, the word "utter" was mere surplusage that did not alter the crime charged. "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). In this case, the prosecutor used the word "utter" in a reiterative fashion along with "publish, pass and deliver" to make out the charge of uttering. The indictment set out allegations sufficient to show that defendant's actions satisfied the elements of the crime at issue in this case without the surplus word "utter." The use of "utter" in the context of the information set forth in the indictment did not alter the charge of uttering otherwise properly alleged in the indictment and therefore did not invalidate the indictment.

While defendant contends that this Court's decision in *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955), mandates the conclusion that the indictment in the present case was sufficient only to make out a charge of "attempted uttering," we conclude that *Hare* is inap-

posite. In *Hare*, this Court concluded that N.C.G.S. § 14-87, North Carolina's robbery statute, includes the offenses of robbery with a dangerous weapon and attempted robbery with a dangerous weapon, and that an indictment alleging attempted robbery—a lesser included offense of robbery—is different from and would not support a conviction for robbery. *Id.* at 264-65, 90 S.E.2d at 551-52. While defendant argues that *Hare* governs in this case and that attempted uttering is a lesser included offense of uttering, we do not agree. Under N.C.G.S. § 14-120, the offering, whether successful or unsuccessful, of a forged instrument with the intent to defraud is uttering. As the indictment charged the defendant with uttering—the crime for which the jury found him guilty—the Court of Appeals erred in vacating the verdict and the judgment of the trial court.

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand this case to that court so that it may address the assignments of error originally presented and argued by defendant on appeal.

REVERSED AND REMANDED.

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STATE OF NORTH CAROLINA v. PAMELA WARLICK GRANT

No. 67A95

(Filed 10 May 1996)

**Homicide § 588 (NCI4th)— battered woman syndrome—self-defense instruction not appropriate**

Evidence presented by the defendant in a first-degree murder trial that she suffered from battered woman syndrome did not entitle defendant to an instruction on self-defense.

**Am Jur 2d, Homicide §§ 519-521.**

**Duty of trial court to instruct on self-defense, in absence of request by accused. 56 ALR2d 1170.**

**Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.**

**Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.**

Justice PARKER concurring.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Allen (C. Walter), J., at the 18 July 1994 Criminal Session of Superior Court, Cleveland County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 10 October 1995.

The defendant was tried noncapitally for the murder of her husband. In her confession, which was introduced into evidence, she said that on 26 July 1992 at approximately 9:30 a.m., she stabbed her husband while he was asleep on a couch. He awoke and said, "I ought to kill you." She then removed a .357 Magnum revolver from a cabinet and shot her husband three times. A forensic pathologist testified that in addition to the stab wound, there were three bullet wounds, one of which was to the brain of the deceased. In his opinion, the stab wound would not have immobilized the deceased for two or three minutes, but the wound to the brain would have rendered him unconscious immediately. Either of the two wounds would have been fatal.

The defendant introduced evidence including her own testimony of the egregious conduct by the deceased toward her over a period of years, which made her life unbearable. Dr. Thomas Toy, a practicing psychologist, testified that the defendant was suffering from the battered woman syndrome. Dr. Toy testified that in his opinion, the defendant did not know the difference between right and wrong in relation to her acts when she killed her husband.

The defendant was found guilty of first-degree murder and sentenced to life in prison. She appealed to this Court.

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

*C. A. Horn for the defendant-appellant.*

WEBB, Justice.

The only assignment of error brought forward by the defendant is the failure of the court to charge on self-defense. She contends that the evidence that she was suffering from the battered woman syndrome entitled her to such a charge.

The defendant concedes that *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989), is contrary to her position. She asks us to overrule *Norman*.

The arguments the defendant advances as to why evidence that she suffered from the battered woman syndrome entitles her to a charge on self-defense were answered in *Norman*. We see no reason to change our position.

NO ERROR.

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

Justice PARKER concurring.

I concur in the majority opinion; but having authored the majority opinion in the Court of Appeals in *State v. Norman*, 89 N.C. App. 384, 366 S.E.2d 586 (1988), *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989), I write this separate opinion to note that I am now bound by this Court's precedent in *Norman*. *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989).

STATE OF NORTH CAROLINA v. RICKY CARLTON EXUM

No. 310A95

(Filed 10 May 1996)

**Constitutional Law § 342 (NCI4th)— capital trial—in-chambers conference with attorneys—absence of defendant—nonwaivable right to be present—prejudice**

The trial court violated defendant's nonwaivable right to be present at all stages of his capital trial by conducting an unrecorded in-chambers conference during the trial with the attorneys present but out of the hearing of the defendant. Because the in-chambers conference was not recorded and the nature and content of the private discussion cannot be gleaned from the record, the State failed to meet its burden of showing that the error was harmless beyond a reasonable doubt, and defendant is entitled to a new trial. N.C. Const. art. I, § 23.

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

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

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

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 31 October 1994 Criminal Session of Superior Court, Greene County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals for a conviction of assault with a deadly weapon with intent to kill inflicting serious injury was allowed 1 November 1995. Heard in the Supreme Court 11 April 1996.

*Michael F. Easley, Attorney General, by John J. Aldridge, III, Assistant Attorney General, for the State.*

*Margaret Creasy Ciardella for defendant-appellant.*

PER CURIAM.

On 27 June 1993, Delores Joyner Exum was stabbed to death by her estranged husband, the defendant, Ricky Carlton Exum, after an altercation at their home. Defendant was indicted for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and common law attempted murder, which was ultimately dismissed by the State. He was tried capitally at the 31 October 1994 Criminal Session of Superior Court, Greene County, and was found guilty of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

During the capital sentencing proceeding, the jury was unable to unanimously agree on its sentencing recommendation, and the trial court imposed a mandatory sentence of life imprisonment for the conviction of first-degree murder. The trial court also imposed a sentence of twenty years' imprisonment on defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury.

A complete presentation of the evidence is unnecessary to understand the legal issue involved in this case. In summary, however, the

State presented evidence tending to show that defendant and Mrs. Exum had experienced domestic problems over several years and were separated at the time of the killing. On the morning of 27 June 1993 at approximately 8:00 a.m., defendant went to the family home and began arguing with Mrs. Exum about a warrant and restraining order that Mrs. Exum had taken out against defendant approximately two weeks earlier for assaulting her. The argument resulted in defendant stabbing Mrs. Exum several times with a knife. In an attempt to take the knife from defendant during the struggle between defendant and Mrs. Exum, Kisha Joyner, one of the couple's four children, was cut on four of her fingers on her right hand. The State's evidence also tended to show that on the day of the incident, defendant had not been drinking alcohol.

Defendant's evidence tends to show that he killed Mrs. Exum in a jealous rage after Mrs. Exum had told him the day before the killing that the baby that she had been carrying when she had a miscarriage in 1992 was not his baby. Defendant's evidence also shows that defendant is an acute, chronic alcoholic and that he had been drinking the night before the killing.

Defendant brings forth numerous issues for review, but we need only focus on defendant's contention that the trial court violated his nonwaivable constitutional right to be present at all stages of his capital trial. Beginning with jury selection and continuing through the jury instruction stage of defendant's capital murder trial, the trial court conducted several bench and in-chambers conferences in defendant's absence. However, we address specifically only the unrecorded in-chambers conference that took place with the attorneys in defendant's absence at the conclusion of testimony by Dr. Thomas Brown, defense expert in the area of forensic psychiatry and substance abuse.

> Article I, section 23 of the Constitution of North Carolina provides: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony . . . ." The sixth amendment to the Constitution of the United States gives an accused the same protection. *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923 (1965). This protection guarantees an accused the right to be present in person at every stage of his trial. *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969).

*State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 613 (1987). Similarly, as we have often stated:

> "The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at *every* stage of the trial. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989)[, *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990)]; N.C. Const. Art. I, § 23 (1984). This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial 'ought to be kept forever sacred and inviolate.' *State v. Blackwelder*, 61 N.C. 38, 40 (1866)[, *overruled on other grounds by State v. Huff*, 325 N.C. 1, 381 S.E.2d 635]. In fact, the defendant's right to be present at every stage of his capital trial is not waivable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989)[, *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)]; *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652."

*State v. Moss*, 332 N.C. 65, 73-74, 418 S.E.2d 213, 218 (1992) (quoting *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990)).

The transcript shows that the following exchange occurred during defendant's trial:

> THE COURT: All right. Members of the jury, we're going to take our lunch break now—well, let me confer with the lawyers a minute.
>
> Sheriff, take the jury back in the jury room.
>
> (The jury is absent.)
>
> THE WITNESS: Can I be excused, Judge?
>
> THE COURT: Wait just a moment.
>
> (A discussion off the record in chambers with the Court and all four counsel. The defendant was not present.)
>
> THE COURT: All right. Let's—I think you're excused, Dr. Brown.

An in-chambers conference is a "critical stage" of a defendant's capital trial at which he has a constitutional right to be present. *See State v. Buchanan*, 330 N.C. 202, 221, 410 S.E.2d 832, 843 (1991). In

*State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991), this Court concluded that it was error for the trial court to conduct an in-chambers conference with the attorneys but without the defendant. *Id.* at 541, 407 S.E.2d at 163. Thus, in the instant case, the trial court erred in conducting the in-chambers conference with the attorneys, out of the hearing of the defendant.

> However, error caused by the absence of the defendant at some portion of his capital trial does not require automatic reversal. This Court has adopted the "harmless error" analysis in cases where a defendant is absent during a portion of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635. The State has the burden of establishing that the error was harmless beyond a reasonable doubt. *Id.*; *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 [(1991)].

*Brogden*, 329 N.C. at 541, 407 S.E.2d at 163. " 'Unless the State proves that the denial of the defendant's right, under article I, section 23 of the Constitution of North Carolina, to be present at this stage of his capital trial was harmless beyond a reasonable doubt, we must order a new trial.' " *Moss*, 332 N.C. at 74, 418 S.E.2d at 218 (quoting *Smith*, 326 N.C. at 794, 392 S.E.2d at 363).

In *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990), this Court, under similar circumstances, found harmless error where a charge conference was held out of the presence of the defendant and was not recorded, but where defendant was represented by counsel at the conference and the trial court subsequently reported the proposed instructions on the record and gave counsel an opportunity to be heard. Likewise, in *Brogden*, this Court held that the error in conducting an informal meeting in chambers to discuss jury instructions, outside the presence of defendant, prior to the formal charge conference held in open court, was harmless beyond a reasonable doubt based upon the court's subsequent actions in open court. *Brogden*, 329 N.C. at 542, 407 S.E.2d at 163.

In this case, however, we are left uninformed as to the substance of the in-chambers discussion held with the attorneys in defendant's absence and are consequently unable to determine whether the error committed is harmless beyond a reasonable doubt. "Notwithstanding an accused's right to be present, certain violations of this right may be harmless if such appears from the record." *Buchanan*, 330 N.C. at 222, 410 S.E.2d at 844. Thus, because the in-chambers conference was not recorded and the nature and content of the private discussion

cannot be gleaned from the record, the State failed to meet its burden of showing the error was harmless beyond a reasonable doubt, and we are, therefore, required to order a new trial. *Moss*, 332 N.C. at 74, 418 S.E.2d at 219.

We have often held that under similar circumstances where the defendant has a constitutional right to be present at a critical stage of his trial and the trial court conducts private conferences or discussions in the defendant's absence, but the substance of the private discussions is not revealed in the record, a new trial is required. *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); *Smith*, 326 N.C. 792, 392 S.E.2d 362. As a result and for the foregoing reasons, defendant in this case must also receive a new trial.

NEW TRIAL.

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CHARLES P. FRANK v. STAR TRAX, INC.

No. 410PA95

(Filed 10 May 1996)

**Judgments § 651 (NCI4th)— punitive damages—post-judgment interest**

The trial court properly awarded post-judgment interest on punitive damages awarded by the jury.

**Am Jur 2d, Interest and Usury §§ 59 et seq.**

On writ of certiorari to review a unanimous, unpublished decision of the Court of Appeals, 120 N.C. App. 200, 461 S.E.2d 808 (1995), which affirmed in part, reversed in part, and remanded a judgment entered by Johnson (Marcus L.), J., on 7 December 1993 in Superior Court, Mecklenburg County. This Court allowed plaintiff's petition for certiorari on 7 December 1995. Heard in the Supreme Court 8 April 1996.

*James, McElroy & Diehl, P.A., by Robert C. Muth and Richard B. Fennell, for plaintiff-appellant.*

*Ellis M. Bragg for defendant-appellee.*

PER CURIAM.

The sole issue before us, as correctly stated in plaintiff's petition for a writ of certiorari, is: Did the Court of Appeals err in reversing the trial court's award of post-judgment interest on the punitive damages awarded by the jury? Under the authority of *Custom Molders, Inc. v. American Yard Prods., Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995), we hold that the Court of Appeals did err in so holding. Accordingly, the decision of the Court of Appeals on that issue is reversed, and the case is remanded to that court for further remand to the Superior Court, Mecklenburg County, for reinstatement of the provision for interest on the award of punitive damages.

REVERSED AND REMANDED.

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STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION v. J. WALTER HUCKABEE T/A RED CARTAGE

No. 446A95

(Filed 10 May 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, 120 N.C. App. 217, 461 S.E.2d 787 (1995), reversing a judgment for defendant entered 30 June 1994 by Brewer, J., in Superior Court, Cumberland County. Heard in the Supreme Court 12 April 1996.

*T.S. Whitaker, Chief Counsel, and C. Coleman Billingsley, Jr., for plaintiff-appellee.*

*Singleton, Murray, Craven & Inman, by Richard T. Craven and John W. McCauley, for defendant-appellant.*

PER CURIAM.

AFFIRMED.

RICKEY A. SWAIM v. ELMER LARRY SIMPSON AND WIFE, JOAN K. SIMPSON

No. 562A95

(Filed 10 May 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) of the decision of a divided panel of the Court of Appeals, 120 N.C. App. 863, 463 S.E.2d 785 (1995), reversing the judgment granting plaintiff's motion for summary judgment entered by Osborne, J., at the 29 August 1994 Civil Session of Superior Court, Yadkin County. Heard in the Supreme Court on 11 April 1996.

*Shore Hudspeth & Harding, P.A., by N. Lawrence Hudspeth, III, and Douglas P. Mayo, for plaintiff-appellant.*

*Morrow, Alexander, Tash & Long, by C.R. "Skip" Long, Jr., for defendant-appellees.*

PER CURIAM.

AFFIRMED.

**WILLIAMS v. WILLIAMS**

[343 N.C. 299 (1996)]

BARBARA E. WILLIAMS v. BENNIE S. WILLIAMS

No. 539A95

(Filed 10 May 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 707, 463 S.E.2d 815 (1995), affirming the judgment of Montgomery, J., filed on 3 January 1994 in District Court, Rowan County. Heard in the Supreme Court 12 April 1996.

*Inge and Doran, P.A., by Robert L. Inge, for plaintiff-appellant.*

*Carlyle Sherrill for defendant-appellee.*

PER CURIAM.

AFFIRMED.

BENJAMIN L. COLVIN, ADMINISTRATOR OF THE ESTATE OF MARGARET T. COLVIN, DECEASED, AND BENJAMIN L. COLVIN, PLAINTIFFS v. GLENN EDWARD BADGETT, DEFENDANT AND THIRD-PARTY PLAINTIFF v. WENDELL SANDERFORD McDONALD, THIRD-PARTY DEFENDANT

No. 508A95

(Filed 10 May 1996)

Appeal by defendant and third-party plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 810, 463 S.E.2d 778 (1995), granting the plaintiff a new trial. Heard in the Supreme Court 10 April 1996.

*Ligon & Hinton, by George Ligon, Jr., for plaintiff-appellee.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendant and third-party plaintiff-appellant.*

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. GUS R. LEJANO

No. 358PA95

(Filed 10 May 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of an order denying defendant's motion to dismiss entered by Rousseau, J., on 11 July 1995, in Superior Court, Forsyth County. 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.*

*Davis & Harwell, P.A., by Fred R. Harwell, Jr., for defendant-appellant.*

PER CURIAM.

For the reasons stated in *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), the decision of the trial court is affirmed.

AFFIRMED.

**PHILLIPS v. U.S. AIR, INC.**

[343 N.C. 302 (1996)]

TIMOTHY S. PHILLIPS, EMPLOYEE, PLAINTIFF-APPELLANT v. U.S. AIR, INCORPORATED, EMPLOYER, THE KEMPER GROUP, CARRIER, DEFENDANT-APPELLEES

No. 527A95

(Filed 10 May 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 538, 463 S.E.2d 259 (1995), affirming an opinion and award of the North Carolina Industrial Commission, filed 7 July 1994. Heard in the Supreme Court 10 April 1996.

*C. Murphy Archibald for plaintiff-appellant.*

*Cranfill, Sumner & Hartzog, L.L.P., by Samuel H. Poole, Jr., for defendant-appellees.*

PER CURIAM.

AFFIRMED.

APPALACHIAN POSTER ADVERTISING COMPANY, INC., PETITIONER v. JAMES E. HARRINGTON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 407A95

(Filed 10 May 1996)

Appeal by petitioner pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 120 N.C. App. 72, 460 S.E.2d 887 (1995), reversing an order entered by Hight, J., on 13 December 1993 in Superior Court, Wake County, affirming revocation of an outdoor advertising permit by the Department of Transportation. Heard in the Supreme Court 8 April 1996.

*Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for petitioner-appellee.*

*Michael F. Easley, Attorney General, by Grayson G. Kelley, Special Deputy Attorney General, and Melanie Lewis Vtipil, Associate Attorney General, for respondent-appellant.*

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for remand to the Superior Court, Wake County, for reinstatement of its 13 December 1993 judgment and order.

REVERSED AND REMANDED.

ARTH v. GUTHRIE

No. 91P96

Case below: 121 N.C.App. 625

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

BALLARD v. WEAST

No. 66P96

Case below: 121 N.C.App. 391

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 9 May 1996. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

BARLOW v. BARLOW

No. 57P96

Case below: 121 N.C.App. 396

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

BATTLE v. MEADOWS

No. 158P96

Case below: 121 N.C.App. 787

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

CASWELL REALTY ASSOCIATES I v. ANDREWS CO.

No. 131P96

Case below: 121 N.C.App. 483

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

CHEEK v. POOLE

No. 50P96

Case below: 121 N.C.App. 370

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

COUNTS v. BLACK & DECKER CORP.

No. 107P96

Case below: 121 N.C.App. 387

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

CREWS v. PAVILION PARTNERS

No. 167P96

Case below: 121 N.C.App. 787

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

DAVIS v. WRENN

No. 114P96

Case below: 121 N.C.App. 156

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

FINNEY v. ROSE'S STORES, INC.

No. 554A95

Case below: 120 N.C.App. 843

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

GATHINGS v. DAWSON CONSUMER PRODUCTS

No. 541P95

Case below: 342 N.C. 654

121 N.C.App. 216

Petition by plaintiff for reconsideration of denial of writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

GUNTER v. JOHNSON

No. 155P96

Case below: 121 N.C.App. 787

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

HOMOLY v. N.C. STATE BD. OF DENTAL EXAMINERS

No. 164P96

Case below: 121 N.C.App. 694

Petition by petitioner (Homoly) for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

JOHNSON v. CHARLES KECK LOGGING

No. 126P96

Case below: 121 N.C.App. 598

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

JONES v. JONES

No. 92P96

Case below: 121 N.C.App. 523

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

JONES v. PATIENCE

No. 154P96

Case below: 121 N.C.App. 434

Notice of appeal by defendant (substantial constitutional question) dismissed by the Court ex mero motu 9 May 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

McNAMARA v. WILMINGTON MALL REALTY CORP.

No. 138P96

Case below: 121 N.C.App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

N.C. DEPT. OF CORRECTION v. MYERS

No. 489PA95-2

Case below: 120 N.C.App. 437

Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 15 April 1996.

NIFONG v. C. C. MANGUM, INC.

No. 150A96

Case below: 121 N.C.App. 767

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 9 May 1996.

OUTDOOR EAST v. HARRELSON

No. 102P96

Case below: 121 N.C.App. 624

Petition by respondent for discretionary review pursuant to G.S. 7A-31 is allowed 10 May 1996 for the limited purpose of entering this order remanding the case to the Court of Appeals for reconsideration in light of *Appalachian Poster v. James Harrington*, No. 407A95, filed 10 May 1996.

OWEN v. UNC-G PHYSICAL PLANT

No. 162P96

Case below: 121 N.C.App. 682

Motion by Attorney General for temporary stay allowed 18 April 1996.

PACK v. RANDOLPH OIL CO.

No. 55P96

Case below: 121 N.C.App. 396

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996. Alternative petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

PASTVA v. NAEGELE OUTDOOR ADVERTISING

No. 166P96

Case below: 121 N.C.App. 656

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

PRECISION FABRICS GROUP v. TRANSFORMER SALES AND SERVICE

No. 568PA95

Case below: 120 N.C.App. 866

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 May 1996.

REA CONSTRUCTION CO. v. CITY OF CHARLOTTE

No. 24P96

Case below: 121 N.C.App. 369

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

RUSS v. GREAT AMERICAN INS. COMPANIES

No. 47P96

Case below: 342 N.C. 896

121 N.C.App. 185

Motion by plaintiffs for reconsideration of order denying petition for discretionary review dismissed 9 May 1996.

SHARP v. MILLER

No. 124P96

Case below: 121 N.C.App. 606

Petition by plaintiff (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE v. CRENSHAW

No. 165P96

Case below: 121 N.C.App. 788

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996

STATE v. CUEVAS

No. 128P96

Case below: 121 N.C.App. 553

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996

STATE v. EVANS

No. 46P96

Case below: 121 N.C.App. 752

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

STATE v. GARNER

No. 72P96

Case below: 121 N.C.App. 398

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE v. HARRIS

No. 119P96

Case below: 121 N.C.App. 627

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE v. HAWKINS

No. 65P96

Case below: 121 N.C.App. 398

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE v. PHELPS

No. 152P96

Case below: 121 N.C.App. 398

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 9 May 1996.

STATE v. WILSON

No. 143P96

Case below: 121 N.C.App. 218

Notice of appeal by Wilson (Pro Se) (substantial constitutional question) dismissed by the Court ex mero motu 9 May 1996. Petition by Wilson (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE EX REL. HOWES v. GASKILL

No. 106P96

Case below: 121 N.C.App. 625

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

TARLTON v. STIDHAM

No. 142P96

Case below: 122 N.C.App. 77

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

TODD v. DUKE UNIVERSITY

No. 157P96

Case below: 121 N.C.App. 789

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

TRANTHAM v. ESTATE OF SORRELLS

No. 127P96

Case below: 121 N.C.App. 611

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

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

WILLIAMS v. WALNUT CREEK AMPHITHEATER PARTNERSHIP

No. 168P96

Case below: 121 N.C.App. 649

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 May 1996.

STATE OF NORTH CAROLINA v. WILLIAM LEE SCOTT

No. 261A94

(Filed 13 June 1996)

**1. Judges, Justices, and Magistrates § 27 (NCI4th)— noncapital first-degree murder—motion to recuse denied—no error**

The trial court did not err in a first-degree murder prosecution by not recusing himself or by failing to have the recusal motion heard by another judge where defendant alleged that the judge had publicly expressed a strong opinion about the victim's credibility and defendant's relationship with her, had presided over criminal proceedings in which defendant was being tried, and had a son who was a prosecutor in that county. Defendant did not present substantial evidence that there was an appearance of partiality by the judge, and, since there were no facts presented to cause a reasonable person to doubt the judge's partiality, there was no error in the failure to refer the motion to another judge. N.C.G.S. § 15A-1223.

**Am Jur 2d, Judges §§ 86 et seq.**

**Disqualification of judge on ground of being a witness in the case. 22 ALR3d 1198.**

**Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.**

**Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case. 16 ALR4th 550.**

**2. Searches and Seizures § 28 (NCI4th)— noncapital first-degree murder—warrantless search of residence—motion to suppress denied**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress evidence found in the crawl space under his home, in a subsequent search inside his home, and his statement to police where an officer was on defendant's premises investigating a missing person report; the initial responding officer knocked on the front door; after he received no response he noticed green flies and went to the rear of the house, where he again noticed green flies, this time accom-

panied by the smell of rotting flesh; he leaned into the crawl space under the house from which the flies and odor emanated and found the victim's body; he secured the scene and called for assistance; investigators arrived and conducted a protective sweep of the house which could have revealed additional victims or hiding suspects; and officers found defendant inside the residence, but did not conduct a more complete search until a warrant was obtained. Viewing the scene through the eyes of a reasonable and cautious police officer on the scene, guided by this officer's experience and training, the search of the crawl space was not unreasonable. Once the officer found the body under the house, he was confronted with a potential emergency and had reason to believe that an injured person might be in the house or that the perpetrator was in the house. The subsequent search of the house was reasonable and the statements of defendant were not taken as a result of any illegal search.

**Am Jur 2d, Searches and Seizures § 140.**

**3. Evidence and Witnesses §§ 339, 2750.1 (NCI4th)— noncapital first-degree murder—abusive relationship—admissible**

The trial court did not err in a first-degree murder prosecution by admitting evidence of the victim's physical injuries and appearance at various times between 1978 and 1993. Testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to the victim was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove issues he disputed, such as lack of intent, malice, premeditation, and deliberation, notwithstanding that some of the incidents dated back some years. Further, defendant opened the door by stating that he and the victim had a loving relationship.

**Am Jur 2d, Evidence § 439; Homicide § 310; Witnesses §§ 717, 718.**

**4. Appeal and Error § 147 (NCI4th)— noncapital first-degree murder—admissibility of medical records—no objection at trial—plain error not alleged**

The question of whether the trial court erred in a first-degree murder prosecution by allowing the director of medical records at a hospital to testify about recorded statements made by the victim to physicians and nurses was not preserved for appeal since defendant did not object at trial or allege plain error.

**Am Jur 2d, Appellate Review §§ 614 et seq.**

**Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed. 619.**

**5. Evidence and Witnesses § 1946 (NCI4th)— noncapital first-degree murder—records of home for abused women—business records exception**

The trial court did not err in a first-degree murder prosecution by admitting an intake form from a home for abused women and children which had been completed by the victim at the request of and in the presence of the director of the home, who testified that the form is filled out in the regular course of business at the shelter and is used by counselors when working with residents. Since the record was completed by the victim, a person with knowledge, at or near the time she entered the shelter, the trial court did not err in admitting the form under N.C.G.S. § 8C-1, Rule 803(6) as a business record made in the ordinary course of business.

**Am Jur 2d, Evidence §§ 1290-1300, 1304, 1307, 1309, 1311, 1312, 1319.**

**Letters to or from customers or suppliers as business records under statutes authorizing reception of business records in evidence. 68 ALR3d 1069.**

**Business records: authentication and verification of bills and invoices under Rule 803(6) of the Uniform Rules of Evidence. 1 ALR4th 316.**

**Admissibility of computerized private business records. 7 ALR4th 8.**

**6. Evidence and Witnesses § 959 (NCI4th)— noncapital first-degree murder—statements by victim—fear of defendant—state of mind exception**

The trial court did not err in a first-degree murder prosecution by admitting hearsay statements by the victim that defendant had caused her injuries in the past, that she often hid from defendant, and that she was afraid of defendant. The conversations between the victim and the nine witnesses related directly to the victim's fear of defendant and were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of the victim's relationship with defendant.

**Am Jur 2d, Evidence §§ 666, 667.**

**7. Evidence and Witnesses § 761 (NCI4th)— noncapital first-degree murder—prior threat to shoot police officers—admissible**

There was no prejudicial error in a first-degree murder prosecution in the admission of evidence that defendant had threatened to shoot police officers in 1990 where similar evidence was admitted without objection several other times in the trial.

**Am Jur 2d, Appellate Review §§ 753, 759.**

**8. Evidence and Witnesses § 770 (NCI4th)— noncapital first-degree murder—hearsay—corroborative—limiting instruction**

There was no prejudicial error in a first-degree murder prosecution in the admission of testimony from the victim's daughter that her half-brother had told her that he thought defendant had burned some important papers where the trial judge instructed the jurors that they should consider the testimony if they found it corroborative of the half-brother's testimony, but to otherwise disregard it. The limiting instruction made any error nonprejudicial.

**Am Jur 2d, Appellate Review §§ 713, 752, 753, 759.**

**9. Evidence and Witnesses § 292 (NCI4th)— noncapital first-degree murder—cross-examination of witness—defendant's substance abuse**

The trial court did not err in a first-degree murder prosecution by allowing the prosecutor to elicit on cross-examination "other crimes" evidence that defendant had a substance abuse problem. The question elicited only whether defendant had a substance abuse problem and defendant did not object to the specific response that the witness and defendant smoked marijuana. Additionally, the witness testified on direct examination that smoking and drinking wasn't part of defendant's lifestyle until recent years; the trial court did not err by overruling defendant's objection to the cross-examination on the basis that the subject was brought up on cross.

**Am Jur 2d, Evidence § 331.**

**10. Evidence and Witnesses § 2750.1 (NCI4th)— noncapital first-degree murder—defense witness—cross-examination—in jail during conversation—door opened on direct**

The trial court in a first-degree murder prosecution did not erroneously allow the prosecutor to impeach a defense witness with evidence that he was in jail when the victim told him that she wanted to die where the defendant opened the door by asking about the witness's request that the victim bring paper and writing instruments to him. A question arose naturally and logically as to why she needed to bring him those items and evidence of the circumstances behind the request was admissible to provide a complete picture for the jury.

**Am Jur 2d, Witnesses § 417.**

**11. Evidence and Witnesses § 2797 (NCI4th)— noncapital first-degree murder—prosecutor's cross-examination of defendant—not improper**

There was no prejudicial error in a first-degree murder prosecution in allowing the prosecutor to conduct what defendant contended was an improper, insulting, and impertinent cross-examination of him that did not elicit relevant evidence. The prosecutor did not place before the jury his own opinions or inadmissible evidence, and there is nothing to show that the testimony was elicited in bad faith or that the questioning exceeded the scope of permissible cross-examination.

**Am Jur 2d, Witnesses §§ 426 et seq.**

**12. Homicide 244 (NCI4th)— noncapital first-degree murder—premeditation and deliberation—sufficiency of evidence**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss for insufficient evidence of premeditation and deliberation where the evidence tended to show that defendant and the victim had a hostile relationship; there was no evidence that the victim struggled or provoked defendant; defendant lied to everyone about the victim's whereabouts and did not call the police or emergency medical personnel; defendant hid the victim's body under his residence; the victim was shot at close range by a shotgun; and the medical examiner testified that it was highly improbable that defendant's claim that the victim committed suicide was accurate.

**Am Jur 2d, Homicide §§ 437 et seq.**

**13. Homicide § 113 (NCI4th)— noncapital first-degree murder—voluntary intoxication—failure to instruct**

The trial court did not err by failing to instruct on voluntary intoxication as a defense to first-degree murder where the evidence shows that defendant may have been highly intoxicated but does not show that defendant was utterly incapable of forming a deliberate and premeditated purpose to kill.

**Am Jur 2d, Homicide §§ 128, 129.**

**14. Criminal Law § 468 (NCI4th)— noncapital first-degree murder—prosecutor's closing arguments—not grossly improper**

The trial court did not err by failing to intervene *ex mero motu* and instruct the jury to disregard several statements made by the prosecutor during closing arguments. When read in context, the prosecutor's argument was no more than an argument that the jury should consider defendant's credibility since he had lied about the victim's whereabouts before her body was found. Although the prosecutor mixed up two assaults on the victim, the mix-up was slight and the error could not possibly have been prejudicial to defendant. Finally, as for the argument that defendant had threatened the victim, there was testimony that defendant said he was going to kill her if she proceeded with charges. The prosecutor's argument was not so grossly improper as to require the trial judge to intervene *ex mero motu*.

**Am Jur 2d, Trial §§ 533-704.**

**15. Homicide § 709 (NCI4th)— noncapital first-degree murder—no instruction on involuntary manslaughter—verdict of guilty of first-degree murder—no error**

There was no prejudicial error in a first-degree murder prosecution where the court did not instruct the jury on involuntary manslaughter but the jury was properly instructed on first-and second-degree murder and returned a verdict of guilty of first-degree murder.

**Am Jur 2d, Homicide §§ 528, 531, 558.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Allen (J.B., Jr.), J., at the 21 March 1994 Mixed Session of Superior Court,

Alamance County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 February 1996.

*Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.*

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

FRYE, Justice.

On 26 July 1993, an Alamance County grand jury indicted defendant, William Lee Scott, for the murder of Nancy Funderburke. A superseding indictment for this crime was returned on 7 March 1994. In a noncapital trial, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation. On 5 April 1994, the trial court entered a judgment imposing a sentence of life imprisonment for the first-degree murder conviction.

On appeal to this Court, defendant makes thirteen arguments. After reviewing the record, transcript, briefs, and oral arguments of counsel, we conclude that defendant received a fair trial, free of prejudicial error.

The State's evidence presented at trial tended to show the following facts and circumstances: In 1969, defendant met the victim, Nancy Funderburke, in Savannah, Georgia. Defendant was a singer in a night club where Funderburke waited tables. At that time, Funderburke had two young daughters, Gina and Stacy. Funderburke, then a widow, had been married twice.

In 1972, after dating for a while, defendant moved in with Funderburke and her daughters. They lived in Charlotte, North Carolina, until 1976, when they moved to Saxapahaw, North Carolina. Funderburke and defendant had a son, William Lee Scott, Jr. (Billy), born 8 July 1977. In 1984, after defendant's mother died, they moved to Burlington, North Carolina, to live in defendant's mother's home. Except for a few brief separations, Funderburke and defendant continued to live together for twenty-one years until Funderburke's death. Although Funderburke often referred to defendant as her husband, they were never married.

There were numerous documented occasions of physical abuse of Funderburke by defendant. The police had been to the house on several occasions for complaints about loud music and for domestic

violence. Funderburke's daughters and Billy witnessed the violence, and several hospital officials and friends saw evidence of the abuse. There was also evidence that Funderburke and defendant often drank excessively and that, during these times, they engaged in fights. Funderburke often left the residence during or after these altercations and stayed at a hotel or slept in her car. Sometimes, Funderburke and Billy would leave and stay at a family abuse shelter. Once, Billy threatened to kill defendant if defendant hurt his mother again.

On Friday, 2 July 1993, Billy, who was then fifteen years old, went to the beach with some friends for the weekend. At around 9:30 or 10:00 p.m. on 5 July 1993, Billy returned home and asked defendant where was his mother. Defendant, who was very intoxicated, mumbled that she had gone to the Ramada Inn or something. Defendant also mumbled something about being sorry about taking a life.

Billy noticed that his mother's bar stool was in the backyard. Defendant told Billy that he had placed the bar stool in the backyard to clean it because some beer had spilled on the bar stool. Defendant said that he was sorry for the things that he had done to Funderburke but did not say where she was at the time.

The next morning, Billy called his sister, Gina Anderson, and expressed his concern about their mother. He told Anderson that the floor had been freshly mopped, which he considered unusual. Billy stated that he had been directed not to call his sisters and that he believed his mother was dead. Anderson said she would call the police. After talking to Anderson, Billy visited a friend's house to see if he could stay there. Anderson contacted her sister, Stacy Strader, and then contacted the police and reported her mother missing. Later that night, the police contacted Billy, and he went to the police station.

On 6 July 1993 at approximately 7:30 p.m., Sergeant Bobby Davis of the Burlington Police Department went to defendant's residence to investigate the missing person's report filed by Anderson. Two vehicles were in the driveway, but when Davis knocked on the front door, no one answered. While knocking on the door, Davis noticed large green flies flying under the house through an air vent. He had previously seen these types of flies on dead animals and people. He then proceeded to the rear of the house, where he noticed the flies at the access door to the underside of the house and could smell an odor of

decaying flesh. He then noticed that there was a green carpet against the access door going underneath the house.

When Davis moved the carpet, he observed that the grass under it was green, which indicated that the carpet had been placed there recently. He opened the access door to the crawl space and shined his flashlight under the house. At this point, he saw the body of a female about midway under the house. After securing the scene, he notified the detective division.

Additional officers arrived on the scene. The officers did not know whether defendant or other victims were inside the house injured or dead. After knocking on the door and yelling for someone to answer, they decided to enter the residence to see if anyone else was injured inside as well as to ensure their own safety. When the officers forced open the door, they found defendant in the living room. Defendant walked over to a bar stool, sat down, and said, "Come on in."

Defendant was handcuffed and led to a patrol car. Officers quickly walked through the residence to check for additional victims. After no more victims were found in the residence, officers removed the handcuffs from defendant's wrists and advised him that he was not under arrest and that he could voluntarily come to the police station. An officer told defendant that they were investigating a missing person's report regarding Funderburke and that they had found a body under his residence. Defendant was cooperative and agreed to talk with the police. Defendant rode with an officer to the police station, where he was questioned and released.

After a search warrant arrived at 2:30 a.m. on 7 July 1993, the police retrieved Funderburke's body from underneath the house. An autopsy revealed that she had suffered a shotgun wound to the chest and that this wound quickly caused her death. The gun was pointed straight at her, and her left hand was positioned between her chest and the muzzle of the gun when the gun was fired. In the medical examiner's opinion, Funderburke's wound could not have been self-inflicted, and the gun could have been within twelve inches of Funderburke's chest when fired.

A search of the house, including chemical testing for blood, revealed evidence of blood in several places. Also, evidence of wipe marks, consistent with someone attempting to clean up a mess, were found. A disassembled twelve-gauge shotgun, two boxes of shotgun

shells, and a loose shell were found in a speaker in Billy's bedroom. A fired shotgun shell was found in the shed outside the residence. The shotgun shells found in the house and shed were all the same kind and were consistent with the deformed pellets removed from Funderburke's body. Tests performed on the shotgun revealed that it would not fire accidentally, even if dropped.

Defendant testified at trial. He stated that he and Funderburke spent 2 July 1993 getting drunk. She was very depressed and talked about suicide. He went to the bathroom, and when he returned, she was attempting to position the shotgun so that she could shoot herself in the head. He began to struggle with her, and the shotgun went off, killing her instantly. Defendant did not know what to do, but he did not want to call the police because he and Funderburke had a lot of trouble with the police. Defendant also presented testimony that he and Funderburke had agreed that, when the other died, the survivor would not spend any money for a burial or funeral but instead would bury the other on defendant's property. Defendant testified that he decided to wait until Billy returned home to bury Funderburke. He stated that he wanted Billy to have an opportunity to see and touch his mother one more time.

Defendant further testified that, if Funderburke had been alive, he would have taken her to the hospital. However, since she was dead, he did not see the harm in letting her remain on the bar stool. For the rest of the evening, he sat beside her and drank. On the next day, he went to see his sister because he was feeling depressed. When asked about Funderburke's whereabouts, defendant said that he did not know and that she had probably gone to the Ramada Inn or something.

On the evening of 4 July 1993, defendant cleaned the house because he was concerned that his aunt would visit him. He took Funderburke's body off the bar stool and put it in another room because he did not want anyone to see her before Billy had a chance to see her. Bruce Bunting visited defendant, and they talked. That night, the body started to smell rotten.

On the evening of 5 July 1993, defendant placed Funderburke's body in the crawl space underneath the house and waited for Billy to come home. Defendant testified that he placed the body under a hole in the floor so he could see her. Billy arrived home at about 10:30 p.m. that night. Defendant testified that he (defendant) was intoxicated. When Billy asked for his mother, defendant said that she had gone to

the Ramada Inn or something. According to defendant, he then told Billy that his mother was dead and asked Billy if he wanted to see her. Defendant told Billy that he (defendant) was going to work in the morning and that Billy could do what he wanted about the body.

Defendant further testified that the police arrived at 7:30 p.m. on 6 July 1993, after defendant had returned from work. When the officers knocked, defendant figured that they were there investigating a missing person's report. Defendant testified that he did not answer the telephone or the door because he knew that "all hell would break loose" and that sooner or later they would find Funderburke's body. Defendant also testified that he heard the officers find the body and break down the front door of the house. He further stated that he told them to come in and that he allowed himself to be handcuffed and led away. He remembered being told that he was not under arrest and being asked if he wanted to come down to the police station. Defendant cooperated with the police.

Defendant's motions to dismiss made at the close of the State's evidence and again at the close of all the evidence were denied.

**[1]** In his first argument, defendant contends he is entitled to a new trial because his motion requesting that the trial judge recuse himself from defendant's trial was improperly denied. Defendant also argues that the trial judge erred in failing to have the recusal motion heard by another judge. We disagree.

At a pretrial hearing on 8 March 1994, defendant, alleging that he and Judge J.B. Allen, Jr., had been friends, requested that Judge Allen recuse himself. Judge Allen denied the motion. On 11 March 1994, defendant filed a written motion moving that Judge Allen be recused. Defendant alleged, among other things, that Judge Allen had publicly expressed a strong opinion about Funderburke's credibility and defendant's relationship with Funderburke, had presided over criminal proceedings in which defendant was being tried, and had a son who was a prosecutor in Alamance County.

On 21 March 1994, Judge Allen heard the motion. Defendant called as a witness Bradley Reid Allen, Judge Allen's son, who testified that, while he was an assistant district attorney in Alamance County, he lived with Judge Allen for a period of time after he began working in the district attorney's office; that he sometimes discussed criminal cases with Judge Allen after their disposition; that he had prosecuted defendant for DWI in 1991 and that the case had been dis-

missed; that he had prosecuted defendant later for DWI and driving while his license was revoked and that he had obtained a conviction on these charges; that he had limited contact with the instant case; and that he had not discussed the case with Judge Allen, and Judge Allen had not discussed the case with him.

As evidence of Judge Allen's alleged bias, defendant also presented a trial transcript from an assault trial over which Judge Allen presided. During the trial, in which defendant was accused of assaulting Funderburke, Funderburke testified that defendant did not assault her in 1991, that she had appeared before Judge Allen in 1979 and 1980 after swearing out warrants against defendant in which she alleged assault but had dropped the charges, and that she wished to drop the charges on that day. The following exchange took place between Judge Allen and Funderburke at the prior assault trial:

> COURT: Mrs. Funderburke, have you ever heard of the story about the little boy hollering wolf?
>
> A: Yes, sir.
>
> COURT: You're familiar with that?
>
> A: Ever since I was a child, yes, sir.
>
> COURT: Okay. Maybe you ought to reread that story. It has a big message behind it. You're free to go, ma'am.

After defendant presented this evidence during the recusal hearing and rested, and after the State declined to present evidence, Judge Allen stated, "[B]efore we go forward I want to put this on the record. . . . I, J.B. Allen, Jr., this presiding judge, has [sic] never discussed in any way the case of *State v. William Lee Scott* with either Bradley R. Allen, assistant DA[,] or Jeffrey B. Allen with the probation department. Now, I'll hear you on your argument, counsel." Defense counsel then argued:

> This Court has in open court expressed an opinion about the believability of Nancy Funderburke in a prior hearing in July of 1991. We would contend to the Court that a reasonable person looking at all the circumstances could conclude that there is an appearance of impropriety here in Your Honor having to make decisions concerning the reliability of out of court statements of Nancy Funderburke when at an earlier time you . . . in essence stated an opinion about the reliability of Nancy Funderburke's statements in a Superior Court proceeding. We, therefore, suggest

to the Court that it would be more proper for another judge to hear this matter that had no involvement with Funderburke and had no situation in which the Court was in the position of judging the credibility of Funderburke at a previous time.

After entertaining the State's arguments, Judge Allen dictated an oral order making findings of fact and concluding as a matter of law that he could be completely fair and impartial. Accordingly, Judge Allen denied defendant's motion for recusal.

Both N.C.G.S. § 15A-1223 and Canon 3 of the Code of Judicial Conduct control the disqualification of a judge presiding over a criminal trial when partiality is claimed. *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). N.C.G.S. § 15A-1223 provides, in pertinent part:

> (b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) [p]rejudiced against the moving party or in favor of the adverse party . . . .

N.C.G.S. § 15A-1223 (1988).

The Code of Judicial Conduct provides in pertinent part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) [h]e has a personal bias or prejudice concerning a party . . . .

Code of Judicial Conduct, Canon 3(C)(1)(a) (1993).

When a defendant makes a motion that a judge be recused, " 'the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' " *Fie*, 320 N.C. at 627, 359 S.E.2d at 775 (quoting *State v. Fie*, 80 N.C. App. 577, 584, 343 S.E.2d 248, 254 (1986) (Martin, J., concurring)). The bias, prejudice, or interest which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him. *State v.*

*Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993). A trial judge should either disqualify himself or refer the matter to another judge if there is " 'sufficient force in the allegations contained in defendant's motion to proceed to find facts.' " *State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982) (quoting *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)).

After carefully reviewing the record and defendant's basis for his recusal motion in the instant case, we conclude that defendant has not presented substantial evidence of partiality or evidence that there was an appearance of partiality on the part of Judge Allen. Since there were no facts presented to cause a reasonable person to doubt Judge Allen's impartiality, there is no error in Judge Allen's failure to refer the motion to recuse to another judge. *See State v. Crabtree*, 66 N.C. App. 662, 665-66, 312 S.E.2d 219, 221 (1984) (where facts not shown to cause reasonable person to doubt impartiality, not error to fail to hold hearing on motion to recuse or to fail to refer motion to recuse to another judge). Thus, Judge Allen did not err in denying defendant's motion that he disqualify himself or in failing to refer the motion to recuse to another judge. Accordingly, we reject defendant's first argument.

**[2]** In his second argument, defendant contends that the trial court erred by denying his motion to suppress the evidence found when officers searched the crawl space underneath his home and when they subsequently searched inside his home. Defendant argues that the trial court erroneously denied his motion to suppress evidence of Funderburke's body, physical objects and materials found in the house, and his statement made to police on 6 July 1993.

Defendant argues that the warrantless search in the crawl space under his home violated his rights under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "It is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). Similarly, the Constitution of the State of North Carolina provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particu-

larly described and supported by evidence, are dangerous to liberty and shall not be granted." N.C. Const. art. I, § 20. The test for determining the reasonableness of the search under the Fourth and Fourteenth Amendments to the United States Constitution

> "is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

*State v. Primes*, 314 N.C. 202, 211, 333 S.E.2d 278, 283 (1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979)).

This Court has stated that "a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). "Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure." *State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988).

Decisions of the United States Supreme Court require that the police obtain a search warrant before searching a home " 'subject only to a few specifically established and well delineated exceptions.' " *Thompson v. Louisiana*, 469 U.S. 17, 19-20, 83 L. Ed. 2d 246, 250 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)). In creating exceptions to the general rule, this Court must consider the " 'balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Mincey v. Arizona*, 437 U.S. 385, 406, 57 L. Ed. 2d 290, 309 (1978) (Rehnquist, J., concurring) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L. Ed. 2d 607, 615 (1975)).

In *Mincey v. Arizona*, the United States Supreme Court reaffirmed the right of police to conduct a warrantless search and seizure when an emergency exists, stating:

> We do not question the right of police to respond to emergency situations. . . . [T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they

> reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.

*Id.* at 392-93, 57 L. Ed. 2d at 300 (citations omitted).

In the instant case, the officer was on defendant's premises investigating a missing person report. The initial responding officer knocked on the front door. It was only after the officer received no response that he noticed the green flies. The officer then went to the rear of the house and again noticed green flies, this time accompanied by the smell of rotting flesh. The officer leaned into the crawl space under the house from which the green flies and the odor emanated and looked around with his flashlight. During this inspection, the officer found Funderburke's body. Immediately thereafter, the officer secured the scene against intruders and called for assistance. Investigators arrived shortly thereafter. Responding to the ongoing emergency, the investigators conducted a protective sweep of the house which could have revealed additional victims or hiding suspects. During the protective sweep of the home, the officers found defendant inside the residence. However, investigators did not conduct a more complete search of the residence until a search warrant was obtained.

"It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222, 4 L. Ed. 2d 1669, 1680 (1960). "[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19-20, 20 L. Ed. 2d 889, 905 (1968). The United States Supreme Court stated in *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981), that a court analyzing conclusions made by a trained officer should consider the circumstances "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." This Court has also held that the circumstances leading to a seizure should be viewed, not in isolation, but as a whole, " 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)).

In the instant case, Davis was a trained officer faced with a potential emergency situation. During *voir dire* at the suppression hearing, Davis testified that he had been employed with the Burlington Police Department for twenty-three years and that, prior to becoming a police officer, he had served as a member of the armed forces in Vietnam for one year. Davis testified that, both as a soldier and as a police officer, he had experienced smelling decaying flesh. He further testified that on one occasion while investigating a missing person's report, he found a body and smelled a "strong, strong odor" of decaying flesh. Upon further investigation, he found that the person was alive and that "the subject's feet were rotting."

We conclude that the search of the crawl space under defendant's home was not within the meaning of the Fourth Amendment's prohibition against unreasonable searches and seizures. We believe that Davis' response to the potential emergency situation was reasonable under the circumstances. Viewing the search in the instant case through the eyes of a reasonable and cautious police officer on the scene, guided by Davis' experience and training, we do not believe that the search of the crawl space was unreasonable.

We further conclude that the subsequent search of the residence pursuant to the search warrant was reasonable and that the statements of defendant were not taken as a result of any illegal search. The law enforcement officers' search of the house here complies with *Mincey,* which allows warrantless searches in emergency circumstances to determine if there are other victims or suspects still on the premises. Once the officer had found the body of Ms. Funderburke under the house—suggested by the presence of flies and the smell of decaying flesh—he was confronted with a potential emergency. He had reason to believe that an injured person might be in the house or that the perpetrator was in the house and would be dangerous if the perpetrator's presence was unknown. Accordingly, we reject defendant's second argument.

**[3]** In his third argument, defendant contends he is entitled to a new trial because the trial court erroneously admitted irrelevant evidence of Funderburke's physical injuries and appearance at various times between 1978 and 1993. Defendant filed pretrial motions to exclude evidence of any alleged prior acts of misconduct or other crimes. He sought to exclude any references to Funderburke's appearance or injuries prior to her death, on the grounds that the source of those injuries was unknown and there was no evidence connecting defend-

ant to those injuries. In response, the trial judge ordered the prosecutor not to elicit the evidence before the jury until the admissibility was examined in *voir dire*. Defendant's objections to the introduction into evidence of medical records and testimony by the shelter director, police officers, a family abuse services director, a motel clerk, a grocery clerk, and a grocery store manager were overruled. The trial court also overruled defendant's objections to the admission into evidence of photographs showing Funderburke's injuries and bruised physical appearance. This evidence showed a myriad of injuries to Funderburke which were inflicted over a lengthy period of time before the murder.

" 'Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused.' " *State v. Bryant*, 337 N.C. 298, 308, 446 S.E.2d 71, 77 (1994) (quoting *State v. Simpson*, 327 N.C. 178, 185, 393 S.E.2d 771, 775 (1990)). In *State v. Weathers*, 339 N.C. 441, 448, 451 S.E.2d 266, 270 (1994), we said:

> Under Rule 404(b), evidence of other crimes, wrongs, or acts is admissible for purposes other than to prove the character of a person or to show that he acted in conformity therewith. Such other purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1992). The aforementioned list is not exclusive and "the fact that evidence cannot be brought within a category does not necessarily mean that the evidence is inadmissible." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986). In *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), this Court definitively stated that Rule 404(b) is a rule of "*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

In *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), we concluded that "the testimony about defendant's misconduct toward his wife was proper under Rule 404(b) to prove motive, opportunity, intent, preparation, absence of mistake or accident with regard to the subsequent fatal attack upon her." *Id.* at 376, 428 S.E.2d at 132.

" 'In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of [the defendant's] feelings.' " *State v. Moore*, 275 N.C. 198, 207, 166 S.E.2d 652, 658 (1969) (quoting *State v. Rash*, 34 N.C. 382, 384 (1851)). Specifically, evidence of frequent quarrels, separations, reconciliations, and ill-treatment is admissible as bearing on intent, malice, motive, premeditation, and deliberation. *Moore*, 275 N.C. at 206-07, 166 S.E.2d at 658.

For these reasons, we conclude that the testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to Funderburke was admissible under N.C.G.S. § 8C-1, Rule 404(b) to prove issues he disputed, such as lack of intent, malice, premeditation, and deliberation, notwithstanding that some of the incidents dated back some years. We further conclude that defendant "opened the door" to the introduction of this evidence by stating that he and Funderburke had a loving relationship. *See State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (where one party introduces evidence of a particular fact, the opposing party may introduce evidence to explain or rebut that fact), *cert. denied*, — U.S. —, 130 L. Ed. 2d 429 (1994). Accordingly, we reject defendant's third argument.

**[4]** In his fourth argument, defendant contends he is entitled to a new trial because the trial court erroneously admitted the State's inadmissible and irrelevant hearsay evidence of Funderburke's statements made to medical personnel, police officers, a motel clerk, a shelter director, friends, and family members. Defendant filed a pretrial motion to exclude all hearsay evidence of Funderburke's out-of-court statements to these State witnesses. The trial judge ordered the prosecutor not to elicit such information before the jury. After a *voir dire* of each witness, the testimony was admitted under Rules 803(1)-(4) and 804(b)(5). The statements, introduced through the testimony of medical personnel, police officers, a motel clerk, a shelter director, friends, and family members, consisted of Funderburke's accounts that defendant had caused her injuries, that she often hid from defendant, and that she was afraid of defendant.

Cindy Cothran, the director of medical records at Alamance Memorial Hospital and Alamance County Hospital, was allowed to testify about statements made by Funderburke to physicians and nurses which were recorded during approximately twelve visits to the

local hospitals from 12 August 1978 until 26 March 1993. The records contained notations that defendant had caused Funderburke's injuries. Defendant argues that it is unclear whether Funderburke actually made the statements written in the record or whether the records simply reflected the opinions of the medical personnel since the statements were not attributed to Funderburke. Also, defendant argues that the assailant's identity is seldom pertinent to diagnosis and, therefore, is not ordinarily admitted under Rule 803(4).

In the instant case, Cothran testified about several occasions when Funderburke told physicians that defendant had beaten her repeatedly or assaulted her with his hands and feet. Cothran further testified as to the diagnosis and treatment of Funderburke on each of the occasions she went to the hospital as a result of the assaults by defendant. At the *voir dire*, defendant conceded the admissibility of the medical records, except as to certain coded entries. The trial court asked counsel to object as appropriate during Cothran's testimony. Defendant did not object to any of Cothran's testimony and does not argue plain error on this appeal.

"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). 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(c)(4).

**[5]** Defendant next argues that the trial court improperly admitted notes of Della Nickerson, an employee of the Family Abuse Services of Alamance County and director of a home for abused women and children. Nickerson testified for the State about several instances when Funderburke was provided shelter at the home for abused women and children. The shelter provides a support group for battered women.

On 11 April 1988, Funderburke became a resident of the shelter. She completed an intake application form at Nickerson's request and in Nickerson's presence. The form was comprised of such matters as the abused person's background and condition. Nickerson testified that the intake form is filled out in the regular course of business at the shelter and is used by counselors when working with residents.

Prior to Nickerson's being called as a witness in front of the jury, the trial court conducted a *voir dire* on the admissibility of the intake form completed by Funderburke on 11 April 1988. Defendant argued that the form contained inadmissible hearsay statements. After entertaining arguments from defendant and the State, the trial court ruled that the intake form was admissible under Rule 803(4) and Rule 803(6) of the North Carolina Rules of Evidence.

We agree with the trial court that the intake form was admissible under Rule 803(6). In *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985), we said:

> Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made. *State v. Wood*, 306 N.C. 510, 294 S.E.2d 310 (1982); *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981). The authenticity of such records may, however, be established by circumstantial evidence. *See State v. Davis*, 203 N.C. 13, 164 S.E. 737, *petition for reconsideration dismissed*, 203 N.C. 35, 164 S.E. 737, *cert. denied*, 287 U.S. 649[, 77 L. Ed. 561] (1932). There is no requirement that the records be authenticated by the person who made them. *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974). *See State v. Franks*, 262 N.C. 94, 136 S.E.2d 623 (1964). Furthermore, if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time. *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974).

Defendant contends the evidence was not admissible as a record kept in the course of a regularly conducted business activity since each participant must be acting in the course of a regularly conducted business activity. Defendant argues that the intake form was personally completed by Funderburke, rather than an employee of the shelter, and that, therefore, it was not admissible under Rule 803(6). We disagree.

Rule 803(6) of the North Carolina Rules of Evidence provides:

> (6) Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, *made at or near*

> *the time by, or from information transmitted by, a person with knowledge*, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C.G.S. § 8C-1, Rule 803(6) (1992) (emphasis added).

The trial court found as fact that Nickerson testified that the intake form was completed in the "regular and normal course of business"; that it was kept as "a regular practice of the activity of the family abuse service"; that Funderburke completed the intake form on 11 April 1988, after being in the shelter for two days; that Funderburke completed the form in her own handwriting; that Nickerson observed Funderburke complete the form; and that the intake form is "normally kept by the Family Abuse Service of Alamance County . . . in a safe place as a record of the activity and the people coming in as residents in this abuse shelter." Accordingly, the trial court concluded that the evidence was admissible under Rule 803(6) of the North Carolina Rules of Evidence.

We conclude that the findings of fact were supported by the evidence and that the findings supported the conclusions of law. Since the record was made by Funderburke, a person with knowledge, at or near the time she entered the shelter, we hold that the trial court did not err in admitting the intake form under Rule 803(6) of the North Carolina Rules of Evidence as a business record made in the ordinary course of business.

**[6]** Defendant further contends, relying on N.C.G.S. § 8C-1, Rule 803(3), that the trial court erroneously admitted hearsay statements by Funderburke that she had been beaten by defendant. Defendant specifically challenges the testimony from nine of the State's witnesses: Janie DeMarra, Betsy Watkins, Stacy Strader, Gina Anderson, Dwayne Harden, Rhiana Skeens, David Allen, Teddy Somers, and B.T. Holland. The testimony of these witnesses was generally to the effect that Funderburke had told these witnesses that defendant had caused her injuries in the past, that she often hid from defendant, and that she was afraid of defendant.

After a *voir dire* of the nine witnesses, the trial court admitted the statements into evidence on the grounds that the statements showed Funderburke's then-existing state of mind pursuant to an exception to the hearsay rule found in Rule 803(3) and that Funderburke's state of mind was relevant to show the state of her relationship with defendant. Defendant contends that the trial court erred in this regard because Funderburke's state of mind was not relevant to the case at hand.

It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant. *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between victim and defendant prior to the murder), *cert. denied*, — U.S. —, 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (defendant's threats to victim shortly before the murder admissible to show victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (victim's statements regarding defendant's threats relevant to the issue of her relationship with defendant).

After a thorough review of the record, we conclude that the conversations between Funderburke and the nine witnesses related directly to Funderburke's fear of defendant and that Funderburke's statements were properly admitted pursuant to the state of mind exception to the hearsay rule to show the nature of Funderburke's relationship with defendant. Accordingly, we reject defendant's fourth argument.

**[7]** In his fifth argument, defendant contends he is entitled to a new trial because the trial court erroneously admitted inadmissible "other crimes" evidence that defendant threatened to shoot police officers in March 1990. Defendant argues that this evidence was irrelevant and inadmissible because it was introduced to show that he is a violent man who had threatened to kill innocent police officers in the past.

On direct examination, Billy, defendant and Funderburke's son, testified that Funderburke and defendant often played loud music. On cross-examination, defendant asked if the police had ever come in response to the music, to which Billy responded in the affirmative. On redirect examination, the following exchange took place between the prosecutor and Billy:

Q. Now, [defense counsel] asked you about a time when, that the police used to come to the house because of the loud music. Do you remember that question?

A. Yes, sir.

Q. And that did happen from time to time, didn't it?

A. Yes, sir.

Q. And it happened in . . . March of 1990, didn't it, Billy, when the police stood outside the house for an hour and a half before you finally came outside? Is that right?

A. Yes, sir.

Q. And they stayed outside the house that long because your father threatened to shoot the officers if they came in the house didn't she [sic]?

[DEFENSE COUNSEL]: Objection.

DEFENDANT SCOTT: That's a lie.

COURT: Objection over-ruled. You may answer the question. It's redirect on cross. You may answer the question.

A. He might have said that. I was in my bedroom at the time.

Assuming *arguendo* that Billy's response was accepted by the jury as a positive response to the prosecutor's question and that it was error to admit the question and answer, we are not convinced that the error was prejudicial. Similar evidence was admitted without objection at several other times during the trial. An officer testified without objection about the concern the police had because of defendant's violent nature if he had been drinking. Evidence was offered about defendant's attempting to intimidate officers, which rendered back-up appropriate when the police had to confront him. The evidence indicated that several police cars would arrive whenever an officer had to be dispatched to the defendant's residence. Billy's testimony simply corroborated the police officers' accounts and explained the officers' behavior on the day the body was discovered. Under these circumstances, defendant has not met his burden of establishing prejudice by showing that there is a reasonable possibility that had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988).

**[8]** In his sixth argument, defendant contends he is entitled to a new trial because the trial court erroneously admitted Gina Anderson's "non-corroborative and inadmissible" hearsay testimony about what Billy allegedly told her. Billy testified that he found his sister's, Gina Anderson's, telephone number in some papers in his parents' bedroom and that he telephoned her to tell her that their mother was missing. However, Billy did not testify that he thought defendant had burned some important papers. When Anderson testified later in the trial, she stated that Billy told her that he thought defendant had burned some important papers since he could not find her phone number. Defendant objected and moved to strike Anderson's response. The trial judge then instructed the jurors that if they found the testimony to be corroborative of Billy's testimony, they should consider it; otherwise, they must disregard it. Assuming *arguendo* that the trial court erred in overruling defendant's objection and denying the motion to strike, we conclude that the limiting instruction made any error nonprejudicial. N.C.G.S. § 15A-1443(a); *cf. State v. Williams*, 341 N.C. 1, 11, 459 S.E.2d 208, 214-15 (1995).

**[9]** In his seventh argument, defendant contends he is entitled to a new trial because the trial court erroneously allowed the prosecutor to elicit inadmissible "other crimes" evidence on cross-examination of defense witness Manley May that defendant had a substance abuse problem.

During direct examination, May testified that defendant and Funderburke were not involved that much in alcohol when they lived in Charlotte or when they first moved to Alamance County. On cross-examination, the prosecutor asked whether defendant had a substance abuse problem. The court overruled defendant's objection that this question exceeded the scope of direct examination because the direct examination elicited testimony about defendant's alcohol use and not his drug use. Defendant argues that this evidence was irrelevant and unfairly prejudicial since there was no evidence from any other source during the trial that he used illegal drugs. Therefore, defendant argues that the evidence was highly inflammatory and was introduced to show that defendant was a bad person.

We conclude that the trial court did not err in overruling defendant's objection. The question elicited only whether defendant had a substance abuse problem. There was nothing improper about this question. We first note that defendant did not object to May's response that, "[o]n several occasions, [defendant] and I smoked mar-

ijuana." We also note that there was already evidence presented through defense witness David Byrd that defendant smoked marijuana and drank beer. Additionally, we note that May testified on direct examination that "smoking and drinking wasn't a part of [defendant's] lifestyle until in recent years." Therefore, we conclude that the trial court properly overruled defendant's objection on the basis that the subject "was brought up on direct examination, so he can ask about it on cross." Accordingly, we reject defendant's seventh argument.

**[10]** In his eighth argument, defendant contends he is entitled to a new trial because the trial court erroneously allowed the prosecutor to improperly impeach defense witness May. May had testified that, on 2 July 1993, Funderburke stated that she wanted to die. This testimony, according to defendant, supported his account that it was an accident. The prosecutor impeached May with evidence that May was in the Alamance County jail in July 1993. May testified on direct examination that he had talked to Funderburke on 2 July 1993. During the conversation, she said that she wanted to bring him some writing paper, stamps, and other items but that she was unable to bring them. On cross-examination, the prosecutor asked, "When you talked to Funderburke for an hour and a half you said to send you writing materials and stamps, that's because you were in prison and need[ed] those?"

We conclude that defendant opened the door by asking about May's request that Funderburke bring paper and writing instruments to him. A question arose naturally and logically as to why she needed to bring him those items. Evidence of the circumstances behind May's request for Funderburke to bring him paper and writing instruments was admissible to provide a complete picture for the jury.

> [I]t remains true that the North Carolina practice is quite liberal and, under it, cross-examination may ordinarily be made to serve three purposes: (1) *to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case*; (2) to bring out new and different facts relevant to the whole case; and (3) to impeach the witness, or cast doubt upon her credibility.

Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 170 (4th ed. 1993) (emphasis added). It was not prejudicial error to admit this testimony. Accordingly, we reject defendant's eighth argument.

**[11]** In his ninth argument, defendant contends he is entitled to a new trial because the trial court erred in allowing the prosecutor to conduct an improper, insulting, and impertinent cross-examination of him that could not possibly have elicited relevant evidence. On cross-examination of defendant, the prosecutor asked defendant seven questions to which defendant assigns error. Defendant did not object at trial to five of these questions but argues plain error regarding these questions on this appeal. As we have stated previously:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . 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.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), *quoted in State v. Weathers*, 339 N.C. 441, 450, 451 S.E.2d 266, 271. Even assuming *arguendo* that the prosecutor's questions were improper and that the trial court erred in not intervening *ex mero motu* to limit the scope of the prosecutor's cross-examination of defendant, we conclude that the court's error did not amount to plain error and did not result in manifest injustice.

Defendant objected to two of the seven questions to which he assigns error: (1) whether defendant called Funderburke's daughter Gina Anderson a "whore" and "useless" on the telephone and (2) whether defendant told Anderson in the 1980s that she would never see Billy if she left home. Defendant contends these questions were improper because they did not elicit relevant evidence and were designed to humiliate and unfairly badger him. We disagree.

In *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992), we said:

> The bounds of cross-examination are limited by two general principles: 1) the scope of the cross-examination rests within the

sound discretion of the trial judge; and 2) the questions must be asked in good faith. *State v. Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990) (citations omitted). A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith. *State v. Dawson*, 302 N.C. 581, 586, 276 S.E.2d 348, 351 (1981). Abuse of discretion is generally found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting his own knowledge, beliefs, or personal opinions or facts which are either not in evidence or not admissible. *Id.* at 585-86, 276 S.E.2d at 351.

In the instant case, the prosecutor did not place before the jury his own opinions or inadmissible evidence, and there is nothing tending to show that the testimony was elicited in bad faith or that the questioning exceeded the scope of permissible cross-examination. Accordingly, we find no abuse of discretion on the part of the trial court and no reversible error.

**[12]** In his tenth argument, defendant contends that the trial court erred in denying his motion to dismiss the first-degree murder charge because there was insufficient evidence of premeditation and deliberation. We disagree. Defendant argues that there is not a scintilla of direct evidence of premeditation and deliberation. Defendant further argues that the State did not present any evidence about events immediately preceding the shooting or at the time of the shooting; did not present any evidence about how the shooting occurred; and did not produce even a single witness who purported to have direct, eyewitness, or even hearsay evidence that defendant acted with premeditation and deliberation. Specifically, defendant argues that the State did not present a scintilla of evidence that defendant obtained the shotgun, released the safety, or pulled the trigger.

In *State v. Davis*, 340 N.C. 1, 11-12, 455 S.E.2d 627, 632, *cert. denied*, — U.S. —, 133 L. Ed. 2d 83 (1995), we said:

> The motion to dismiss must be allowed unless the State presents substantial evidence of each element of the crime charged. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). "Substantial evidence" means " 'that the evidence must be existing and real, not just seeming or imaginary.' " *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In evaluating a motion to dismiss, the trial court must consider the evidence in the light

most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Locklear*, 322 N.C 349, 368 S.E.2d 377 (1988).

In defining premeditation and deliberation, this Court has stated:

> "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. . . . Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner."

*State v. Small*, 328 N.C. 175, 181-82, 400 S.E.2d 413, 416 (1991) (quoting *State v. Brown*, 315 N.C. 40, 58-59, 337 S.E.2d 808, 822-23 (1985) (citations omitted), *cert. denied*, 476 U.S. 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)).

In the instant case, viewing the evidence in a light most favorable to the State, the evidence tended to show that defendant and Funderburke had a hostile relationship. There is no evidence that Funderburke struggled or provoked defendant. Defendant lied to everyone about Funderburke's whereabouts and did not call the police or emergency medical personnel. Defendant hid Funderburke's body under his residence. Funderburke was shot at close range by a shotgun, and the medical examiner testified that it was highly improbable that defendant's claim that Funderburke committed suicide was accurate. We conclude that the evidence was sufficient to show premeditation and deliberation. Accordingly, defendant's tenth argument is rejected.

**[13]** In his eleventh argument, defendant contends that the trial court committed reversible error by failing to instruct the jury on voluntary intoxication as a defense to first-degree murder. We disagree.

In *State v. Herring*, 338 N.C. 271, 275, 449 S.E.2d 183, 186 (1994), we said:

> A defendant who wants to raise the issue of whether he was so intoxicated by the voluntary consumption of alcohol or other drugs "that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on the evidence produced by the state, of his intoxication." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "Evidence of mere intoxication" does not meet this burden. *Id.* The defendant "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." *Id.* The evidence on which the defendant relies
>
> > must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913)[, *overruled on other grounds by State v. Oates*, 249 N.C. 282, 106 S.E.2d 206 (1958)]. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975)[, *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)].
>
> *Mash*, 323 N.C. at 346, 372 S.E.2d at 536 (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)).

Defendant contends that the evidence in this case showed that he and Funderburke often went drink-for-drink, that he and Funderburke drank a gallon of vodka within five and a half hours, that he could not remember some of the details before the shooting, and that Funderburke had a blood-alcohol concentration of .40. Defendant therefore argues that, allowing for his size, he must have had a blood-alcohol concentration of at least .30. Further, defendant argues that his behavior after the murder was erratic and suggests he was intoxicated.

Viewing the evidence in the light most favorable to defendant, the evidence shows that defendant may have been highly intoxicated, but the evidence does not show defendant was utterly incapable of forming a deliberate and premeditated purpose to kill. We conclude that defendant has not met his burden of showing that he was utterly inca-

pable of forming the requisite intent. For this reason, we reject defendant's eleventh argument and hold that the trial court did not err in refusing to submit a voluntary intoxication charge to the jury.

**[14]** In his twelfth argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* and instruct the jury to disregard several statements made by the prosecutor during closing arguments at trial. Defendant contends he is entitled to a new trial because the prosecutor improperly called defendant a liar and misstated the evidence. During closing arguments, the prosecutor made the following statements: "[B]ut he did to them [his family] what I contend to you he did in this courtroom the other day. He lied." The prosecutor also argued, "[I]ts a lie. He has to lie." Further, the prosecutor argued:

> [I]f you believe defendant and if the shooting was an accident, why lie to your sister on Saturday? Why lie to your son on Monday more than once? Why lie to [Bunting]? Why would he lie to the police, not once but several times? Think maybe you lie because you hadn't figured out what you're going to tell to try to get yourself off? Do you think you might lie when your conscience is full of guilt and you got to figure out a way out of it? . . . We showed that you are a murderer by the people that you lied to.

Defendant argues that the prosecutor should not have been allowed to comment on the truth or falsity of the evidence.

Defendant also complains that the prosecutor stated that defendant had beaten Funderburke, even though Funderburke recanted these allegations. The prosecutor also stated that Funderburke said that defendant told her that he was "going to kill her." Defendant argues that there was no evidence presented to this effect. Thus, defendant contends that through this argument, the prosecutor manufactured two inflammatory and highly prejudicial pieces of evidence.

The arguments of counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). "Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). "Because defendant did not object to the portions of the argument to which he now assigns error, 'review is lim-

ited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu.*' " *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 924 (1989) (quoting *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)) (alteration in original), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990).

With reference to the prosecutor's argument that defendant had lied, we note that a prosecutor may properly argue to the jury that it should not believe a witness. *State v. McKenna*, 289 N.C. 668, 687, 224 S.E.2d 537, 550, *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976). When read in context, the prosecutor's argument was no more than an argument that the jury should consider defendant's credibility since he had lied about Funderburke's whereabouts before her body was found. In view of the several conflicting statements made by defendant in this case, we conclude that the prosecutor's jury argument was not so grossly improper as to require the trial court's intervention *ex mero motu.*

As to the prosecutor's comments concerning the assault against Funderburke, the prosecutor said:

> And in February of '91, she gets a broken finger, a broken arm, broken ribs, and large bruises because this defendant is trying to force her to dance. Now, she doesn't say anything at all in her medical records on that, the next day that there was any dancing going on or any falling off any barstool. She changes that later after the police reinjure [sic] the arm. She says [that] after the defendant takes her down there and want[s] to get a lawsuit going. She does change it. She changes it in court. That's not what she said that night, that night to the next day at the police department. She said patient was assaulted by boyfriend.

The prosecutor did mix up two assaults on Funderburke. One took place in February of 1991, and Funderburke did not go to the hospital. However, the comment that "patient was assaulted by boyfriend" obviously relates to an incident where Funderburke talked to a doctor, not the police. After a January 1991 incident, Funderburke did go to the hospital. The prosecutor simply mixed up the incidents. This mix-up was slight, and the error could not have possibly been prejudicial to the defendant. As for the prosecutor's argument that defendant threatened Funderburke, there was testimony by Officer Holland that the defendant said he was going to kill her if she proceeded with

the charges. Therefore, we conclude that the prosecutor's argument was not so grossly improper as to require the trial judge to intervene *ex mero motu* during the prosecutor's closing argument.

**[15]** Finally, in his thirteenth argument, defendant contends he is entitled to a new trial because the trial court erred in failing to instruct the jury on involuntary manslaughter. The trial court submitted three possible verdicts to the jury: (1) guilty of first-degree murder, (2) guilty of second-degree murder, and (3) not guilty. Defendant concedes that this Court recently held in *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 873 (1995), that where a jury is properly instructed on the elements of first- and second-degree murder and thereafter returns a verdict of guilty of first-degree murder based on premeditation and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction. *Id.* at 148-49, 451 S.E.2d at 844; *accord State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995); *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990); *State v. Young*, 324 N.C. 489, 380 S.E.2d 94.

Defendant urges this Court to abandon this precedent because it violates the Fourteenth Amendment, is poor public policy, and is unfair to defendants. However, we have carefully considered defendant's argument and find no compelling reason to depart from our precedent. Accordingly, we reject defendant's final argument.

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

NO ERROR.

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STATE OF NORTH CAROLINA v. JAMES EDWARD WILLIAMS

No. 517A93

(Filed 13 June 1996)

**1. Jury § 219 (NCI4th)— capital murder—jury selection—juror unable to vote for death penalty—excusal for cause**

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by excusing for cause a potential juror based upon her opinions about the death penalty

where the potential juror continually stated to the prosecutor and to the trial court that she did not believe that she could vote for the death penalty under any circumstances. The transcript supports the finding that she would be unable to perform her duties and unable to apply the law impartially in the case.

**Am Jur 2d, Jury §§ 199, 279.**

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

**2. Jury § 256 (NCI4th)— capital murder—jury selection—peremptory challenges—racial motivation—findings**

There was no error in a first-degree murder prosecution in the trial court's ruling that defendant failed to make a *prima facie* showing of a *Batson* violation and in not making findings after the prosecutor gave reasons for his peremptory excusals where the court ruled that defendant had failed to make a *prima facie* showing before the prosecutor articulated his reasons for the peremptory challenges and only asked for the reasons after defendant requested that they be stated for the record. The ruling in *Hernandez v. New York*, 500 U.S. 352, requiring findings on whether the stated reasons are a pretext thus does not apply. The trial court did not err in finding that defendant failed to make a *prima facie* showing of discrimination because the fact that the prosecutor peremptorily excused two black jurors in a row and that every black juror to that point had been excused peremptorily or for cause is not enough by itself to mandate a *prima facie* showing. There is no evidence of this case being especially susceptible to racial discrimination since the defendant and the victim were both white and the excused jurors were black and the record supports the race-neutral reasons for excusal given by the prosecutor.

**Am Jur 2d, Jury § 244.**

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

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

**3. Criminal Law § 507 (NCI4th)— capital murder—ex parte contact between judge and jurors**

There was no prejudicial error in a first-degree murder prosecution where the court conducted *ex parte* interrogations of two seated jurors in chambers, conducted conferences with counsel in chambers out of the presence of defendant, and failed to reconstruct those interrogations and conferences in the presence of defendant. During the presentation of evidence in the guilt phase of the trial, two jurors indicated on separate occasions that they needed to raise an issue that might affect their ability to serve as a juror. On each occasion, the trial judge first conducted an *ex parte* examination of the juror in the presence of only the court reporter, the juror was excused from chambers after the trial judge's examination, and the trial judge continued the conference in chambers with the attorneys, but outside the sight and hearing of defendant, to report the substance of what the juror had said and to determine what should be done. One juror was acquainted with one of defendant's attorneys, and the other thought she might be related to the victim. Both continued to serve. Even if defendant had been present at the chambers conferences, he could not have compelled the trial judge to remove either juror, and the record does not reflect that the trial judge abused his discretion in not removing either juror.

**Am Jur 2d, Trial §§ 1573 et seq.**

**4. Homicide § 552 (NCI4th)— first-degree murder—refusal to instruct on second-degree**

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on the lesser included offense of second-degree murder where, as to felony murder, the State presented positive evidence that defendant participated in the theft of the victim's car and personal property, there was no evidence that defendant did not participate in the transaction ending in the theft of the victim's car and personal property, and the fact that an accomplice participated hardly absolves defendant. As to premeditated and deliberate murder, the State presented evidence that defendant told an accomplice in advance that he knew a lady who had a car and that he could get it by killing her, there was no evidence presented that the accomplice struck the victim or inflicted the injuries, and defendant failed to present evidence of intoxication that rendered him utterly incapable of forming a deliberate and premeditated intent to kill. The evidence would

not have permitted the jury rationally to acquit defendant of felony murder and premeditated and deliberate murder and to find him guilty of second-degree murder.

**Am Jur 2d, Homicide §§ 525 et seq.**

**Lesser-related state offense instructions: modern status. 50 ALR4th 1081.**

**5. Homicide § 668 (NCI4th)— capital murder—voluntary intoxication—refusal to instruct**

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on voluntary intoxication. Although defendant contends that imposing on him a burden of production is a due process violation, the failure to meet the burden of production does not preclude defendant from introducing evidence on the issue and the jury may still consider the evidence. Here, defendant relied on evidence of the amount of alcohol consumed on the night of the murder and failed to meet the burden, the focus of which is the effect rather than the fact of intoxication. The evidence fails to show that at the time of the killing 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.

**Am Jur 2d, Homicide § 517.**

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

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

**6. Evidence and Witnesses § 1422 (NCI4th)— capital murder—probation report—defendant's need for money—admissible**

The trial court did not err during a first-degree murder prosecution by allowing testimony that defendant knew he owed money as a condition of his probation and that a probation report was filed that stated that defendant was in default on his monthly payments. Although defendant argues that the testimony was not relevant because the probation violation report was not served on him until after the murder, the report was relevant to show that defendant was actually in default at the time of the murder and the jury could have reasonably inferred that defendant knew that

he was not making the required payments and needed money to make them in order to avoid a prison term.

**Am Jur 2d, Evidence §§ 304-312.**

**7. Criminal Law § 409 (NCI4th)— capital murder—sentencing closing arguments—final argument by both defense attorneys**

There was no error in a capital sentencing proceeding where defendant contended that the trial court refused to allow both of defendant's attorneys to argue during the final argument but the court's statement is at worst ambiguous and it is not clear whether the judge was referring to both of defendant's attorneys or to one when he said, "then you can argue." The law allows but does not require that more than one defense attorney address the jury during the defendant's final argument and the transcript cannot be interpreted to show that the court refused to permit both of defendant's attorneys to argue after the State where they never specifically requested to do so and never objected.

**Am Jur 2d, Trial §§ 544-546.**

**8. Criminal Law § 454 (NCI4th)— capital murder—prosecutor's argument—psychiatric report admitted as corroboration**

There was no gross impropriety in the prosecutor's argument in the sentencing phase of a capital murder prosecution where defendant claimed that the argument drew inferences from a psychiatric report, thereby using as substantive evidence a document that had been admitted only for corroborative purposes. The Rules of Evidence do not apply to sentencing proceedings and the argument consisted of reasonable inferences drawn from facts brought out in testimony that were relevant to the sentencing determination.

**Am Jur 2d, Trial §§ 572, 573.**

**9. Criminal Law § 454 (NCI4th)— capital murder—prosecutor's argument—pecuniary gain aggravating circumstance—probation report**

There was no gross impropriety in the prosecutor's argument in the sentencing phase of a capital murder prosecution where defendant contended that the prosecutor mischaracterized the pecuniary gain evidence relating to a probation violation report

by arguing that the report, which showed defendant's need for money, was served three days before the murder when it was filed three days before the murder but served after the murder. Even if the jury could have inferred from the statement that the probation violation report was served on defendant three days before the murder, defendant would not have been prejudiced. It has already been held that the fact that the report was filed three days before the murder was relevant because it showed that defendant was actually in jeopardy of returning to prison if he failed to make the payments and the jury could presume that defendant was aware of the terms of his probation.

**Am Jur 2d, Trial §§ 572, 573.**

**10. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstances—no significant prior criminal history**

There was no error in the sentencing phase of a first-degree murder prosecution in the submission of the statutory mitigating circumstance of no significant history of prior criminal activity over defendant's objection. When viewed in light of the psychological and environment experiences of defendant, his prior criminal activity, mostly misdemeanor in character, could have been found by a reasonable juror to be insignificant in the determination of the sentencing recommendation in this case. N.C.G.S. § 15A-2000(f)(1).

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

**11. Criminal Law §§ 682, 681 (NCI4th)— capital sentencing—peremptory instructions—mental or emotional disturbance—mental capacity**

The trial court did not err in the sentencing phase of a capital murder prosecution by refusing to instruct the jury peremptorily on the statutory mitigating circumstances that the murder was committed while defendant was under the influence of mental or emotional disturbance and that the capacity of defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of the law was impaired. The evidence supporting these two mitigating circumstances is controverted or not manifestly credible in that his evidence of alcohol impairment was controverted by evidence of his planning and attempting to conceal the murder, and evidence that he acted impulsively because of attention deficit disorder was controverted by psychi-

atric evidence that defendant was responsible for his actions at the time of the crimes and knew right from wrong, testimony that defendant was able to conform his behavior to school requirements, testimony that attention deficit disorder becomes easier to manage as the individual grows older, and testimony that defendant did not act impulsively.

**Am Jur 2d, Criminal Law §§ 598, 599.**

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

**12. Criminal Law § 1334 (NCI4th)— capital murder—theory of prosecution—aggravating circumstances—motion to require State to specify**

The trial court did not err in a capital murder prosecution by denying defendant's motions to require the State to specify the theory on which the State was prosecuting the charge of first-degree murder and the aggravating circumstances on which the State intended to rely in the penalty phase.

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

**13. Jury § 103 (NCI4th)— capital murder—individual voir dire**

There was no error in a capital murder prosecution in the trial court's denial of defendant's motions for individual *voir dire* of the potential jurors and of motions for individual *voir dire* of particular jurors concerning what they had heard or read about the case or their potential relationships to the victims.

**Am Jur 2d, Jury §§ 198, 199.**

**14. Jury § 141 (NCI4th)— capital murder—jury selection—parole eligibility**

The trial court did not err in a capital murder prosecution in denying defendant's motions to allow *voir dire* of potential jurors about their conceptions of parole eligibility or in not allowing defendant to argue that a life sentence would mean that defendant would serve life in prison.

**Am Jur 2d, Jury §§ 193 et seq.**

**Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.**

**15. Criminal Law § 1330 (NCI4th)— capital murder—defendant's argument— life imprisonment if jury unable to agree**

There was no error in a capital murder prosecution in the trial court not allowing defendant to argue to the jury that the court was required by law to impose a sentence of life imprisonment if the jury was unable to unanimously agree on a verdict within a reasonable time.

**Am Jur 2d, Criminal Law §§ 609 et seq.**

**16. Constitutional Law § 371 (NCI4th)— first-degree murder—death penalty—not unconstitutional**

The North Carolina capital sentencing scheme is not unconstitutional on its face or as applied.

**Am Jur 2d, Criminal Law § 628.**

**17. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—residual doubt—codefendant not receiving death penalty**

The trial court did not err in a capital sentencing proceeding by not submitting as nonstatutory mitigating circumstances that the evidence does not foreclose all doubt as to guilt or that a codefendant had confessed but will not be facing the death penalty.

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

**18. Criminal Law § 1327 (NCI4th)— capital sentencing—instructions—duty to recommend death**

The trial court did not err in a capital sentencing proceeding by instructing the jury that it had the duty to impose the death penalty if it found the mitigating circumstances failed to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances.

**Am Jur 2d, Trial §§ 1441 et seq.**

**19. Criminal Law § 1343 (NCI4th)— capital sentencing—especially heinous, atrocious or cruel aggravating circumstance—not unconstitutional**

The aggravating circumstance in the capital sentencing proceeding that the murder was especially heinous, atrocious, or

cruel is not unconstitutionally vague and overbroad on its face and as defined by the charge to the jury.

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

**20. Criminal Law § 1348 (NCI4th)— capital sentencing—instructions—definition of mitigating circumstances**

The trial court did not err in a capital sentencing proceeding in using its definition of mitigating circumstances instead of that requested by defendant.

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

**21. Criminal Law § 1363 (NCI4th)— capital sentencing—non-statutory mitigating circumstances— instruction on proof and value**

The trial court did not err in a capital sentencing hearing in instructing the jury on the proof and mitigating value of non-statutory mitigating circumstances.

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

**22. Criminal Law § 1371 (NCI4th)— capital sentencing—proportionality review—not vague and arbitrary**

The standards set by the North Carolina Supreme Court for its proportionality review in capital cases are not vague and arbitrary and consistently have been narrowly defined and explained.

**Am Jur 2d, Criminal Law § 628.**

**23. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate**

A sentence of death for first-degree murder was not disproportionate where the record supports the submission and finding by the jury of the aggravating circumstances that the murder was committed for pecuniary gain and that the murder was especially heinous, atrocious, or cruel; despite defendant's argument to the contrary, the jury could have rationally found that defendant was not influenced by a mental or emotional disturbance at the time he committed the murder while finding that he suffered from "dependent avoidance disorder with self-defeating features"; and there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. In this case the jury found the aggravating circum-

stance that the murder was especially heinous, atrocious, or cruel and defendant was convicted on the theory of premeditation and deliberation. This case is more similar to cases in which the death sentence was proportionate than cases in which it was disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

**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 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 judgment imposing a sentence of death entered by Greeson, J., at the 11 October 1993 Criminal Session of Superior Court, Randolph County, upon a jury verdict of guilty of first-degree murder in a case in which defendant was tried capitally. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for common law robbery was allowed 20 December 1994. Heard in the Supreme Court 12 September 1995.

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

*Ann B. Petersen for defendant-appellant.*

ORR, Justice.

The defendant, James Edward Williams, was found guilty of first-degree murder both on the basis of premeditation and deliberation and under the felony murder rule. He was also found guilty of common law robbery. After a capital sentencing hearing, the jury recommended a sentence of death for the first-degree murder conviction; Judge Greeson sentenced defendant accordingly and additionally sentenced defendant to a consecutive term of ten years' imprisonment on the robbery conviction.

The evidence tended to show that defendant and Bernice Sikes were "boyfriend-girlfriend." While Sikes was in prison in January of 1991, defendant told her by phone on several occasions that he knew a lady that had a car and that he could get it by killing her.

On 14 February 1991, defendant, Sikes, and defendant's cousin, Hammonds, who were all living at the Thomasville home of defendant's mother, left the house at about 5:00 p.m. to go bowling in High Point. They stayed at the bowling alley for about an hour, then rode around the area, stopping at an ABC store. Next, they stopped at a Burger King and then a game room, where defendant bought a six-pack of beer. The three played pool at the game room, returned to the bowling alley about 9:00 p.m., and left the bowling alley about 11:00 p.m. While Hammonds drove, defendant gave directions to the Trinity home of the victim, Elvie Rhodes. Hammonds dropped off defendant and Sikes at Rhodes' home. Defendant told Hammonds to tell his mother that somebody picked him up at the bowling alley.

Sikes testified that she and defendant waited outside the home of Elvie Rhodes while defendant finished his six-pack of beer. Defendant told her that they were at the house of a woman he had gone out to supper with several times. He then told Sikes to wait outside and entered the house. After a short interval, Sikes knocked on the door, which defendant opened wearing only his underpants. He later told Sikes he had undressed to keep from getting blood on his clothes. Sikes entered the house and saw Ms. Rhodes with a bloody face and eyes swollen shut. Defendant kicked and slapped Ms. Rhodes; rubbed his hand on the side of her face and licked the blood off; hit her in the head with a pole from a kitchen chair; and told her, "You know I'm going to kill you, don't you?" Next, defendant took Ms. Rhodes to the bathroom so that she could see her face, then he took her back to the living room and threw her to the floor. Defendant told Sikes to clean up the blood in the kitchen. He then said to Sikes, "She won't die, baby." Sikes further testified that she looked in the living room and saw defendant's arm around Ms. Rhodes' throat, choking her. Then defendant stomped Ms. Rhodes in the stomach, chest, and throat. He then gave Sikes his knife and told her to go cut the venetian blind cord. Defendant used the cord to choke Ms. Rhodes until she died.

Next, defendant instructed Sikes to clean up the blood and fingerprints and to look for money. Sikes then helped defendant wrap Ms. Rhodes' body in a quilt and put it in the trunk of Ms. Rhodes' car. They left in the car at around 6:00 or 6:30 a.m. and subsequently threw a bag containing poles from the kitchen chair and the cloth that the blood had been cleaned up with into a trash bin behind a car wash in Thomasville. They proceeded from there to Hardee's and bought breakfast. Later that day, they disposed of the body in some woods

near Farmer, where Sikes used to live. Ms. Rhodes' car was found parked and abandoned outside a restaurant in Thomasville. A latent palm print on the trunk was identified as defendant's.

When Sikes was first arrested, she told police that she committed the murder. At trial, she testified that she had falsely confessed to protect defendant because he told her she would get in less trouble than he would because she was a mother of three, while he had a bad prior record.

## JURY SELECTION

### I.

**[1]** Defendant contends that the trial court improperly excused for cause potential juror Vernell Honeycutt based on her opinions about the death penalty. We disagree.

> The test for determining whether a prospective juror may be properly excused for cause for his views on the death penalty 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). . . .
>
> We have recognized that a prospective juror's bias may not always be "provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

*State v. Green*, 336 N.C. 142, 158-59, 443 S.E.2d 14, 24 (citation omitted), *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994). The trial court's ruling will not be disturbed absent abuse of discretion. *Id.*

Defendant claims that potential juror Honeycutt should not have been excused for cause because she said that she would be willing to follow the law and the evidence. However, a review of the entire *voir dire* transcript supports a finding that Honeycutt's views against the death penalty would prevent or substantially impair the performance of her duties as a juror. "[A] potential juror's equivocation on the subject of the death penalty may stem from a 'conscientious desire to do his duty as a juror and to follow the court's instructions in the face of recognizing his personal inability to impose the death penalty.' " *State*

*v. Miller*, 339 N.C. 663, 679, 455 S.E.2d 137, 145 (quoting *State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993), *cert. denied*, — U.S. —, 133 L. Ed. 2d 169 (1995). Here, Honeycutt continually stated to the prosecutor and to the trial court that she did not believe that she could vote for the death penalty under any circumstances. When the court asked if she knew of any circumstances that she could think of when she could vote to impose the death penalty, Honeycutt replied, "No, I don't know of any." The trial court properly could have concluded that Honeycutt's statement that she would follow the court's instructions arose out of her desire to perform her duties as a juror according to the dictates of the law. The *voir dire* transcript supports the trial court's finding that Honeycutt would be unable to perform her duties and unable to apply the law impartially in the case. The court's excusal for cause of potential juror Honeycutt was not an abuse of discretion. This assignment of error is overruled.

**II.**

**[2]** Defendant next contends that during jury selection, the State exercised its peremptory challenges to remove black jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). We hold that no error occurred involving the State's use of peremptory challenges in jury selection.

Defendant assigns error to the peremptory challenges of two of the five black jurors who were in the venire. The other three were removed for cause. Defendant objected to the peremptory challenges during jury selection. The trial court ruled that defendant had not made a *prima facie* case, but agreed to defendant's request that the prosecutor give his reasons for excusing the jurors for the record. The prosecutor stated as his reasons for peremptorily challenging the first juror that

> [s]he had a brother that was charged with assault in Virginia with a shotgun, and also she had a sister that was murdered. She also has [sic] her niece is seeing a psychiatrist, and she related that, and also she wasn't particularly paying any attention to what was going on and her demeanor is not—She also was having trouble whether to judge somebody or not. She has a problem in that she could not judge anybody now but she was hesitant, in my opinion, and also on the death penalty, in my judgment.

The prosecutor stated as his reasons for excusing the second juror

> her demeanor and her answers to me. Also she had had—She knew Ms. Hole and she also knew Ms. Hedrick from a court case in court in which she and an officer had a—she tore up a ticket and threw it in the officer's face. We were aware of that, and she had a relationship with Ms. Hole that was not—was unlike her answers to me and I do not feel that her answers, her attitude was such that she was definitely not—just did not feel comfortable with her answers and her demeanor. And she lied about knowing Ms. Hedrick. . . . And she has a significant traffic record.

Defendant argues that the court erred both in not making findings after the prosecutor gave his reasons for excusing the jurors and in not finding that a *Batson* violation occurred.

As summarized in *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989), the Supreme Court held that in *Batson v. Kentucky*

> a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution 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. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. *Batson*, 476 U.S. [at] 98, n.21, 90 L. Ed. 2d [at] 89, n.21.

*State v. Jackson*, 322 N.C. at 254-55, 368 S.E.2d at 840. In *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), the Supreme Court held that a defendant has standing to complain that a prosecutor used the State's peremptory challenges in a racially discriminatory manner by excusing jurors of a different race than the defendant. Thus, the fact

that defendant was white did not preclude him from making a *prima facie* showing of discrimination in the exclusion of black jurors.

Defendant's argument that the trial court was required to make findings after the prosecutor gave his reasons for excusing the jurors in question is based on the rule established in *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), and applied in *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995). If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext. *Hernandez v. New York*, 500 U.S. at 359, 114 L. Ed. 2d at 405; *State v. Robinson*, 336 N.C. at 93, 443 S.E.2d at 312.

That rule does not apply in this case because the trial court made a ruling that defendant failed to make a *prima facie* showing before the prosecutor articulated his reasons for the peremptory challenges. The court only asked for the reasons after defendant requested them to be stated for the record. The trial judge stated, "the Court holds that there hasn't been a prima facia [sic] showing that he's purposefully discriminated at all on the basis of the Court's hearing of the answers and especially the demeanor of the last one. But go ahead, for the record." Thus, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing.

Defendant based his objection solely on the fact that the prosecutor peremptorily excused two black jurors in a row, which, when combined with the for-cause excusals, resulted in every black juror up to that point having been excused. The trial court based its finding on the answers and demeanor of the peremptorily excused jurors. Because the trial court considers all relevant circumstances including the demeanor and questions and answers of both the prosecutor and the excused jurors, we must give the court's judgment deference. *See Batson v. Kentucky*, 476 U.S. at 98, 90 L. Ed. 2d at 89.

After reviewing the transcript and the parties' arguments, we find nothing to indicate that the court erred. The fact that the prosecutor peremptorily excused two black jurors in a row and that, when com-

bined with three for-cause removals, every black juror to that point had been excused is not enough by itself to mandate a *prima facie* showing. *See State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991) ("the acceptance rate of minorities by the State is relevant to our inquiry, but it is not dispositive"). There is no evidence of this case being especially susceptible to racial discrimination since the defendant and the victim were both white and the excused jurors were black. *See State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990) (the trial court should consider the susceptibility of the particular case to racial discrimination). Furthermore, the record supports the race-neutral reasons for excusal given by the prosecutor. Therefore, we hold that the trial court committed no error in finding that defendant failed to make a *prima facie* showing of a *Batson* violation and in not making findings after the prosecutor gave reasons for his peremptory excusals.

## GUILT-INNOCENCE PHASE

## III.

**[3]** Defendant next contends that the trial judge erred by conducting *ex parte* interrogations of two seated jurors in chambers and conferences with counsel in chambers, out of the presence of defendant, and by failing to reconstruct those interrogations and conferences in the presence of defendant. Defendant claims these actions violated his right to be present at every stage of his trial, as guaranteed by Article I, Section 23 of the Constitution of North Carolina and the Sixth Amendment to the Constitution of the United States. *See, e.g., State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). We agree, but hold that the error was harmless beyond a reasonable doubt.

On two occasions during the presentation of evidence during the guilt-innocence phase of the trial, a separate juror seated in the regular jury of twelve indicated to the trial judge by message through a bailiff that he or she needed to raise an issue that might affect his or her ability to serve as a juror. One juror was acquainted with one of defendant's attorneys, and the other thought she might be related to the victim. On each occasion, the trial judge first conducted an *ex parte* examination of the juror in the presence of only the court reporter, outside the presence of counsel and of defendant. On each occasion, the juror was excused from chambers after the trial judge's examination, and the trial judge continued the conference in chambers with the attorneys, but outside the sight and hearing of defendant, to report the substance of what the juror had said and to deter-

mine what, if anything, should be done. On each occasion, the trial continued after the chambers conference with the juror involved continuing to serve as a member of the jury.

We have held that the trial court errs when it communicates with a juror in the absence of the defendant. *See State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612. We have also held that the trial court errs when it conducts a chambers conference with counsel for the state and counsel for defendant in defendant's absence. *See State v. Daniels*, 337 N.C. 243, 259, 446 S.E.2d 298, 309 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 895 (1995); *State v. Brogden*, 329 N.C. 534, 541-42, 407 S.E.2d 158, 163 (1991).

> If the defendant's absence from a proceeding constitutes error, a new trial is required unless the State demonstrates the error was harmless beyond a reasonable doubt. A record of what occurred at the proceeding may show the harmlessness of the error.

*State v. Daniels*, 337 N.C. at 257, 446 S.E.2d at 307 (citation omitted).

In this case, all chambers communications complained of were recorded by the court reporter at the time they occurred. After reviewing these transcripts and the arguments of the parties, we conclude that the error was harmless beyond a reasonable doubt.

Defendant claims that if he had been present at the conferences, he could have prompted removal of the two jurors in question. However,

> "[t]he trial judge has broad discretion in supervising the selection of the jury to the end that both the state and the defendant may receive a fair trial. This discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error."

*State v. McLaughlin*, 323 N.C. 68, 101, 372 S.E.2d 49, 70 (1988) (quoting *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980), *sentence vacated*

*on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990) (citations omitted).

Thus, defendant could not have forced the removal of either juror. The decision was always in the discretion of the trial judge. The record reflects that the trial judge thoroughly interviewed the juror who was a friend of the defense attorney and determined that he would still be able to perform his duties as a juror. The record also reflects that the trial judge determined that the juror who thought she might be distantly related to the victim was not disqualified by N.C.G.S. § 15A-1212(5) because the possible relationship was beyond the sixth degree. All four conferences were recorded, and defense counsel were given an opportunity, in defendant's presence, to be heard regarding each juror. The record does not reflect any abuse of discretion by the trial judge in his decision not to remove either juror.

Thus, even if defendant had been present at the chambers conferences, he could not have compelled the trial judge to remove either juror, and the record does not reflect that the trial judge abused his discretion in not removing either juror. Therefore, any error committed by the trial court in conducting conferences with jurors and counsel outside the presence of defendant was harmless beyond a reasonable doubt.

## IV.

**[4]** Defendant next assigns error to the trial court's refusal to instruct the jury on the lesser-included offense of second-degree murder. We hold that the trial court did not err in refusing to give this instruction.

We recently discussed this issue in *State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995):

> The test for determining whether the jury must be instructed on second-degree murder is whether there is any evidence in the record which would support a verdict of second-degree murder. *State v. Strickland*, 307 N.C. 274, 285, 298 S.E.2d 645, 653 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). " 'It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense.' " *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835 (1994) (quoting *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976),

*overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). However, if the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is not evidence other than defendant's denial that he committed the crime to negate these elements, the trial court should not instruct the jury on second-degree murder. *Id.* at 634-35, 440 S.E.2d at 835 (citing *State v. Strickland*, 307 N.C. at 293, 298 S.E.2d at 658).

The United States Supreme Court has indicated that in cases where one or more elements of the offense charged remain in doubt but the defendant is clearly guilty of some offense, the jury is likely to resolve its doubts in favor of a conviction rather than to acquit the defendant altogether. *Beck v. Alabama*, 447 U.S. 625, 634, 65 L. Ed. 2d 392, 401 (1980). In such cases, an instruction on a lesser-included offense must be given to reduce the risk of an unwarranted conviction. *Id.* at 635, 65 L. Ed. 2d at 401. However, due process requires an instruction on a lesser-included offense only "if the evidence would permit the jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.*

*State v. Conaway*, 339 N.C. at 514, 453 N.C. at 841.

In this case, the question is whether the evidence would have permitted the jury rationally to find defendant guilty of second-degree murder and to acquit him of both felony murder and premeditated and deliberate murder.

As to felony murder, defendant argues that the jury could have found that Bernice Sikes stole the items of personal property from inside the house without his knowledge or direct participation. However, the State presented positive evidence that defendant participated in the theft of Ms. Rhodes' car and personal property. Sikes testified that defendant searched Ms. Rhodes' purse and freezer for money and knew Sikes stole Ms. Rhodes' pocketbook, a flashlight, and a radio, and that together they loaded Ms. Rhodes' body into the trunk and drove away in the car. Also a latent palm print lifted from the trunk of the car and submitted to the State Bureau of Investigation for analysis was determined to have been made by the left palm of defendant. There was no evidence that defendant did not participate in the transaction ending in the theft of Ms. Rhodes' car and personal property. The fact that Bernice Sikes also participated in the commission of this felony hardly absolves defendant. Thus, the

evidence would not have permitted the jury rationally to acquit defendant of felony murder.

Furthermore, as to premeditated and deliberate murder, defendant offers two interpretations of the evidence which he claims would have permitted the jury rationally to find him guilty of second-degree murder and acquit him of premeditated and deliberate murder. First, defendant suggests that Sikes argued with Ms. Rhodes and killed her, as she originally told police, and that defendant, extremely intoxicated from the large quantity of alcohol he consumed that night, tried to stop Sikes when the fight started, was unable to do so, assisted in the crime of second-degree murder committed by Sikes, and helped her dispose of the body. Second, defendant suggests that he committed the murder with his mind so befuddled by alcohol that he was utterly incapable of forming a deliberate and premeditated intent to kill.

The State presented positive evidence of premeditation and deliberation by defendant. Sikes testified that defendant told her in advance that "he knew a lady that had a car and that he could get it by killing her." She also testified that defendant told Ms. Rhodes that he was going to kill her before he did so. Although two defense witnesses testified that Sikes had told them she would kill a woman who caused her and defendant to separate, no evidence was presented that Sikes struck the victim or inflicted the injuries. Defendant also failed to present evidence of intoxication that rendered him utterly incapable of forming a deliberate and premeditated intent to kill. The evidence showed that defendant was not too intoxicated to give detailed directions to the witness who drove defendant and Sikes to Ms. Rhodes' home, to take steps to conceal his presence at the scene of the murder, and to conceal or dispose of incriminating evidence. Thus, the evidence would not have permitted the jury rationally to acquit defendant of premeditated and deliberate murder and to find him guilty of second-degree murder.

For the foregoing reasons, the trial court did not commit error in refusing to instruct the jury on the lesser-included offense of second-degree murder.

V.

**[5]** Defendant also assigns error to the trial court's refusal to instruct the jury on voluntary intoxication. We hold that the trial court committed no error by refusing to give this instruction.

A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

> The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

*State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) [(citations omitted)] (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)).

*State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988).

Defendant claims that it is a due process violation to impose on him a burden of production to entitle him to a voluntary intoxication instruction because such a burden is inconsistent with the State's burden of proving to the jury guilt beyond a reasonable doubt. As we noted in *State v. Phipps*, 331 N.C. 427, 456-57, 418 S.E.2d 178, 194 (1992), the failure to meet the burden of production does not preclude defendant from introducing evidence on the issue. When the burden of production is not met, and an instruction on involuntary intoxication is therefore not given, the jury may still consider the evidence of intoxication in deciding whether the State has proved premeditation and deliberation beyond a reasonable doubt. Thus, the State's burden of proving guilt beyond a reasonable doubt is unchanged, and there is no due process violation.

In this case, defendant failed to meet the burden of production necessary to entitle him to an instruction on voluntary intoxication and was therefore not entitled to the instruction. Defendant relies on evidence of the amount of alcohol he consumed on the night of the murder. However, the focus of the inquiry is not the fact of intoxication, but its effect. "If by reason of voluntary intoxication a defendant

did not form a specific intent to kill after premeditation and deliberation, an essential element of first-degree murder is absent and the offense is reduced to second-degree murder." *State v. Harvell*, 334 N.C. 356, 367, 432 S.E.2d 125, 131 (1993).

Although the evidence of the amount of alcohol consumed by the 235-pound defendant is disputed, the evidence as to the effect of intoxication does not show that defendant was incapable of forming the requisite intent. As discussed above, the evidence shows that defendant was able to give detailed directions to the witness who drove defendant and Sikes to the victim's house. According to Sikes' testimony, defendant was able to take steps to conceal his presence at the scene of the murder by taking off his shirt to keep from getting blood on it and by instructing Sikes to wipe down the doorknobs, thermostat control, and radio. According to Sikes' testimony, defendant was able to conceal or dispose of incriminating evidence by wrapping the victim's body in a quilt and taking the body and other evidence of the crime to be disposed of elsewhere, throwing some of the objects that had been used in the crime into a trash bin behind a car wash in Thomasville.

This evidence fails to show that at the time of the killing 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. Thus, we conclude that defendant failed to meet his burden of production, and the trial court committed no error in refusing to give an instruction on voluntary intoxication.

## CAPITAL SENTENCING PROCEEDING

## VI.

**[6]** Defendant contends that the trial court erred during the sentencing proceeding by allowing testimony that defendant knew he owed money as a condition of his probation and that a probation violation report was filed that stated that defendant was in default on his monthly payments. Defendant claims that this testimony was not relevant as evidence that the murder was committed for pecuniary gain because the probation violation report informing him that he was in default was not served on him until after the murder occurred. We disagree.

"Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). The testimony revealed that

the payment of restitution was a condition of the suspension of a ten-year sentence the defendant had received and that defendant was in default on his monthly payments to the court when the probation violation report was filed on 11 February 1991, prior to the 14 February 1991 murder. Thus, the report was relevant to show that defendant was actually in default at the time of the murder. This testimony tended to support the finding of the pecuniary gain aggravating circumstance because the jury could have reasonably inferred that defendant knew that he was not making the required payments and needed money to make them in order to avoid a prison term. This assignment of error is overruled.

## VII.

**[7]** Defendant contends that the trial court refused to allow both of defendant's attorneys to argue during the last or final argument of closing arguments in the sentencing phase, thereby committing reversible error. We disagree.

In *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986), we held that the trial court committed prejudicial error in refusing to permit both counsel for defendant to address the jury during defendant's closing argument at the guilt-innocence phase of the trial. Relying on *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986), we stated that when the defendant is entitled to the final argument to the jury in a capital case,

> his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of N.C.G.S. § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury.

*State v. Eury*, 317 N.C. at 516-17, 346 S.E.2d at 450. N.C.G.S. § 15A-2000(a)(4) gives the defendant or defendant's counsel the right to the last argument in a capital sentencing proceeding.

In *State v. Simpson*, 320 N.C. 313, 357 S.E.2d 332 (1987), *cert. denied*, 485 U.S. 963, 99 L. Ed. 2d 430 (1988), the trial court ruled that it would "allow the defendant to have an opening argument by one attorney and the District Attorney to have one argument and the defendant to have the closing argument by one attorney." *Id.* at 326-27, 357 S.E.2d at 339. We held that the trial court's refusal to permit both counsel for the defendant to address the jury during the defendant's statutorily guaranteed final argument in the sentencing phase of

his capital case "deprived the defendant of a substantial right and amounted to prejudicial error." *Id.* at 327, 357 S.E.2d at 340.

In *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), the trial court ruled that only one counsel for the defendant could address the jury during the defendant's final argument in the sentencing phase. We resolved the issue as follows:

> In *Eury* it was unnecessary to decide whether such error was prejudicial per se, because on the specific facts before us we concluded that "one can only speculate as to how the jury would have reacted had defendant not been deprived of her substantial right to have both counsel make closing argument." [*State v. Eury*,] 317 N.C. at 517, 346 S.E.2d at 450. We now conclude that these concerns expressed in *Eury* are common to all cases in which defendants are deprived of their right to have all of their counsel address the jury during each argument that they are entitled to make at the conclusion of either phase of a capital case. Therefore, we hold that the trial court's refusal to permit both counsel to address the jury during the defendant's final arguments constituted prejudicial error per se in both the guilt-innocence and sentencing phases.

*State v. Mitchell*, 321 N.C. at 659, 365 S.E.2d at 559.

The case at bar, however, is distinguishable. In each of the cases cited above, we held that the court erred by refusing to permit more than one defense attorney to argue last, thereby actively depriving defendant of a substantial right. In *Eury*, the defendant's counsel moved and argued that both defense counsel be permitted to address the jury during defendant's closing argument and objected to and noted exception to the court's ruling that only one could argue after the State. *State v. Eury*, 317 N.C. at 513-14, 346 S.E.2d at 448-49. In *Simpson*, the trial court made a ruling that it would allow "the defendant to have the closing argument by one attorney." *State v. Simpson*, 320 N.C. at 327, 357 S.E.2d at 339. In *Mitchell*, the defendant requested that both of his counsel be allowed to address the jury during the final argument, and the trial court ruled that only one counsel for the defendant could speak during defendant's final argument. *State v. Mitchell*, 321 N.C. at 657, 365 S.E.2d at 558.

In the case at bar, after defendant's counsel had informed the trial court that both attorneys for the defendant planned to make a closing argument to the jury and other matters were discussed, the

court asked who was going to argue first. The transcript reads as follows:

> MR. OLDHAM [Defendant's counsel]: I believe the State.
>
> THE COURT: No, sir. They just have closing. You have—
>
> MR. BUNCH [Defendant's counsel]: I'll be arguing first.
>
> THE COURT: And then the State will argue and then you can argue.

This final statement by the court is, at worst, ambiguous. It is unclear whether the judge was referring to both of defendant's attorneys or to Mr. Oldham alone when he said, "then you can argue." The court may have intended for Mr. Bunch to argue, then the State, then both defense attorneys if they should choose to do so. The transcript contains no specific reference to or request that both defense attorneys argue after the State, and defendant's attorneys never objected to the fact that both of them did not argue after the State.

The law does not require that more than one defense attorney address the jury during the defendant's final argument; it simply allows such a practice. We cannot interpret the transcript to show that the court refused to permit both of defendant's attorneys to argue after the State where they never specifically requested to do so and never objected. For the foregoing reasons, this assignment of error is overruled.

## VIII.

**[8]** Defendant next claims the prosecutor's argument was improper in two respects. We disagree. Since defendant failed to object, he must demonstrate that the prosecutor's arguments amounted to gross impropriety. *E.g.*, *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995). In making this inquiry, it must be stressed that prosecutors are given wide latitude in their argument. *Id.* Counsel have wide latitude to argue the law, the facts, and reasonable inferences supported thereby. *E.g.*, *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996).

Defendant claims that the prosecutor's argument drew inferences from a psychiatric report from Dorothea Dix Hospital, thereby using as substantive evidence a document that had been admitted only for impeachment purposes. However, the Rules of Evidence do not apply

in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992); *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 739 (1996). Therefore, the prosecutor may properly have argued reasonable inferences based on the report.

The psychiatric report was the result of a court-ordered forensic screening and determination of defendant's competency to stand trial. The report was used as part of the basis of the expert opinion testimony of Drs. Hoover and Badawi, which defendant presented during the penalty phase of the trial. The State used the report in its cross-examination of defendant's expert witnesses. Because the report was used in the penalty phase, the Rules of Evidence do not apply, and the State was properly allowed to argue reasonable inferences drawn from the testimony concerning the report. A review of the transcript reveals that the prosecutor's argument consisted of reasonable inferences drawn from facts brought out in testimony that were relevant to the sentencing determination. This assignment of error is overruled.

**[9]** Defendant also claims that the prosecutor's argument was grossly improper because it mischaracterized the pecuniary gain evidence relating to defendant's probation violation report by arguing that the probation violation report, showing defendant's need for money to avoid going to prison, was served on him three days before the murder. The report was filed three days before the murder but was not served on defendant before the murder.

The prosecutor stated, "That's why on February 14th, 1991[,] three days after this probation violation was served on him or three days after it was filed we find him at the Rhodes' house looking for money." Even if the jury could have inferred from this statement that the probation violation report was served on defendant three days before the murder, the defendant would not have been prejudiced. We have already held that the fact that the report was filed three days before the murder was relevant because it showed that defendant was actually in jeopardy of returning to prison if he failed to make the late payments, and the jury could presume that defendant was aware of the terms of his probation. We fail to find that the argument was grossly improper. This assignment of error is overruled.

## IX.

**[10]** Defendant also contends that the trial court erred in submitting to the jury, over defendant's objection, the N.C.G.S. § 15A-2000(f)(1)

statutory mitigating circumstance that defendant had no significant history of prior criminal activity. Defendant concedes that a trial court has the duty to submit a statutory mitigating circumstance when there is evidence at the trial from which a reasonable juror could find that the circumstance exists even when the defendant objects. *See 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 (1988). However, defendant argues that no rational juror could find that defendant's criminal history was insignificant. We note that

> " '[s]ignificant' means that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence. . . . In other words, the prior criminal activity could be found by the jury to be completely irrelevant to the issue of sentencing. The prior activity of the defendant could be found by the jury to be completely unworthy of consideration in arriving at its decision. There could be evidence of prior criminal activity in one case that would have no influence or effect on the jury's verdict, which, in another case, could be the pivotal evidence."

*State v. Artis*, 325 N.C. at 314-15, 384 S.E.2d at 490 (quoting *State v. Wilson*, 322 N.C. 117, 147, 367 S.E.2d 589, 609 (1988) (Martin, J., concurring)) (alteration in original).

Thus, the focus should be placed on whether the criminal history is such as to influence the jury's sentencing recommendation. A very limited record might be significant in the jury's consideration, while a lengthy criminal record might be insignificant.

> *See, e.g.*, *Wilson*, 322 N.C. 117, 367 S.E.2d 589 (error not to submit mitigating circumstance where prior criminal activity in evidence was felony conviction for kidnapping of defendant's former wife when defendant was twenty years old and involvement in theft and drugs); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (two twenty-year-old felonies properly submitted under N.C.G.S. § 15A-2000(f)(1)); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. [1164], 90 L. Ed. 2d 733 (1986) (submission of this mitigating circumstance to the jury proper, notwithstanding a record showing eighteen felony convictions, all acquired during defendant's youth), *overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

*State v. Artis*, 325 N.C. at 314-15, 384 S.E.2d at 490-91. The trial court must consider all relevant circumstances and determine whether a

rational jury could conclude that defendant had no significant history of prior criminal activity as it relates to the sentencing decision. If the court so decides and the mitigating circumstance is submitted to the jury, the jury must decide whether the evidence is sufficient to constitute a significant history of criminal activity and thus preclude a finding of that circumstance. *Id.*

Here, defendant presented evidence tending to show that he became involved in crime through a combination of psychological influences, including anxiety over separation from his father and modeling his behavior on his father's behavior. After this testimony was presented, the trial court correctly noted that the court must submit the (f)(1) mitigating circumstance if it determined that a rational juror could conclude that the defendant had no significant history of prior criminal activity, and whether the evidence is sufficient to constitute significant criminal activity is for the jury to decide. The court then informed the attorneys that it intended to submit the (f)(1) mitigating circumstance over defendant's objection. Next, the court properly allowed the State to rebut defendant's evidence by exposing defendant's prior criminal record.

In its charge to the jury, the court stated, "You should not determine whether [defendant's prior criminal history] is significant only on the basis of a number of convictions, if any, in the defendant's record. Rather, you should consider the nature and the quality of the defendant's history . . . ." The court then instructed the jury that

> you would find this mitigating circumstance if you find that the defendant's record consists of being convicted of misdemeanor larceny, misdemeanor breaking or entering, and misdemeanor larceny, two counts; misdemeanor possession of stolen property, carrying a concealed weapon—misdemeanor, misdemeanor [breaking and entering], and possession of a weapon of mass destruction, uttering forged papers, misdemeanor assault on a female, and misdemeanor assault with a deadly weapon, and that this is not a significant history of prior criminal activity.

When viewed in light of the psychological and environmental experiences of defendant, this prior criminal activity, mostly misdemeanor in character, could have been found by a reasonable juror to be insignificant in the determination of his or her sentencing recommendation in this case. Therefore, the trial court did not err in submitting the N.C.G.S. § 15A-2000(f)(1) statutory mitigating circumstance to the jury.

## X.

**[11]** Defendant contends that the trial court erred in refusing to instruct the jury peremptorily on two statutory mitigating circumstances: N.C.G.S. § 15A-2000(f)(2), that the murder was committed while the defendant was under the influence of mental or emotional disturbance, and N.C.G.S. § 15A-2000(f)(6), that 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. We disagree.

If requested, a trial court should give a peremptory instruction for any statutory or nonstatutory mitigating circumstance that is supported by uncontroverted and manifestly credible evidence. *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996). If the evidence supporting the circumstance is controverted or is not manifestly credible, the trial court should not give the peremptory instruction. *Id.* The trial court's refusal to give the peremptory instruction does not prevent defendant from presenting, or the jury from considering, any evidence in support of the mitigating circumstance.

After reviewing the record and transcripts, we conclude that the evidence supporting the two mitigating circumstances in question is controverted or is not manifestly credible. Defendant claims the mitigating circumstances were supported by evidence that he acted impulsively because of his alcohol impairment and because he suffered from attention deficit disorder. Defendant's evidence of alcohol impairment was controverted by evidence of his actions of planning and attempting to conceal the murder, as discussed in issue V above. Defendant's evidence that he acted impulsively because he suffered from attention deficit disorder was also controverted. Dr. Hoover testified that in a psychiatric report from Dorothea Dix Hospital, Dr. Lynn found that defendant was responsible for his actions at the time of the alleged crime and knew right from wrong. Dr. Badawi testified that defendant was able to conform his behavior to the school requirement and that attention deficit disorder gets easier to manage as the individual grows older. Bernice Sikes' testimony tended to show that defendant did not act impulsively. This assignment of error is overruled.

## XI.

Defendant also identifies several preservation issues, which he acknowledges this Court has previously decided adversely to his

position. We decline to overturn our prior holdings on these issues, and we find that defendant has not shown that the trial court committed prejudicial error in any of these issues, but the issues are preserved for later review by the United States Supreme Court or a lower federal court. The preservation issues and controlling case law follow.

**[12]** 1. Did the court err in denying defendant's motions to require the State to specify the theory on which the State was prosecuting the charge of first-degree murder and the aggravating circumstances on which the State intended to rely in the penalty phase? Held no error in *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 61 (1995); *State v. Baker*, 338 N.C. 526, 451 S.E.2d 574 (1994); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991).

**[13]** 2. Was the trial court's denial of defendant's motions for individual *voir dire* of the potential jurors and of motions for individual *voir dire* of particular jurors concerning what they had heard or read about the case or their potential relationships to the victim error? Held no error in *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. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).

**[14]** 3. Did the court err in denying defendant's motions to allow *voir dire* of potential jurors about their conceptions of parole eligibility or in not allowing defendant to argue to the jury that a life sentence would mean that defendant would serve life in prison? "[A] criminal defendant's status under the parole laws is irrelevant to a sentencing determination, and, as such, cannot be considered by the jury during sentencing . . . ." *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

**[15]** 4. Did the court err by not allowing defendant to argue to the jury that the court was required by law to impose a sentence of life imprisonment if the jury was unable to unanimously agree on a verdict within a reasonable time? "[I]t is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict." *State v. Smith*, 305 N.C. 691, 710, 292 S.E.2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

**[16]** 5. Is the North Carolina capital sentencing scheme, on its face or as applied, unconstitutional? North Carolina's capital sentencing scheme has consistently been held constitutional. *E.g.*, *State v.*

*Williams*, 339 N.C. 1, 452 S.E.2d 245; *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600.

**[17]** 6. Did the court err in refusing to submit as nonstatutory mitigating circumstances (a) that "defendant has been found guilty beyond a reasonable doubt of first degree murder, but the evidence does not foreclose all doubt as to his guilt"; and (b) that a "co-defendant, Bernice Sikes, has confessed to committing the crime but will not be facing the death penalty"? Held no error in *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 1013 (1995); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

**[18]** 7. Did the court err in instructing the jury that it had the duty to impose the death penalty if it found the mitigating circumstances failed to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances? Defendant's argument has been repeatedly rejected. *E.g.*, *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252; *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

**[19]** 8. Is the aggravating circumstance that the murder was especially heinous, atrocious, or cruel unconstitutionally vague and overbroad on its face and as defined by the charge to the jury? Held constitutional in *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245.

**[20]** 9. Did the court err in using its definition of mitigating circumstances instead of that requested by defendant? The instruction given by the court was substantially similar to that upheld in *State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824.

**[21]** 10. Did the trial court err in instructing the jury on the proof and mitigating value of nonstatutory mitigating circumstances? This argument was rejected 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).

**[22]** 11. Are the standards set by the North Carolina Supreme Court for its proportionality review vague and arbitrary? This Court's procedure in conducting proportionality review is not vague and arbitrary and consistently has been narrowly defined and explained. *E.g.*, *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600.

## PROPORTIONALITY REVIEW

## XII.

**[23]** We now turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. Two aggravating circumstances, N.C.G.S. § 15A-2000(e)(6), that the murder was committed for pecuniary gain, and N.C.G.S. § 15A-2000(e)(9), that the murder was especially heinous, atrocious, or cruel, were submitted to the jury without objection. The record supports the submission and finding by the jury of these two aggravating circumstances.

Defendant argues that the fact that the jury answered "no" to the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance and answered "yes" to the nonstatutory mitigating circumstance that defendant suffered from "dependent avoidance disorder with self- defeating features" shows that the jury was influenced by passion, prejudice, or other arbitrary consideration. However, the jury could have rationally found that defendant was not influenced by a mental or emotional disturbance at the time he committed the murder, while finding that he suffered from "dependent avoidance disorder with self-defeating features." Therefore, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must now turn to our final statutory duty of proportionality review.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2) (Supp. 1995). We do not conclude that the imposition of the death penalty in this case is aberrant or capricious.

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, 433 S.E.2d 144 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895 (1994). 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. *Id.* Although we review all of these cases when engaging in this statutory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.*

Defendant argues that this case is more compelling for a life sentence than either *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), or *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987). We disagree. In *Young*, the two aggravating circumstances found were pecuniary gain and committed in the commission of a robbery. In finding the death sentence disproportionate, this Court focused on the fact that there was no finding that defendant was engaged in a course of conduct including other violent crimes or that the murder was especially heinous, atrocious, or cruel. The present case is distinguishable from *Young* because, among other things, in this case the jury found the aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This case is also distinguishable from *State v. Stokes*, in which the defendant was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation as well as under the felony murder rule. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

After reviewing the cases, we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Therefore, the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. Comparing this case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. CLIFTON ALLEN WHITE

No. 94A94

(Filed 13 June 1996)

**1. Jury § 153 (NCI4th)— capital trial—jury selection—beliefs about death penalty—question not improper**

Where a prospective juror in a capital trial had indicated that his religious beliefs would impair him from imposing the death penalty, the trial court did not err by allowing the prosecutor to ask the juror, "if [the court] tells you that you should put aside your feelings of that nature and make your decision based solely on the evidence and the law, do you feel that your beliefs, based on your religion, would prevent or substantially impair the performance of your duty regardless of the instructions of the court?" since the question was fairly worded to elicit a clear statement from the juror as to whether he could temporarily set aside those religious beliefs that prevented him from following the law.

**Am Jur 2d, Criminal Law § 685; Jury §§ 199, 279.**

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

**2. Jury § 153 (NCI4th)— capital trial—jury selection—death penalty beliefs—ability to impose death penalty—question not improper**

The trial court did not abuse its discretion by allowing the prosecutor to ask a prospective juror who had indicated that his religious beliefs would impair him from imposing the death penalty whether he could, if the State met its burden of proof, come back into the courtroom, given his religious beliefs, "and stand up in front of this man and say, 'I sentence you to be executed,' " although the question overstated the juror's actual role in the sentencing process, since the question was fairly aimed at determining the extent of the juror's reservations about imposing the death penalty.

**Am Jur 2d, Criminal Law § 685; Jury §§ 199, 279.**

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

**3. Jury § 150 (NCI4th)— capital trial—death penalty beliefs—excusal for cause—no opportunity for rehabilitation**

The trial court did not err in excusing a prospective juror for cause without giving the defense an opportunity to attempt to rehabilitate him where the record shows that the juror's responses to a series of questions posed by the prosecutor and by the court clearly supported an excusal for cause because of his inability to impose the death penalty based on his religious beliefs about the sanctity of life.

**Am Jur 2d, Criminal Law § 685; Jury §§ 199, 279.**

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

**4. Criminal Law §§ 860, 1322 (NCI4th)— capital trial—jury's inquiry about parole—instruction**

When the jury inquired about parole during sentencing deliberations in a capital trial, the trial court properly instructed the jury that a defendant's eligibility for parole is not a proper matter for consideration by the jury in recommending punishment.

**Am Jur 2d, Trial § 1443.**

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

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

**5. Jury § 141 (NCI4th)— capital case—parole eligibility—voir dire not allowed**

The trial court did not err in denying defendant's pretrial motion in a capital case to permit *voir dire* regarding prospective jurors' misconceptions about parole eligibility.

**Am Jur 2d, Trial § 1443.**

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

**Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.**

**Propriety and prejudicial effect of federal court's refusal on voir dire in civil action to ask or permit questions submitted by counsel. 72 ALR Fed. 638.**

**6. Evidence and Witnesses § 345 (NCI4th)— murder and burglary trial—prior sexual assaults—similarity to present crimes—admission for limited purposes**

Evidence of two prior sexual assaults by defendant was properly admitted in a prosecution for first-degree murder and second-degree burglary under Rule of Evidence § 404(b) in order to show motive, purpose, intent, opportunity, and plan or design as to the charge of first-degree murder, and to show intent to commit murder as to the charge of second-degree burglary, where the prior assaults were similar to the present crimes in that defendant committed both of the prior assaults by placing a sharp blade to the women's throats, and the victim in this case was stabbed and her throat slashed; defendant caused clothing to be removed from both prior victims, and the victim in this case was found completely naked; defendant assaulted the prior victims after using alcohol and drugs; and defendant testified about an alcohol and drug abuse habit he had at the time of the present offenses and contended that he was incapable of forming the requisite intent for first-degree murder because he was under the influence of alcohol and drugs. N.C.G.S. § 8C-1, Rule 404(b).

**Am Jur 2d, Burglary § 63; Evidence §§ 437, 441; Homicide §§ 310, 311.**

**Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.**

**Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.**

**Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed. 781.**

**7. Evidence and Witnesses § 701 (NCI4th)— prior assaults—limiting instruction in final charge—no plain error**

The trial court did not commit plain error in its final charge in a prosecution for first-degree murder and second-degree bur-

glary because, in its limiting instruction concerning evidence of two prior assaults by defendant, the court omitted the statement that the testimony should not be considered on the issue of character where, prior to the admission of testimony about the assaults, the court instructed the jury not to consider the testimony on the issue of defendant's character, and the court clearly instructed the jury both at the time the testimony was admitted and in the final charge that it could consider the testimony only for certain limited purposes.

**Am Jur 2d, Trial §§ 1120, 1283.**

**8. Homicide § 663 (NCI4th)— first-degree murder—instructions—intent to kill—voluntary intoxication—no shifting of burden of proof**

The trial court did not improperly shift the burden of proof from the State to defendant by instructing the jury that defendant was not guilty of first-degree murder if, as a result of voluntary intoxication, he "could not," rather than "did not," have the specific intent to kill where the court correctly focused the jury's attention in considering the evidence of intoxication on the State's burden of proof by further instructing the jury that if the jury, upon considering evidence of intoxication, had a reasonable doubt as to whether defendant formulated a specific intent required for a first-degree murder conviction, the jury would find defendant not guilty of first-degree murder based on premeditation and deliberation.

**Am Jur 2d, Homicide § 517.**

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

**9. Evidence and Witnesses § 2296 (NCI4th)— psychiatric testimony—reliance on psychologist's report—cross-examination about psychologist's conclusions**

Where a defense psychiatrist relied on the report of a clinical psychologist in formulating his diagnosis, Rule of Evidence 705 permitted the prosecutor to cross-examine the psychiatrist about the psychologist's conclusions, including those with which the psychiatrist disagreed. N.C.G.S. § 8C-1, Rule 705.

**Am Jur 2d, Expert and Opinion Evidence § 187.**

**Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital reports. 55 ALR3d 551.**

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

**10. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—erroneous submission—absence of prejudice**

Assuming *arguendo* that it was error for the trial court to submit the no significant history of prior criminal activity mitigating circumstance to the jury in a capital sentencing proceeding, such error was not prejudicial to defendant where defendant originally requested submission of this circumstance but later asked to withdraw that request, and the prosecutor never argued to the jury that defendant requested that this circumstance be submitted or that defendant sought to have the jury find this circumstance. N.C.G.S. § 15A-2000(f)(1).

**Am Jur 2d, Criminal Law §§ 598, 599.**

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

**11. Criminal Law § 1343 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—instruction—constitutionality**

The trial court's pattern jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding was not unconstitutionally vague. N.C.G.S. § 15A-2000(e)(9).

**Am Jur 2d, Criminal Law §§ 598, 599; 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.**

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

**12. Criminal Law § 1323 (NCI4th)— capital sentencing—consideration of mitigating circumstances—instruction**

The trial court did not err in instructing the jury in a capital sentencing proceeding that each juror was allowed, rather than required, to consider the mitigating circumstances found to exist when weighing the aggravating circumstances against the mitigating circumstances.

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

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

**13. 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 where defendant was convicted on theories of premeditation and deliberation and of lying in wait; defendant killed the victim in her own home; the jury found the aggravating circumstance that the murder was especially heinous, atrocious, or cruel; and defendant left the victim in her bedroom unclothed, beaten, and bloody, with her hands tied behind her back.

**Am Jur 2d, Criminal Law § 628.**

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

Justice WEBB dissenting.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Saunders, J., on 4 February 1994 in Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to other convictions and sentences was allowed 30 June 1995. Heard in the Supreme Court 13 February 1996.

*Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for defendant-appellant.*

ORR, Justice.

Defendant was indicted for the murder and first-degree kidnapping of Kimberly Ewing as well as for larceny of an automobile, robbery with a dangerous weapon, and second-degree burglary. Defendant was originally capitally tried at the 17 August 1990 Criminal Session of Superior Court, Mecklenburg County, and was found guilty of all charges. In accordance with the jury's recommendation, the trial court sentenced defendant to death for the murder of Ewing. On 25 June 1992, this Court reversed defendant's convictions and remanded the case to Mecklenburg County for a new trial. *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992).

Defendant was again tried capitally and was found guilty of first-degree murder on the theories of premeditation and deliberation and of lying in wait. Defendant was also convicted again of first-degree kidnapping, larceny of an automobile, robbery with a dangerous weapon, and second-degree burglary on the basis of intent to commit larceny. In accordance with the jury's recommendation, the trial court sentenced defendant to death for the murder of Ewing and imposed consecutive forty-year sentences of imprisonment for first-degree kidnapping, robbery with a dangerous weapon, and second-degree burglary, as well as a consecutive ten-year sentence of imprisonment for felonious larceny of an automobile.

The evidence presented at trial tended to show that defendant had known Ewing for about two weeks prior to her death. They met through Ewing's roommate, Wendy Gibson, whom defendant had recently met at a bar. Defendant often visited Gibson at Ewing's home.

On the night of Friday, 5 May 1989, defendant and Ewing went to a party with some friends. At the party, Ewing became upset with defendant for handing some syringes to one of her friends who had a drug problem. Defendant left the party and went to see Gibson at the Waffle House, where she worked. Ewing also went to the Waffle House and again argued with defendant about the syringes. They eventually stopped arguing, and when Gibson got off work, the three went to Ewing's home. Gibson and Ewing went to their respective bedrooms, and defendant slept on the couch.

The next day, defendant and Ewing again argued, but ultimately seemed to resolve the dispute. The three went to several bars that afternoon and returned to Ewing's home that evening. Around 10:00 p.m., the three left Ewing's home. Ewing took defendant to a conve-

nience store near her home, and then she drove Gibson to the Waffle House for work. Ewing ate dinner at the Waffle House, then left between 11:30 p.m. and midnight to return home.

At around 11:00 p.m., defendant took a taxi cab from the convenience store to the road where Ewing's house was located. Defendant told the cab driver that he was upset with his girlfriend, who had left him and had taken everything, and he was going to "kick ass" and kill her. When defendant got out of the cab, he told the driver that he was going to steal her VCR and sell it for drugs to pay for the cab ride. The driver declined the offer and drove away.

Defendant drove Ewing's car to a friend's house early Sunday morning. He exchanged Ewing's microwave, stereo, speakers, and some jewelry for drugs. He also gave away some of Ewing's clothing. Defendant said that he had argued with his girlfriend and had taken the things that he had bought her. He later drove away in Ewing's car.

Gibson returned home Sunday morning. She discovered that Ewing's car, stereo, television, VCR, and microwave were missing. She then found Ewing dead in her bedroom. Ewing was naked and covered in blood, and her hands were tied behind her back with an electrical cord. Ewing had been cut and stabbed in the neck and beaten over the head with a blunt object. A fireplace shovel was found in her bedroom, and a paring knife was missing from the house.

On 16 May 1989, defendant was arrested in Florida. In a statement to police, defendant said he "got messed up on some drugs" one night and killed his girlfriend's roommate when she came home. He said he took a cab to Ewing's house, climbed in a window, and waited for her. When she arrived, he tied her hands behind her back. He then hit her in the head with a fireplace shovel and cut and stabbed her with a paring knife, killing her. He took the victim's money and some of her possessions, traded them for cocaine, and drove her car to Florida.

Although defendant admitted that he killed Ewing, he contended that he committed a lesser degree of homicide because he never intended to kill her and because the killing occurred during an altercation between defendant and the victim while he was under the influence of alcohol and cocaine.

## I.

Defendant first contends that the trial court erred in excusing for cause prospective juror Michael Culbreth and in failing to give the

defense an opportunity to rehabilitate him. The court excused Culbreth after he expressed reservations about imposing the death penalty based on his religious beliefs about the sanctity of life. Defendant has shown neither an abuse of discretion nor prejudice, both of which are required to establish reversible error relating to *voir dire*. *See, e.g., State v. Miller*, 339 N.C. 663, 678, 455 S.E.2d 137, 145, *cert. denied*, — U.S. —, 133 L. Ed. 2d 169 (1995).

**[1]** Defendant first argues that the questions posed to Culbreth incorrectly stated the law because they suggested that Culbreth would be required to set aside his religious scruples in making a decision as to the appropriate punishment. After Culbreth had indicated that his religious scruples would impair him from imposing the death penalty, the prosecutor asked him, "if [the court] tells you that you should put aside your feelings of that nature and make your decision based solely on the evidence and the law, do you feel that your beliefs, based on your religion, would prevent or substantially impair the performance of your duty regardless of the instructions of the Court?" Defendant claims that this question was improper because it misstated the law.

Defendant correctly notes that a juror may not be required "to leave [his] religious scruples outside the jury room during deliberations, except to the extent that the juror is, because of those religious beliefs, unable to follow the law." However, if a juror's responses reveal that he does not believe in the death penalty, the juror must be able to state clearly that he is willing to temporarily set aside his own beliefs in deference to the rule of law. *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). Because Culbreth had already indicated that his religious beliefs would impair him from imposing the death penalty, the question at issue was appropriate. The question was fairly worded to elicit a clear statement from Culbreth of whether he could temporarily set aside those religious beliefs that prevented him from following the law. Therefore, when viewed in the context of the entire *voir dire* of Culbreth, the question was proper under *State v. Brogden* and *Lockhart v. McCree*.

**[2]** Defendant next claims that the prosecutor improperly asked Culbreth whether he could, if the State met its burden of proof, "come back into the courtroom, given [his] religious beliefs, and stand up in front of this man and say, 'I sentence you to be executed?' " Defendant argues that the question was improper because if he served on the jury, Culbreth would not actually be required to stand

up and tell defendant his sentence. The trial court is charged with supervising the examination of potential jurors and has broad discretion to control the extent and manner of *voir dire*. *E.g.*, *State v. Miller*, 339 N.C. at 677, 455 S.E.2d at 144. We do not find that the court abused its discretion in allowing this question. The question, although overstating the juror's actual role in the sentencing process, was fairly aimed at determining the extent of Culbreth's reservations about imposing the death penalty.

**[3]** Defendant also claims that he should have been allowed to rehabilitate Culbreth, citing *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905.

> In *Brogden* this Court found error where the record clearly showed (i) repeated denials by the trial court of requests to rehabilitate under the mistaken belief that such requests are to be denied as a matter of law and (ii) excusal by the trial court of a prospective juror likely qualified to be seated. *Brogden*, 334 N.C. at 53, 430 S.E.2d at 913. By contrast, where the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter. *State v. Hill*, 331 N.C. 387, 403, 417 S.E.2d 765, 772 (1992)[, *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993)]. In addition, "[t]he defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). Finally, in determining whether the trial court erred in denying a request to rehabilitate, this Court considers the entire *voir dire* of the prospective juror. *Brogden*, 334 N.C. at 46, 430 S.E.2d at 909.

*State v. Gibbs*, 335 N.C. 1, 35, 436 S.E.2d 321, 340 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994).

A review of the transcript reveals that Culbreth's answers to a series of questions posed by the prosecutor and by the court clearly supported an excusal for cause. When the prosecutor asked Culbreth, "Then as a matter of conscious [sic], regardless of the facts and circumstances, do you feel that your religious, your strong religious beliefs, would prevent or substantially impair the performance of your duties as a juror, regardless of the Court's instruction?" Culbreth responded, "That is correct." When the court asked Culbreth, "So,

upon reflection, Mr. Culbreth, at this time, as you indicated earlier, you can consider [the death penalty] but if the State proved everything that it was required to prove beyond a reasonable doubt, it would be your duty to make a recommendation of the death penalty, and you could not do that because of your personal beliefs?" Culbreth responded, "Right."

We conclude that the trial court did not abuse its discretion in deciding that Culbreth's responses adequately supported an excusal for cause. We have already noted that the trial court has broad discretion in supervising *voir dire*. Also, we "must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). We hold that the trial court erred neither in the supervision of the *voir dire* of prospective juror Culbreth nor in his excusal for cause.

## II.

**[4]** Defendant next contends that the trial court erred with respect to the issue of parole eligibility. Defendant first claims that the court erred in failing to truthfully instruct the jury on the actual conditions of parole after inquiry by the jury during deliberations. We disagree.

The court gave the following instruction:

> The question of eligibility of parole is not a proper matter for you to consider in recommending punishment and it should be eliminated entirely from your considerations 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.

This instruction is a correct statement of the law and is essentially identical to the instruction approved by this Court in *State v. Brown*, 306 N.C. 151, 181-82, 293 S.E.2d 569, 588-89, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). We decline to change the rule that a defendant's eligibility for parole is not a proper matter for consideration by a jury and thus find no error with the court's instruction.

**[5]** Defendant also claims that the court erred in denying his pretrial motion to permit *voir dire* regarding venire members' misconcep-

tions about parole eligibility. He argues that some inquiry should have been allowed to ensure that jurors who are unable to follow an instruction not to consider parole eligibility can be excused from jury service. We disagree.

"The long-standing rule in this jurisdiction is that a defendant's eligibility for parole is not a proper matter for consideration by a jury." *Id.* at 182, 293 S.E.2d at 589. The court so instructed the jury. We will assume the jury followed the court's instruction and did not consider the possibility of parole in reaching its decision. *See State v. Lee*, 335 N.C. 244, 266-67, 439 S.E.2d 547, 558, *cert. denied*, — U.S. —, 130 L. Ed. 2d 162 (1994). This assignment of error is overruled.

## III.

**[6]** Defendant contends that the trial court committed reversible error in admitting evidence of prior bad acts during the guilt phase of the trial. We disagree.

Defendant argues that evidence of two prior sexual assaults allegedly committed by him was inadmissible because he was not being tried for a sexual offense or for second-degree burglary with intent to commit a sexual offense. Therefore, claims defendant, the evidence was not relevant to the charges on which defendant was being tried. However, the testimony that defendant had committed the assaults was admitted under North Carolina Rule of Evidence 404(b) to support the charges of first-degree murder and of second-degree burglary with intent to commit the murder. We note that although defendant was convicted of second-degree burglary solely on the basis of intent to commit larceny, he was tried for second-degree burglary on the bases of intent to commit murder, intent to commit first-degree kidnapping and intent to commit larceny.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1995).

The evidence of the prior assaults was sufficiently similar to the evidence in this case of first-degree murder and intent to commit

first-degree murder to be admissible under Rule 404(b). According to the testimony, defendant committed both of the prior assaults by placing a sharp blade to the women's throats. In this case, the victim was stabbed and her throat slashed. Defendant caused clothing to be removed from both victims of the prior assaults. In this case, the victim was found completely naked. Defendant assaulted both victims of the prior assaults shortly after using alcohol and/or drugs and introduced evidence showing that he had an alcohol and drug abuse problem near the time of the prior assaults. Defendant himself testified about an alcohol and drug abuse habit he had at the time of this offense and argued that he was incapable of forming the requisite intent for first-degree murder because he was under the influence of alcohol and cocaine at the time he committed the murder.

The evidence of the alleged prior assaults was presented through the testimony of Darlene Hamrick and Rhonda Lambert. Prior to each of these witnesses' testimony, the court properly instructed the jury that the testimony was not to be considered on the issue of character or to show that defendant acted in conformity therewith, but may be considered for the following limited purposes: to show motive; purpose; intent; opportunity to commit; and if there existed in defendant's mind a plan, scheme, system, or design or preparation for the offense as to the charge of first-degree murder, and to establish intent to commit murder as to the charge of second-degree burglary. We find no error in the court's admission of evidence of the alleged prior assaults for these purposes.

**[7]** Defendant also assigns error to the trial court's final charge to the jury because, in its limiting instruction concerning the evidence of the alleged prior assaults, the court omitted the statement that the testimony should not be considered on the issue of character. However, the court did instruct the jury that the testimony of prior bad acts should not be considered to show that defendant acted in conformity therewith. The court also instructed the jury that the testimony may be considered for the limited purposes only to show motive; purpose; intent; opportunity to commit; and if there existed in defendant's mind a plan, scheme, system, or design or preparation for the offense as to the charge of first-degree murder, and to establish intent to commit murder as to the charge of second-degree burglary.

Defendant failed to object to this jury instruction at trial. "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)." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). However, defendant also failed to allege plain error. Because this is a case in which the death penalty was imposed, however, this Court still may elect to review defendant's contention of error. *Id.* at 584-86, 467 S.E.2d at 31-32. Following recent precedent, we elect to review the merits of the issue under a plain error analysis. *See, e.g., id.*; *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 738 (1995).

The plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

*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.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977), *quoted in State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378. When reviewing an instruction for plain error, we must examine the entire record and determine if the alleged instructional error had a probable impact on the jury's finding of guilt. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375.

Prior to the testimony of each witness, Hamrick and Lambert, the court instructed the jury not to consider the testimony on the issue of defendant's character. Both at the time the testimony was admitted and in the final charge to the jury, the court clearly instructed the jury that it may consider the testimony only for the limited purposes stated above. Therefore, the jury was sufficiently warned of the limited purposes for which it could consider the evidence of the prior

alleged assaults. We conclude that, assuming *arguendo* that the instruction contained error, the error did not have a probable impact on the jury's finding of guilt and did not constitute plain error. This assignment of error is overruled.

## IV.

**[8]** Defendant next contends that the trial court improperly instructed the jury regarding evidence of voluntary intoxication. Defendant argues that the court shifted the burden of proof from the State to defendant by incorrectly instructing the jury that defendant was not guilty of first-degree murder if, as a result of intoxication, he "could not," rather than "did not," have the specific intent to kill. We disagree.

Again, defendant neither objected to this instruction at trial nor alleged plain error. Therefore, the issue is not preserved. N.C. R. App. P. 10(c)(4). However, because this is a capital case, we elect to review the issue for plain error. *See State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28.

When reviewing jury instructions for error, this Court views the entire instruction in context. *See, e.g., State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) ("a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge"), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). In addition to the mere "slip of the tongue" complained of by defendant, the court instructed the jury that

> upon considering the evidence with respect to the Defendant's intoxication or drugged condition, if you have a reasonable doubt as to whether the Defendant formulated a specific intent required for a conviction of first degree murder, you would not return a verdict of guilty as to that charge as it relates to premeditation and deliberation.

A review of the entire instruction reveals that the court did not shift the burden of proof. Instead, the court correctly focused the jury's attention in considering the evidence of intoxication on the State's burden of proof by instructing that if the jury had a reasonable doubt as to whether defendant formulated a specific intent required for a first-degree murder conviction, the jury would not find defendant guilty of first-degree murder based on premeditation and deliberation. After reading the instruction in its entirety, we conclude that, assuming *arguendo* that the instruction contained error, the error did

not have a probable impact on the jury's finding of guilt and did not constitute plain error.

V.

**[9]** Defendant also contends that during the penalty phase of the trial, the trial court erred by allowing the State to cross-examine the defense's expert witness in psychiatry, Dr. John Billinsky, about the work of Dr. William Varley, upon which Billinsky had relied. Dr. Varley is a clinical psychologist who conducted psychological testing on defendant and reported his conclusions to Dr. Billinsky. The prosecutor questioned Dr. Billinsky about a conclusion drawn by Dr. Varley with which Dr. Billinsky disagreed. Defendant argues that such cross-examination was improper because it allowed the prosecutor to introduce into evidence Varley's conclusions without the defense having an opportunity to cross-examine Varley, thereby violating defendant's constitutional right to confrontation. We disagree.

We have held that this type of cross-examination is proper under Rule 705 of the Rules of Evidence. *See State v. Simpson*, 341 N.C. 316, 354-55, 462 S.E.2d 191, 213 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 194 (1996); *State v. Allen*, 322 N.C. 176, 183, 367 S.E.2d 626, 629-30 (1988). Rule 705 provides in pertinent part:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C.G.S. § 8C-1, Rule 705 (1992).

> In *Allen*, 322 N.C. 176, 367 S.E.2d 626, we considered the application of Rule 705 to a situation analogous to the one presently before us. In *Allen*, the defense's expert witness relied upon material in a prior psychiatric report, yet the expert witness disagreed with the ultimate diagnosis in this report and formed his own. We reasoned that cross-examination by the State concerning the previous, differing diagnosis was proper, as Rule 705 provides for cross-examination on the underlying facts and data used by an expert in reaching his expert opinion.

*Simpson*, 341 N.C. at 355, 462 S.E.2d at 213. In *Simpson*, which presented the same issue, we found *Allen* dispositive. We further noted that

> [i]t was not necessary, as defendant argues, for [the defense expert] to rely on the actual, differing diagnosis. Pursuant to Rule 705, [the defense expert] was properly cross-examined about other diagnoses contained within psychiatric reports upon which she relied, although she ultimately formed a differing diagnosis.

*Id.*

In the case at bar, because Dr. Billinsky relied on the work of Dr. Varley, Rule 705 permitted the prosecutor to cross-examine Dr. Billinsky about Dr. Varley's conclusions, including those with which Dr. Billinsky disagreed. This assignment of error is overruled.

## VI.

**[10]** In his next assignment of error, defendant contends that the trial court erred by submitting as a mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (Supp. 1995). Defendant originally requested submission of the (f)(1) circumstance. Then, prior to the State's rebuttal at the capital sentencing proceeding, defendant asked to withdraw that request, stating that the (f)(1) circumstance was not a proper mitigating circumstance based on the evidence of defendant's criminal history. The court denied defendant's request and allowed the State to present, in rebuttal, evidence of a prior rape allegedly committed by defendant. The court instructed the jury that in considering whether the (f)(1) mitigating circumstance exists, it could consider the following criminal activity: breaking and entering in 1976; escape in 1976, 1977, and 1979; breaking and entering and larceny in 1989; driving while impaired; and the alleged sexual assaults and/or rapes against Lambert, Hamrick, and Corter. Defendant claims the jury also heard evidence of extensive illegal drug use. We conclude that the court's submission of the circumstance constituted harmless error.

> The test governing the decision to submit the (f)(1) mitigator is "whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or

> the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

*State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922 (1996). In *Walker*, we held that

> [a]ssuming *arguendo*, however, that it was error for the trial court to submit the (f)(1) no significant history mitigating circumstance based on the evidence in this case and that defendant objected to its submission, we conclude that it was not prejudicial to defendant. The fact that a statutory mitigating circumstance has been erroneously submitted by the trial court, but rejected by the jury, is not tantamount to the jury having found an aggravating circumstance.
>
> Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless. We caution our trial courts and prosecutors, however, that prosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

*Id.* at 223-24, 469 S.E.2d at 923.

In the case at bar, the prosecutor never argued to the jury that defendant requested the N.C.G.S. § 15A-2000(f)(1) circumstance be submitted or that defendant sought to have the jury find that circumstance. The prosecutor did argue that the defense would contend that the defense had met its "burden that certain mitigating circumstances exist" and that the jury must decide whether the defense has "satisfied you of the existence of any mitigating circumstances." These arguments do not focus on the (f)(1) circumstance as having been requested by defendant and, therefore, did not prejudice defendant.

For the foregoing reasons, we conclude that, assuming *arguendo* that it was error for the trial court to submit the (f)(1) no significant history of prior criminal activity mitigating circumstance based on the evidence in this case, such error was not prejudicial to defendant.

## VII.

Defendant also argues two "preservation issues." This Court has previously held adversely to defendant's position on these issues. We decline to overrule these prior decisions, and we find no prejudicial error. However, these assignments of error are preserved for any necessary future review by a federal court.

**[11]** First, defendant contends that the trial court's instruction on the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), was unconstitutionally vague. The court followed the pattern jury instruction for the (e)(9) circumstance. *See* N.C.P.I.—Crim. 150.10, at 22-24 (1995).

> Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury.

*State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993). This assignment of error is overruled.

**[12]** Second, defendant contends that the trial court erred in instructing that each juror was allowed, rather than required, to consider the mitigating circumstances found to exist when weighing the aggravating circumstances against the mitigating circumstances. This Court approved the trial court's instruction in *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. Lee*, 335 N.C. 244, 439 S.E.2d 547. This assignment of error is overruled.

## VIII.

**[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. We have examined the record, transcripts and briefs and conclude that the evidence fully supports the aggravating circumstances found by the jury, that the murder was commit-

ted while defendant was engaged in first-degree kidnapping, second-degree burglary, and robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must now turn to our final statutory duty of proportionality review.

Although defendant made no argument that his sentence is disproportionate, we are nevertheless mandated by N.C.G.S. § 15A-2000(d)(2) to conduct proportionality review. Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). 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). We do not conclude that the imposition of the death penalty in this case is excessive or disproportionate.

This case has several distinguishing factors. Defendant was convicted on the theories of premeditation and deliberation and of lying in wait. "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). Also, the victim was killed in her own home. A murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, the jury found that the murder was especially heinous, atrocious, or cruel. While this aggravating circumstance was also found in *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), in which the Court found the death sentence to be disproportionate, in *Bondurant*, the Court focused on the fact that the killing, consisting of one gunshot wound to the head, was not "torturous" and focused on the defendant's attempt to obtain

medical assistance for the victim. In this case, defendant committed no such act of compassion. Instead, defendant left the victim in her bedroom unclothed, beaten, and bloody, with her hands tied behind her back.

We conclude that the present case is more similar to certain cases in which we have found the death sentence proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life imprisonment. *E.g.*, *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996); *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995).

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. Comparing this case to similar capital cases and considering the crime and defendant, we hold that the sentence of death entered in the present case is not excessive or disproportionate. Therefore, the sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

Justice WEBB dissenting.

I dissent from the majority because I believe it was error to admit evidence of two prior sexual assaults by the defendant. I believe the only use that could be made of this evidence was to prove the defendant's character to show he acted in conformity therewith. This is in violation of N.C.G.S. § 8C-1, Rule 404(b).

The majority quotes with approval the court's instruction to the jury that it could consider the testimony only "to show motive, purpose, intent, opportunity to commit, and if there existed in defendant's mind a plan, scheme, system, or design or preparation for the offense as to the charge of first-degree murder." I do not believe evidence of previous assaults could prove any of these except by an inference that if the defendant committed the assaults he must have had these things in mind. This is what Rule 404(b) is designed to prevent.

I vote for a new trial.

STATE OF NORTH CAROLINA v. WADE LARRY COLE

No. 324A94

(Filed 13 June 1996)

**1. Constitutional Law § 287 (NCI4th)— capital murder—motion of counsel to withdraw—denied—no denial of Sixth Amendment rights**

The trial court did not err in a first-degree murder prosecution by not allowing trial counsel to withdraw where the attorneys who had represented defendant in his first trial were appointed for the retrial; counsel described in their withdrawal motion disputes with defendant; defendant had accused them of conspiring with prosecutors, alleged that they wanted to see him executed, and alleged that exhibits had been altered; defendant had become violent during their last conference, tearing pages from a tablet, ordering them from the room, and threatening to fight them; and counsel added at the hearing that defendant was not cooperative, that he had lost all confidence in them and did not believe that they had his best interest at heart, and that two other attorneys had agreed to serve as counsel. A review of the transcript and record of the trial reveals that defense counsel zealously represented their client and that any disputes were resolved before trial, and there is no indication that defendant's outburst a week prior to his trial adversely affected the representation of defendant by his attorneys at trial. Defendant's Sixth Amendment guarantee of effective assistance of counsel was not violated.

**Am Jur 2d, Attorneys at Law §§ 168, 173-175; Criminal Law §§ 984-987.**

**Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt. 36 ALR3d 1221.**

**Indigent accused's right to choose particular counsel appointed to assist him. 66 ALR3d 996.**

**Power of court to change counsel appointed for indigent, against objections of accused and original counsel. 3 ALR4th 1227.**

**2. Criminal Law § 78 (NCI4th)— capital murder—retrial—motion for change of venue—pretrial publicity**

The trial court did not abuse its discretion in a retrial for first-degree murder by denying defendant's pretrial motion for a change of venue where defendant argued he could not receive a fair trial because the county was small and publicity for the first trial had been intense, adding that it would be difficult to select a jury with black members because so many of the potential black jurors in the county knew the victims. Defendant's evidence consisted of newspaper articles on the first trial, which were essentially factual and were published almost four years prior to the retrial. Defendant also presented evidence that there were approximately 1,600 potential jurors left for the venire in his retrial, certainly a sufficient number from which to select an impartial jury of twelve.

**Am Jur 2d, Criminal Law §§ 372-397; Venue §§ 48 et seq.**

**Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.**

**Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 ALR3d 760.**

**3. Constitutional Law § 338 (NCI4th)— capital murder—no black jurors—Sixth Amendment challenge—fair cross section—no mistrial**

The trial court did not abuse its discretion by denying defendant's motions for a mistrial and change of venue in a first-degree murder retrial where no black jurors had been seated at the time the motion was made. Defendant does not allege and the evidence does not show a *Batson* violation and there was no indication that any potential juror was struck peremptorily on the basis of race or that any blacks were excluded from the jury venire; black persons were excluded from the jury for a variety of reasons ranging from health problems to views on the death penalty. Defendant essentially argues that he is entitled to have persons of his race serve on the jury that tries him, which may be a desirable goal, but is not required; what the law requires is that there be no systematic exclusion of certain constitutionally cognizable groups from the venire and that no potential juror be excluded from the petit jury on account of race or gender. Defendant here

has not shown that he did not receive the treatment that the law requires.

**Am Jur 2d, Jury §§ 7, 131-139, 156.**

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

**Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L. Ed. 2d 1078.**

**4. Jury 203 (NCI4th)— capital murder—juror initially expressing bias against defendant—rehabilitated by judge**

The trial court did not abuse its discretion in a first-degree murder retrial by refusing to excuse a juror who expressed bias against defendant where the juror first responded that he thought defendant was guilty but unambiguously responded after being questioned by the judge that he could put aside his knowledge of the case, that his knowledge of the case would not affect his ability to render a fair and impartial verdict, and that he could base his verdict on the evidence presented at trial.

**Am Jur 2d, Jury §§ 266, 267, 289-292.**

**Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel. 76 ALR2d 678.**

**5. Homicide § 333 (NCI4th)— involuntary manslaughter—stabbing—foreseeability**

The trial court did not err in a retrial for first-degree murder and manslaughter by denying defendant's motion to dismiss the charge of involuntary manslaughter. It was not necessary that defendant foresee that the victim would die from the assault, just that he foresee that some serious injury might result, and the evidence shows that the victim was a fifty-seven year-old woman and that defendant was well aware of her state of health. It is reasonable that defendant would have foreseen that two stab wounds to a woman of her age and health would be injurious to her.

**Am Jur 2d, Homicide §§ 474, 496; Trial §§ 1077-1079, 1093, 1121, 1123.**

**Necessity that trial court charge upon motive in homicide case. 71 ALR2d 1025.**

**Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter. 19 ALR4th 861.**

**6. Evidence and Witnesses § 2182 (NCI4th)— capital murder—defense expert—range of possible blood alcohol level—excluded**

The trial court did not err in a first-degree murder retrial by prohibiting a defense expert from testifying about the range of defendant's possible blood-alcohol level at the time of the alleged offense where the expert testified that he based his estimate on information received from defendant and standard considerations such as defendant's weight, but defendant testified that he did not know the quantity of liquor he consumed or the percentage of alcohol in the liquor, there was uncertainty concerning defendant's actual weight at the time of the homicides, and the expert used the average rate of metabolism in his calculations rather than defendant's actual rate, but admitted during *voir dire* that the rate of metabolism might vary considerably among individuals. There was an inadequate basis for the opinion.

**Am Jur 2d, Expert and Opinion Evidence §§ 6, 32-36, 214-216, 228-232.**

**Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood. 77 ALR2d 971.**

**7. Criminal Law § 460 (NCI4th)— capital murder—closing argument—speculation on defendant's blood alcohol level—no gross impropriety**

There was no gross impropriety in the prosecutor's closing argument in a first-degree murder retrial requiring intervention *ex mero motu* where the court had excluded expert testimony regarding the range of defendant's blood alcohol level and the prosecutor speculated as to defendant's blood alcohol level.

**Am Jur 2d, Trial §§ 533, 534, 555, 564, 615.**

**8. Criminal Law § 441 (NCI4th)— capital murder—prosecutor's argument—credibility of witness**

The trial court did not err in a first-degree murder retrial by not intervening *ex mero motu* in a portion of the prosecutor's closing argument in which it was argued that the jury should not credit an expert's testimony.

**Am Jur 2d, Trial §§ 544, 555, 695.**

**9. Evidence and Witnesses § 668 (NCI4th)— capital murder—cross-examination—no plain error**

There was no plain error in a first-degree murder retrial in allowing the State to elicit testimony on cross-examination that one of defendant's character witnesses, a police captain, knew defendant's brother because he had arrested him on a number of occasions.

**Am Jur 2d, Witnesses §§ 811-823.**

**Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR2d 952.**

**Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case. 97 ALR3d 1150.**

**10. Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstance—course of conduct**

The trial court did not err in a first-degree murder retrial by submitting as an aggravating circumstance that the murder was part of a violent course of conduct that included defendant's commission of another crime of violence against another person where there was sufficient evidence of the other crime of violence, involuntary manslaughter with regard to the murder victim's mother, and the evidence showed a violent course of conduct in that the manslaughter victim was stabbed when she attempted to intervene while defendant was stabbing her daughter. The stabbings were very close in time and defendant used the same *modus operandi* in that he stabbed them both with a knife.

**Am Jur 2d, Criminal Law §§ 598, 599, 609, 627, 628.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in**

**committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-*Gregg* cases. 64 ALR4th 837.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

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

**11. Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstances—course of conduct—instructions**

Instructions in a capital murder prosecution defining the aggravating circumstance that the murder was part of a course of conduct involving commission of a crime of violence against another person were not unconstitutionally vague.

**Am Jur 2d, Criminal Law §§ 598, 599, 609.**

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

**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.**

**12. Criminal Law § 680 (NCI4th)— capital sentencing—peremptory instruction not given—defendant's good character**

The trial court did not err in a first-degree murder retrial where defendant contended that the court erred by not giving a peremptory instruction on the nonstatutory mitigating circum-

stance that defendant is a person of good character in the community in which he lives because the court gave the instruction after initially declining. Although defendant contends that the use of the word "and" rather than "as" in the phrase "...if...you find the facts to be and all the evidence tends to show..." increased his burden of persuasion and was not a peremptory instruction, the use of "and" was a *lapsus linguae* and did not have a prejudicial effect on defendant.

**Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1350.**

**13. Criminal Law §§ 1320, 1360 (NCI4th)— capital sentencing—mitigating circumstances—only some evidence mentioned**

There was no error in a first-degree murder retrial where defendant contended that the trial court erred by limiting the causes of the mitigating circumstance of impaired capacity to certain specified causes that omitted other causes supported by the uncontradicted evidence. A trial judge's mention of only some of the evidence supporting a mitigating circumstance does not preclude jurors from considering other evidence that might support such a circumstance.

**Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1279, 1280.**

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

**14. Criminal Law § 1343 (NCI4th)— capital sentencing—especially heinous, atrocious, or cruel—not unconstitutionally vague**

The jury's determination in a first-degree murder retrial that the murder was especially heinous, atrocious, or cruel was not based on unconstitutionally vague instructions.

**Am Jur 2d, Criminal Law §§ 609, 627, 628; Trial §§ 1124, 1138.**

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

**15. Criminal Law § 1351 (NCI4th)— capital sentencing—mitigating circumstance—burden of proof—not unconstitutional**

The trial court's instructions in a first-degree murder retrial defining the burden of proof applicable to mitigating circumstances did not violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1184, 1202, 1289-1292.**

**16. Criminal Law § 1363 (NCI4th)— capital sentencing—mitigating circumstances—value**

The trial court in a first-degree murder retrial did not violate the Eighth and Fourteenth Amendments to the United States Constitution by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed it did not have mitigating value.

**Am Jur 2d, Trial §§ 1759, 1760.**

**17. Criminal Law § 1363 (NCI4th)— capital sentencing—mitigating circumstances—value**

The trial court did not err in a first-degree murder retrial by allowing jurors not to give effect to mitigating circumstances found by the jurors.

**Am Jur 2d, Trial §§ 1759, 1760.**

**18. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate**

A death sentence in a first-degree murder retrial was not disproportionate where the record fully 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 arbitrary consideration, this case is not substantially similar to any of the cases in which the death penalty was found disproportionate, and this case is similar to certain cases in which the death sentence was found proportionate. North Carolina has never found disproportionality in a case in which the defendant was found guilty for the death of more than one person, multiple aggravating circumstances were found to exist in only one case where the death sentence was found disproportionate, and the especially heinous, atrocious, or cruel

aggravating circumstance has been found as the sole aggravating circumstance in many cases where the death sentence was found proportionate.

**Am Jur 2d, Criminal Law §§ 609, 627-629.**

**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 in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-*Gregg* cases. 64 ALR4th 837.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Beaty, J., at the 31 May 1994 Criminal Session of Superior Court, Camden 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 involuntary manslaughter was allowed on 6 September 1995. Heard in the Supreme Court 13 March 1996.

*Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.*

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

FRYE, Justice.

Defendant, Wade Larry Cole, was indicted on 27 June 1988 for two counts of murder. He was tried capitally in July 1989, found guilty of one count of first-degree murder and another count of involuntary manslaughter, and sentenced to death and ten years' imprisonment. On appeal, we awarded defendant a new trial. *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992). During defendant's second capital trial, the jury returned verdicts of guilty on one count of first-degree murder and guilty on one count of involuntary manslaughter. During a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the first-degree murder conviction. The jury found as aggravating circumstances that the murder was especially heinous, atrocious, or

cruel and that the murder was part of a course of conduct involving other crimes of violence against another person. The jury also found nine of the ten statutory and nonstatutory mitigating circumstances submitted to it. The trial judge imposed a sentence of two years' imprisonment for the involuntary manslaughter conviction and, in accordance with the jury recommendation, imposed a sentence of death for the first-degree murder conviction.

Defendant makes sixteen arguments on appeal to this Court. We reject each of these arguments and conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's convictions of first-degree murder and involuntary manslaughter as well as defendant's sentences of two years' imprisonment and death.

The State's evidence presented at trial tended to show the following facts and circumstances: Theresa Graham, thirty-two years old, lived in a house in Camden County with Hattie Graham (Ms. Graham), her fifty-seven-year-old mother; defendant; and defendant's and Theresa's two children, Rod and Assunta Graham, ages eleven and two, respectively. On 22 June 1988, William Bowser, Theresa's twelve-year-old cousin, was spending the night at the Graham residence. Defendant came home from work at around 5:30 p.m. on that evening. Upon entering the house, he asked where dinner was and then hit Theresa with his fist. Defendant then went outside, and Theresa followed him asking why he had hit her. Once outside, defendant began hitting Theresa again. Her mother followed and attempted to stop defendant from striking her daughter. Defendant then struck Ms. Graham, who fell and hit her head against the door of defendant's automobile. Rod and Bowser helped Ms. Graham into the house, and she called the police.

When Deputies Lilly and Vick of the Camden County Sheriff's Department arrived at the Graham residence, defendant and Theresa were arguing. Theresa had a black eye and a bruised face. Theresa remained with the children while the deputies transported defendant and Ms. Graham in separate vehicles to the magistrate's office. At the magistrate's office, a warrant was issued for defendant's arrest for the assault of Ms. Graham. Defendant posted bond and was released with instructions that he not return to the Graham residence except to retrieve his automobile. Police officers accompanied defendant back to the residence to retrieve his automobile and stayed until defendant left shortly before midnight.

At approximately 1:36 a.m. on 23 June 1988, a police dispatcher in Elizabeth City received a call from Ms. Graham, who sounded excited and out of breath. Ms. Graham stated that her daughter was on the front porch dead and that defendant had shot her. Ms. Graham also told the dispatcher that she had tried to stop the attack but that defendant had knocked her down. The dispatcher contacted Deputy Vick, who then contacted Ms. Graham. After talking to Ms. Graham, Deputy Vick returned to the Graham residence. On his way, the deputy radioed a description of defendant and his vehicle to other law enforcement officers.

When Deputy Vick arrived at the Graham residence, he found Theresa lying face-down on the floor of the screened porch and a knife lying on top of her neck; Theresa had no pulse. The three children then ran from the house. Deputy Vick entered the house and found Ms. Graham slumped over on the couch.

After other officers arrived, Deputy Vick took the children to the Sheriff's Department and interviewed them. Bowser stated that he was asleep on the couch when he heard a loud crash and saw defendant break through the back door. According to Bowser, defendant, armed with a .22-caliber rifle, snatched the telephone cord out of the wall, went to Theresa's bedroom, pulled Theresa from the bed, and shot her. Defendant kept beating Theresa as he dragged her into the dining room. Defendant then went into the kitchen, grabbed a knife, returned to the dining room, and began stabbing Theresa. At some point, Ms. Graham tried to intervene, and defendant stabbed her. Defendant then took Theresa onto the porch and resumed stabbing her. He eventually stopped; yelled, "I told you I was going to kill you"; then left the Graham residence. After defendant left, Bowser reconnected the phone, and Ms. Graham called the Sheriff. After talking to Deputy Vick on the telephone, Ms. Graham stopped breathing. Bowser and Rod went to Rod's room and hid under the bed until they heard Deputy Vick arrive at the residence.

At 3:23 a.m., an officer saw defendant's automobile, stopped defendant, and placed him under arrest. When approached by the officer, defendant asked, "Is she dead, man?" The officer smelled alcohol on defendant's breath, and it was apparent to him that defendant had been drinking.

The medical examiner determined that Theresa had received over one hundred stab wounds to her body, some of which were defensive wounds. Twenty-eight of the stab wounds had penetrated her internal

body cavity, and many of them could have been fatal. There was one incised knife wound to the heart, as well as knife wounds to her spleen, liver, lungs, kidneys, and small intestines. Theresa also suffered two gunshot wounds: one to the right front part of her cheek and one to her left leg. The wound to her cheek was not fatal, but the gun had been placed in close proximity to her face when it was fired.

Ms. Graham had a single stab wound that penetrated her right breast as well as a stab wound to her left arm. She also had scrapes and bruises on her chest and lips. The medical examiner determined that Ms. Graham had severe coronary atherosclerosis, or hardening of the arteries of the heart, indicating heart disease. The cause of death was cardiac arrhythmia, or abnormal heart rhythm precipitated by stress; severe coronary disease was a major factor of her death. The stress on her heart was caused by the receiving of blunt-force injuries caused by blows to her lips, chest, head, right breast, and left arm.

Defendant testified at trial. He stated that when he got off work on the evening of the killings, he consumed some wine and smoked a marijuana cigarette before returning home. He and Theresa fought because she told him to "kiss her a—" when he asked about dinner. After he was released for assaulting Ms. Graham, defendant purchased more wine. After drinking the alcohol, he called Theresa, and she sounded out of breath. Defendant testified that he heard the couch squeaking, and thinking she was having sex with a neighbor, he became angry. Defendant further testified that he then drove to the house, and when he walked up, he thought he heard Theresa breathing heavily, the couch or bed squeaking, and a male voice. Defendant went back to his truck, got his rifle, and returned to the house.

According to defendant, when he got to the house, he found Theresa in bed with Bowser, and he lost control. Defendant admitted shooting and stabbing Theresa but denied stabbing Ms. Graham. He testified that when he realized what he was doing, he stopped, threw down the knife, and drove to Elizabeth City where he slept for an hour. Defendant also denied that he said, "I told you I was going to kill you," after he stabbed Theresa.

Defendant's motion to dismiss both counts of murder, made at the close of all the evidence and renewed after the jury verdicts were announced, was denied by the trial court. The jury returned verdicts finding defendant guilty of the first-degree murder of Theresa Graham and of the involuntary manslaughter of Ms. Graham.

**[1]** As his first argument, defendant contends that the trial judge erred by not allowing his trial counsel to withdraw from the case. Defense counsel filed a pretrial motion to withdraw on 23 May 1994, one week before the trial was to begin. The motion was denied. Defendant argues that the record shows that the criteria for withdrawal were amply satisfied and that his Sixth Amendment right to effective assistance of counsel, as guaranteed under the United States Constitution, was violated. We disagree that defendant's right to effective assistance of counsel was violated.

Attorneys Lennie Hughes and O.C. Abbott represented defendant in the first trial. They were appointed for his retrial. In the withdrawal motion, filed 23 May 1994, counsel described disputes that they had with defendant during their 19 and 20 May 1994 visits with him. According to his attorneys, defendant accused them of conspiring with prosecutors, alleged that they wanted to see him executed, and alleged that exhibits had been altered. During the last conference with defendant, he became violent, tore some pages from Hughes' tablet, ordered the attorneys out of the room, and threatened to fight them.

Judge James C. Davis heard the motion to withdraw, at which time counsel added that defendant was not cooperative. According to his attorneys, defendant had lost all confidence in them and did not believe they had his best interest at heart. Defense counsel also pointed out that two other attorneys had agreed to serve as counsel. When defendant was addressed by the court, he stated that counsel had not subpoenaed certain witnesses and that the evidence had been altered.

The trial court may permit counsel to withdraw where good cause is shown. N.C.G.S. § 15A-144 (1988). Assuming *arguendo* that defense counsel did show good cause for their removal, defendant has not shown that he received ineffective assistance of counsel. Our review of the transcript and record reveals that defense counsel zealously represented their client and that any disputes between counsel and defendant were resolved before trial. We find no indication that defendant refused to cooperate with his attorneys or that defendant's outburst a week prior to his capital trial adversely affected the representation of defendant by his attorneys at trial. Accordingly, we conclude that defendant's Sixth Amendment guarantee of effective assistance of counsel was not violated. *See State v. Robinson*, 330 N.C. 1, 12, 409 S.E.2d 288, 294 (1991) (denial of defense counsel's motion to withdraw where defendant failed to show prejudice).

**[2]** In his second argument, defendant contends that the trial court erred by denying his pretrial motions for a change of venue and subsequent motion for a mistrial. During pretrial motions, defendant moved for a change of venue, arguing primarily that because the county was so small and because publicity for the first trial had been so intense, defendant could not receive a fair trial. Defendant added, as an aside, that he believed that because so many potential black jurors in rural Camden County knew the victims, it would be difficult to select a jury with black members. He noted that there were no black jurors in defendant's first trial. Initially, the trial court ordered that the case be moved to Chowan County for logistical reasons but that the jurors be selected from Camden County. Subsequently, however, defendant's trial was ordered back to Camden County, again for logistical reasons.

We consider first the denial of defendant's motion for change of venue. In *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), this Court said:

> When "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 trial court must either transfer the case to another county or order a special venire. N.C.G.S. § 15A-957 (1988). . . .
>
> 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." *Id.* at 255, 307 S.E.2d at 347. 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. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). . . . The determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes,

based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law. *See State v. Abbott*, 320 N.C. 475, 478, 358 S.E.2d 365, 368 (1987).

*Yelverton*, 334 N.C. at 539-40, 434 S.E.2d at 187.

In the instant case, defendant did not prove that there was a reasonable likelihood that he could not receive a fair trial because of prejudice against him in Camden County. Although defendant makes much mention of a potential imbalance of racial composition in the trial in his brief to this Court, the thrust of his argument to the trial court was that the size of the county and the amount of pretrial publicity would make it difficult for defendant to receive a fair trial. After review of the materials presented to the trial court, we conclude that the trial court did not abuse its discretion. Defendant's evidence consisted of newspaper articles on the first trial. These articles, which appear to be essentially factual in nature, were published almost four years prior to defendant's retrial. This Court has consistently held that where defendant shows only that the publicity surrounding his case consists of such factual, noninflammatory news stories, a trial court's denial of a change of venue is proper. *See, e.g., State v. Richardson*, 308 N.C. 470, 478, 302 S.E.2d 799, 804 (1983); *State v. Oliver*, 302 N.C. 28, 36-37, 274 S.E.2d 183, 189-90 (1981). Defendant also presented evidence that there were approximately 1,600 potential jurors left for the venire in his retrial. We conclude that this was certainly a sufficient number from which to select an impartial jury of twelve. Accordingly, defendant's motion for change of venue was properly denied.

**[3]** We now address the denial of defendant's motion for mistrial. Before defendant moved for a mistrial, sixteen black jurors were interviewed by the trial court. Thirteen knew defendant, the victims, or both. Nine of the thirteen who knew defendant or the victims were struck because of their familiarity with one or both victims or defendant, three were struck because of their views on the death penalty, and one was struck peremptorily. Of the three who did not know defendant or the victims, one was excused for opposition to the death penalty and the other two for health reasons. At this point, no black person had been seated on the jury or questioned by defendant. Defendant moved for a mistrial, arguing that there was a systematic exclusion of blacks from the jury and that a cross-section of the community was not being presented. The motion was denied by the trial

court. After the denial of the motion, three more black jurors were interviewed. Two of the prospective jurors knew defendant or the victims. One was excused peremptorily by the State, and the other two prospective jurors were excused peremptorily by defendant. The process resulted in a jury consisting of no black members.

On appeal, defendant contends that the failure to grant his motion for change of venue was prejudicial in that it resulted in the systematic exclusion of black jurors in violation of the Sixth Amendment to the United States Constitution. On this basis, defendant contends that the trial court erred by not granting his motion for mistrial. It is important to emphasize that defendant does not allege and the evidence does not show that the prosecutor excused jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). In the instant case, we are not convinced that defendant was entitled to a mistrial or that the denial of defendant's motion for change of venue resulted in a violation of the Sixth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution prohibits the arbitrary exclusion of certain groups or classes of citizens from the jury in federal and state cases. Defendant concedes, however, that the United States Supreme Court has held that the fair cross-section requirement of the Sixth Amendment applies only to the selection of jury venires and panels and not to the selection of petit juries chosen from those panels or venires. *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975). He also concedes that we have adhered to this position taken by the United States Supreme Court and have not extended the fair cross-section analysis to petit juries. *State v. Fullwood*, 323 N.C. 371, 382, 373 S.E.2d 518, 525 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). The exclusion of a cognizable group from the petit jury by challenges for cause and peremptory challenges is not a violation of the right to an impartial jury as guaranteed by the Sixth Amendment. *Lockhart v. McCree*, 476 U.S. 162, 173, 90 L. Ed. 2d 137, 147-48 (1986). As defendant further concedes in his brief, this Court has stated that a defendant does not have a right to a jury with a racial composition that mirrors that of the community or even to have one member of defendant's race on the jury. *State v. Matthews*, 295 N.C. 265, 245 S.E.2d 727 (1978), *cert. denied*, 439 U.S. 1128, 59 L. Ed. 2d 90 (1979).

Defendant contends that his claim is different and, therefore, is not governed by this precedent because the denial of the change of

venue excluded blacks as effectively and as systematically as if they had been struck for cause or peremptorily on the basis of race, or as if they had been excluded from the jury pool because of race in the selection of the pool. We disagree with defendant's contention. Black persons were struck from the jury for a variety of reasons ranging from health problems to views on the death penalty. As we stated earlier, there was no indication that any potential juror was struck peremptorily on the basis of race. Nor is there any indication that blacks were excluded from the jury venire.

Our decision in this case is informed by the Court's discussion of a somewhat similar argument made by the defendant in *State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). In *Elkerson*, the defendant argued that more blacks should have been included in the venire because a disproportionate number of blacks would be removed from the jury because of their views on the death penalty. As in the instant case, defendant did not show that any discrimination on the basis of race had taken place in the drawing or selection of the jury panel. *Id.* at 664, 285 S.E.2d at 788. This Court found no error in Elkerson's trial. Like the defendant in *Elkerson*, defendant in the instant case is essentially arguing that he is entitled to have persons of his race serve on the jury that tries him. While this may be a desirable goal, the law does not require it. What the law requires is that there be no systematic exclusion of certain constitutionally cognizable groups from the venire and that no potential juror be excluded from the petit jury on account of race or gender. Defendant has not shown that he did not receive the treatment that the law requires. Accordingly, we conclude that the trial court did not err in denying defendant's motion for mistrial.

**[4]** As defendant's third argument, he contends that the trial court erred by refusing to excuse a juror who expressed bias against him. Defendant attempted to strike prospective juror Leslie Ethridge for cause. The trial judge denied defendant's request. Defendant asserts that it was clear during *voir dire* that Ethridge had formed the belief that defendant had committed the crime and, therefore, that the trial court erred by not excusing him. We disagree.

This Court has consistently held that where the fitness of a juror is arguable, "the granting of a challenge for cause rests in the sound discretion of the trial court." *State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993). In the instant case, the juror first responded that he thought defendant was guilty; however, after being

questioned by the trial court, he unambiguously responded that he could put aside his knowledge of the case, that his knowledge would not affect his ability to render a fair and impartial verdict, and that he could base his verdict on the evidence presented at trial. We conclude that the trial judge did not abuse his discretion by denying defendant's motion to strike Ethridge for cause.

**[5]** Defendant, in his fourth argument, contends that the trial court erred by denying his motion to dismiss the charge of involuntary manslaughter. The trial judge instructed the jury that it could find defendant guilty of involuntary manslaughter based on one of two theories: (1) an unlawful act not amounting to a felony, or (2) culpable negligence. At defendant's request, the trial judge also instructed the jury on foreseeability as a requirement to find proximate cause under the theory of culpable negligence. Defendant argues that there was insufficient evidence to support his conviction on the theory of culpable negligence because there was no evidence of foreseeability. The State argues that foreseeability is not an essential element of proximate cause. We disagree with the State's contention, but nonetheless find no error.

As we stated in *State v. Powell*, 336 N.C. 762, 446 S.E.2d 26 (1994):

> "Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

*Id.* at 771-72, 446 S.E.2d at 31 (quoting *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966)) (citations omitted). It was not necessary that defendant foresee that the victim, Ms. Graham, would die from the assault, just that he foresee that some serious injury might result. The evidence shows that Hattie Graham was a fifty-seven-year-old woman. Defendant had been dating her daughter for fifteen years, and they had been living under the same roof with Ms. Graham for many of those years. Defendant was well aware of the

victim's state of health. It is reasonable that defendant would have foreseen that two stab wounds to a woman of Ms. Graham's age and health would be injurious to her. Accordingly, we reject defendant's argument.

**[6]** By defendant's fifth argument, he contends that the trial court erred by prohibiting a defense expert from testifying about the range of defendant's possible blood-alcohol level at the time of the alleged offense. During the trial, defendant sought to introduce testimony of Dr. Brian Grover, an expert witness in the area of clinical psychology and substance abuse. Dr. Grover was to testify, *inter alia*, about the range of defendant's blood-alcohol level at the time of the alleged offenses. The trial court conducted *voir dire* of Dr. Grover after the State's objection to this testimony.

During *voir dire*, Dr. Grover testified that he had performed assessments of people's blood-alcohol level in the past and that he calculates the range of a person's blood-alcohol level, rather than the specific level of blood-alcohol content. His calculations account for any uncertainty about the amount of alcohol consumed. To make these calculations, he uses standard considerations such as the person's weight and rate of metabolism. In this case, in light of defendant's uncertainty about the type and bottle size of Wild Irish Rose that he consumed or the type or amount of any other alcoholic beverage he consumed, Dr. Grover calculated a range based on possible bottle sizes and types. He estimated that defendant's blood-alcohol level was between .13 and .37. He stated that he was fairly confident about this approximation.

After *voir dire*, the trial court sustained the State's objection and ruled that Dr. Grover could testify only about what defendant had told him about the amount, type, timing, and consumption of alcohol near the time of the alleged offenses, and how that consumption affected defendant's capacity to form the specific intent required for first-degree murder. The trial court found that there was too much uncertainty about defendant's blood-alcohol content and about the amount of alcohol defendant had consumed. Therefore, the court concluded that the approximation was too speculative. Defendant contends that the trial court's failure to allow Dr. Grover to testify about defendant's blood-alcohol level was erroneous.

This Court has stated that an expert witness' "[o]pinion testimony based on inadequate data should be excluded." *State v. Rogers*, 323 N.C. 658, 664, 374 S.E.2d 852, 856 (1989). Dr. Grover testified that he

based his estimation of defendant's blood-alcohol level on information received from defendant and standard considerations such as defendant's weight. However, defendant testified that he did not know the quantity of liquor he consumed or the percentage of alcohol in the liquor. There was also uncertainty concerning defendant's actual weight at the time of the homicides. Furthermore, Dr. Grover used the average rate of metabolism in his calculations, rather than defendant's actual rate of metabolism. Dr. Grover admitted during *voir dire*, however, that the rate of metabolism might vary considerably among individuals. Accordingly, we conclude that there was an inadequate basis for Dr. Grover's opinion concerning defendant's blood-alcohol level and that the trial judge properly excluded this testimony. We, therefore, reject defendant's fifth argument.

**[7]** In his sixth argument, defendant contends that the trial court erred by not intervening *ex mero motu* to prevent the prosecutor from making grossly improper statements during closing arguments. Defendant argues that the prosecutor took unfair advantage of the trial court's ruling that excluded Dr. Grover's testimony concerning the range of defendant's blood-alcohol level and that it was improper for the State to speculate as to defendant's blood-alcohol level. During closing arguments, the prosecutor argued:

> Their last straw is this alcohol thing. That's it for them. They have conceded and admitted everything else in the face of overwhelming evidence. That's where they are. That's all they've got left. Don't let them fool you. Had he been drinking? Clearly from the testimony he had. Clearly had. Moderate odor of alcohol, officer said, strong odor of alcohol. Shouldn't he have been arrested for driving while impaired? Maybe. He'd blown an eight or nine? Maybe. He consumed some alcohol. The only way we know that is we've heard people talk about odors and we've heard him say how much he consumed.

Defendant did not object during the prosector's argument and now argues that the trial court should have intervened *ex mero motu*. This Court has stated that

> [c]ontrol of counsel's argument is largely left to the trial court's discretion. When a defendant does not object to an alleged improper jury argument, the trial judge is not required to intervene *ex mero motu* unless the argument is so grossly improper as to be a denial of due process.

*State v. Howell*, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994) (citations omitted). We agree with defendant that the prosecutor's argument was speculative. There was no testimony regarding defendant's actual blood-alcohol level. Testimony at trial indicated that defendant had consumed alcoholic beverages on the day of the murder, but there was no certainty about the amount or type of alcoholic beverages consumed. Nevertheless, the prosecutor's argument was not so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*.

**[8]** Defendant also contends that the trial judge erred by not intervening *ex mero motu* in another portion of the prosecutor's closing argument. In this portion, the prosecutor argued that the jury should discredit Dr. Grover's testimony. After examination of this portion of the prosecutor's argument, we conclude that it was not improper and, therefore, certainly was not so improper as to require the judge to intervene *ex mero motu*. As we stated in *State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778, *cert. denied*, — U.S. —-, 133 L. Ed. 2d 438 (1995), "[a] prosecutor may properly argue to the jury that it should not believe a witness." *Id.* at 220, 456 S.E.2d at 784. Accordingly, defendant's sixth argument is rejected.

**[9]** As his seventh argument, defendant contends that the trial court committed plain error by permitting the State to elicit irrelevant and prejudicial testimony about defendant's brother, Prince Cole. Defendant called Captain W.O. Leary of the Elizabeth City Police Department as a character witness. On direct examination, Leary testified that he knew defendant and that he had been to defendant's home when defendant lived in Elizabeth City. Leary also testified that he knew defendant's mother and brother, who had lived with defendant in Elizabeth City. On cross-examination, the State elicited testimony that Leary knew defendant's brother, Prince, because he had arrested him on a number of occasions.

Defendant did not object to this line of questioning at trial and now asks this Court to order a new trial under the plain error rule. As we have stated previously,

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused,"

> or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . 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.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), *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 defendant's seventh argument.

**[10]** Defendant contends in his eighth argument that the trial court erred by submitting as an aggravating circumstance that the capital murder was part of a violent course of conduct that included defendant's commission of another crime of violence against another person. Defendant first contends that there was insufficient evidence of the other crime of violence. Because we have already found that there was sufficient evidence of the other crime of violence against another, to wit, involuntary manslaughter with regard to Hattie Graham, we reject this contention. Defendant also contends that the assault on Hattie Graham was not part of a single course of conduct involving the capital murder. We disagree.

Submission of the course of conduct aggravating circumstance is proper when there is evidence that the victim's murder and other violent crimes were part of a pattern of intentional acts establishing that there existed in defendant's mind a plan, scheme, or design involving both the murder of the victim and other crimes of violence. *State v. Cummings*, 332 N.C. 487, 508, 422 S.E.2d 692, 704 (1992). "In determining whether to submit the course of conduct aggravating circumstance, the trial court must consider 'a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons.' " *State v. Lee*, 335 N.C. 244, 277, 439 S.E.2d 547, 564 (quoting *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990)), *cert. denied*, — U.S. —, 130 L. Ed. 2d 162 (1994). "[T]he closer the incidents of violence are connected in time, the more likely that the acts are part of a plan, scheme, system, design or course of action." *Cummings*, 332 N.C. at 510, 422 S.E.2d at 705.

In this case, the evidence was sufficient to warrant the submission of the course of conduct aggravating circumstance to the jury. The evidence showed that defendant engaged in a violent course of conduct by stabbing Ms. Graham when she attempted to intervene while defendant was stabbing her daughter. The stabbings took place very close in time. In fact, the assault on Ms. Graham actually occurred during the attack on Theresa. Further, defendant used the same *modus operandi* in that he stabbed them both with a knife. Indeed, defendant used the same knife that he used to kill Theresa to stab her mother. The evidence clearly establishes that the two crimes were committed as a part of a course of conduct in which defendant engaged and which included the commission by defendant of a crime of violence against another person. Thus, the trial court did not err in submitting this circumstance to the jury.

**[11]** By his ninth argument, defendant contends that the trial court's instructions defining the aggravating circumstance that the murder was part of a course of conduct involving defendant's commission of a crime of violence against another person were unduly vague. We have previously held that instructions similar to the instructions given in this case were not unconstitutionally vague. *See State v. Williams*, 305 N.C. 656, 684, 292 S.E.2d 243, 260, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 224, 283 S.E.2d 732, 746 (1981); *State v. Barfield*, 298 N.C. 306, 353, 259 S.E.2d 510, 543 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We conclude that the instruction in the instant case was not unconstitutionally vague or without definition. Accordingly, we reject defendant's ninth argument.

**[12]** In his tenth argument, defendant contends that the trial court erred by not giving a peremptory instruction on the nonstatutory mitigating circumstance that defendant is a person of good character in the community in which he lives. We conclude that the trial judge did give the instruction and, therefore, that the trial court did not err.

During the capital sentencing proceeding, defendant requested a peremptory instruction on the mitigating circumstance that defendant was a person of good character and reputation in the community in which he lived. Although the trial court initially declined to give a peremptory instruction, the court subsequently instructed the jury as follows: "Accordingly, however, as to this mitigating circumstance, I charge you that if one or more of you find the facts to be *and* all the evidence tends to show, that the defendant is a person of good char-

acter and reputation in the community in which he lives, then you will answer yes to this mitigating circumstance." (Emphasis added.) Defendant contends that the instruction with the use of the word "and" instead of the word "as" increased defendant's burden of persuasion and was not a peremptory instruction. We conclude that the trial court did give defendant's requested peremptory instruction and that the use of the word "and" was a *lapsus linguae* and did not have a prejudicial effect on defendant. Accordingly, we reject defendant's tenth argument.

**[13]** In his eleventh argument, defendant contends that the trial court erred by limiting the causes of the mitigating circumstance of impaired capacity to certain specified causes that omitted other causes supported by the uncontradicted evidence. This Court has previously ruled that a trial judge's mention of only some of the evidence supporting a mitigating circumstance does not preclude jurors from considering other evidence that might support such a circumstance. *State v. Payne*, 337 N.C. 505, 526-27, 448 S.E.2d 93, 105 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). Accordingly, this argument is rejected.

## PRESERVATION ISSUES

**[14-17]** Defendant also raises four additional arguments that he concedes have been previously decided contrary to his position by this Court: (1) the jury's determination that the murder was especially heinous, atrocious, or cruel was based on unconstitutionally vague instructions; (2) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (3) the trial court violated the Eighth and Fourteenth Amendments to the United States Constitution by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed it did not have mitigating value; and (4) the trial court erred by allowing jurors not to give effect to mitigating circumstances found by the jurors.

Defendant raises these issues for the purpose of permitting this Court to re-examine 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. Accordingly, we reject these arguments.

PROPORTIONALITY REVIEW

**[18]** Having concluded that defendant's trial and separate capital sentencing proceeding were free of 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 the defendant. N.C.G.S. § 15A-2000(d)(2) (Supp. 1995).

The jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and that 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). One or more of the jurors found two of the three statutory mitigating circumstances submitted: that the defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). None of the jurors found the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct with the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(4). One or more of the jurors also found seven of the seven nonstatutory mitigating circumstances submitted. 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 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 have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316

N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds* by *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any of the cases in which the death penalty was found disproportionate. First, the defendant was convicted of killing two individuals. "We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. at 96, 388 S.E.2d at 107.

Second, multiple aggravating circumstances were found to exist in only one case where we found the death sentence disproportionate. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181. However, as we noted in *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, — U.S. —, — L. Ed. 2d —, 64 U.S.L.W. 3763 (1996):

> 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.

*Walls*, 324 N.C. at 71, 463 S.E.2d at 776. In the instant case, as with *Walls*, both the especially heinous, atrocious, or cruel and the course of conduct aggravating circumstances were found to exist by the jury.

It is also proper to compare this case to those where the death sentence was found 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 our 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 our duty." *Id.* It suffices to say here that we conclude the present case is similar to certain cases in which we have found the death sentence proportionate.

We note that the especially heinous, atrocious, or cruel aggravating circumstance has been found as the sole aggravating circumstance in many of the cases where we have found the sentence of

death proportionate. *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996); *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. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993); *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). Likewise, the aggravating circumstance was found in the instant case. As we stated in *Walls*, "[w]hile this fact is certainly not dispositive, it does serve as an indication that the sentence of death . . . is not disproportionate." *Walls*, 342 N.C. at 72, 463 S.E.2d at 777.

After comparing this case to other 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. *See, e.g., State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995); *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 478 (1996); *State v. Ingle*, 336 N.C. 617, 445 S.E.2d 880 (1994), *cert. denied*, — U.S. — 131 L. Ed. 2d 222 (1995). All of these cases involved double murders where the jury found the aggravating circumstances that the murders were part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against another person and that, as to at least one of the murders, it was especially heinous, atrocious, or cruel, and where this Court found the sentence of death proportionate. Accordingly, we cannot conclude that the death sentence in this case is excessive or disproportionate. Therefore, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

EDWARD VALVES, INC., A DELAWARE CORPORATION v. WAKE COUNTY, AND EMMETT CURL, IN HIS CAPACITY AS WAKE COUNTY ASSESSOR

No. 34PA95

(Filed 13 June 1996)

**Constitutional Law § 86 (NCI4th)— tax assessment—42 U.S.C. 1983—substantive constitutional claim—state remedies**

An action for direct judicial review of a tax assessment claim under N.C.G.S. § 105-381 which included a claim under 42 U.S.C. § 1983 based upon equal protection arising from the ad valorem assessment of engineering drawings following the sale of the assets of a company was remanded where the trial court had entered summary judgment for Wake County on Edward Valves' claim that the tax assessments on engineering drawings as administered and enforced by the county assessor under color of state law violates the company's rights under the Equal Protection Clause of the Fourteenth Amendment. Although Wake County contends that the taxpayer is not entitled to relief under section 1983 because the taxpayer has plain, adequate and complete remedies for appeals from taxes under the North Carolina Machinery Act, a taxpayer may pursue remedies under 42 U.S.C. § 1983 regardless of the state statutory or administrative remedies provided by the North Carolina Machinery Act where the taxpayer asserts civil rights violations under 42 U.S.C. § 1983 based upon a substantive constitutional right.

**Am Jur 2d, Civil Rights §§ 3, 4.**

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of a constitutional question pursuant to N.C.G.S. § 7A-30 of a unanimous decision of the Court of Appeals, 117 N.C. App. 484, 451 S.E.2d 641 (1995), reversing judgment entered by Farmer, J., on 1 December 1993 in Superior Court, Wake County. Heard in the Supreme Court 17 November 1995.

*Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for plaintiff-appellee.*

*Shelley T. Eason, Deputy County Attorney, for defendant-appellants.*

*Johnson, Mercer, Hearn & Vinegar, P.L.L.C., by Charles H. Mercer, Jr., on behalf of North Carolina Citizens for Business and Industry, amicus curiae.*

*Johnson, Mercer, Hearn & Vinegar, P.L.L.C., by Samuel H. Johnson, on behalf of Capital Associated Industries, Inc., amicus curiae.*

*Smith Helms Mulliss & Moore, L.L.P., by Charles F. Bowman, on behalf of The Charlotte Chamber of Commerce, Inc., and its Manufacturing Council, amicus curiae.*

ORR, Justice.

This case arises out of the sale of assets by plaintiff Edward Valves, Inc. ("Taxpayer") to BTR-Dunlop, Inc. and concerns the alleged overassessment of Taxpayer's personal and real property for tax year 1990. Since 1964, Taxpayer has manufactured specialty valves for the nuclear and fossil fuel power plant industry in a manufacturing facility located in Raleigh, North Carolina. Until 10 March 1989, Taxpayer operated as a part of the Measurement and Flow Control Division of Rockwell International. On that date, all of Taxpayer's assets were sold to BTR-Dunlop, Inc., and as a result of that sale, Taxpayer became a separate Delaware corporation.

Because the sale to BTR-Dunlop, Inc. was an asset sale, Taxpayer was required by federal tax law to allocate the consideration paid for all of the purchased assets. In connection with that process, the firm of American Appraisal Associates, Inc. appraised all of Taxpayer's assets, including approximately 200,000 engineering drawings Taxpayer had created since 1908 and retained at the Raleigh facility. These engineering drawings are custom-made and contain technical engineering specifications needed to create a particular valve as required by its customers. As a result of the appraisal conducted by American Appraisal, the reproduction costs of the drawings were determined to be $12,827,900. The drawings were then placed on the balance sheet and federal income tax records of the "new" Taxpayer corporation at that value.

Prior to the sale of Taxpayer to BTR-Dunlop, Inc., the cost of creating the drawings was treated as a current expense by the company and written off by the company as a current cost of doing business. Because the drawings had been expensed in the past, they had never before appeared on the company balance sheet or federal income tax records.

Under the assessment methodology used by the Wake County Assessor's Office, a business' intangible personal property and self-

created intellectual property are taxed only if they are capitalized on the business' books. Defendant Wake County takes the capitalized cost—the cost shown on the books—and depreciates that cost on a straight-line basis according to the life of the asset as determined by the taxpayer. If an asset is not reflected on the business' books, it is not taxed by Wake County.

The 1990 Wake County Business Property Listing form furnished by Wake County to Taxpayer and all other businesses did not contain a schedule for the listing of intangible business property or any instructions concerning the listing of such property. Defendant Wake County made no concerted effort to discover intangible business property. According to Richard Jones, the Assistant Assessor in charge of the Personal Property and Audit Divisions within the Assessor's Office, neither he nor the business auditors had been trained in the taxation of intangible or self-created intellectual property, nor had the State Department of Revenue or any other state department or agency provided the Assessor's Office with any written guidelines or instructional materials concerning how to tax such property. In fact, the Business Personal Property Appraisal Manual provided to defendants by the Ad Valorem Section of the Property Tax Division of the North Carolina Department of Revenue states that "intangible property may represent tremendous value; however, it is usually not subject to physical measurements." Further, the manual states that "[w]here a new owner will acquire an existing business," such an acquisition can occur as either a stock sale or an asset sale but that "[i]n each case, our first goal in making our appraisal is to use the actual historical cost." Counties are explicitly warned against "using selling price as the determinant of value." Finally, the Assessor's Office itself had adopted no written guidelines concerning the taxation of intangible and self-created intellectual property; none had been furnished to the County's auditors; and Jones was aware of no county in North Carolina, other than Wake County, which seeks to tax intangible personal property or seeks to have a taxpayer list such property.

As a result of the asset acquisition, Taxpayer's Wake County business property listing for ad valorem tax purposes for tax year 1990 changed substantially. Whereas, under the 1989 listing, Taxpayer reported fixed assets at a cost of $27,581,804, those same fixed assets, with the exception of $593,457 in additional fixed assets added in 1989 and $120,000 disposed of during that same year, were listed at a cost of $40,015,802 on Taxpayers' 1990 Wake County Business

Property Listing form. Included in those fixed assets was the $12,827,900 in engineering drawings. Taxpayer listed the engineering drawings and their values on the Wake County listing forms because it was informed by the Wake County Assessor's Office that it was required to use the new acquisition cost rather than the historical cost and that the engineering drawings had to be listed if they were on Taxpayer's books. As a result of the County's use of the new acquisition costs rather than the historical costs of the engineering drawings, Taxpayer's property tax bill increased by $390,082, with over $190,000 of the increase attributable to the value of the engineering drawings. The total amount of assessed value of all other discovered intangible property for tax year 1990 in Wake County was $2,414,926; of that amount, apart from that paid by Taxpayer, only $479,186 in total assessed value of intangible property actually had taxes paid on it. Thus, Taxpayer's engineering drawings resulted in a payment on an assessed value of more than twenty-seven times greater than the total amount paid by all other businesses on intangible property in Wake County combined for the tax year 1990.

After receiving the increased tax bill, Taxpayer attempted to file an amended listing using the historical costs, but Wake County rejected this amendment. After the Assessor's Office rejected the attempted amendment, Taxpayer timely paid the assessed taxes under protest and made a formal post-payment request for refund on the grounds that it had erroneously listed the engineering drawings.

In addition to the dispute surrounding the engineering drawings, Taxpayer had earlier served its appeal on the Wake County Board of Equalization and Review concerning its 1990 real property assessment. Notwithstanding the service of the appeal, Taxpayer was never given a hearing on the assessment of its real property by the Wake County Board of Equalization and Review because, according to defendant Wake County's records, the appeal was unperfected.

After defendant Wake County denied Taxpayer's request for refund, Taxpayer brought this action against defendant Wake County and Emmett Curl in his capacity as Wake County Assessor (collectively, "defendant Wake County") under N.C.G.S. § 105-381(2), which allows a taxpayer to seek judicial review of an assessment directly in Superior Court by paying taxes and then bringing suit against the taxing unit for refund of taxes paid if the assessment was a tax imposed through clerical error, an illegal tax, or a tax levied for an illegal purpose. In addition, Taxpayer brought the action under 42 U.S.C. § 1983.

In its complaint, Taxpayer asserts, among other allegations, the following: (1) that the taxes assessed are illegal on the grounds that defendant Wake County does not uniformly assess intangible personal property, such as Taxpayer's engineering drawings, for taxation, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the uniformity of taxation requirements of Article V, Section 2(2) of the North Carolina Constitution; (2) that Taxpayer listed the value of its engineering drawings by mistake and that such listing constituted "clerical error" justifying refund under N.C.G.S. § 105-381(a)(1)(a); (3) that the listing form used by defendant Wake County fails to specify intangible business property as taxable property to be listed; (4) that pursuant to 42 U.S.C. § 1983, the tax assessments on the engineering drawings administered and enforced by the County Assessor under color of state law violates the company's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; and (5) that Taxpayer's real property was overvalued, and the County wrongfully denied its right to appeal the 1990 real property assessment to the County Board of Equalization and Review.

The trial court entered summary judgment as to these claims in favor of defendant Wake County and dismissed the action. Subsequently, Taxpayer appealed to the Court of Appeals, contending that the engineering drawings were "self-created intangible property" which defendant Wake County taxed only when a business was sold; therefore, defendant Wake County's assessment methodology violated constitutional requirements of uniformity and equal protection.

The Court of Appeals reversed the trial court's determination, holding that defendant Wake County's "methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General Statutes § 105-284(a) and 42 [U.S.C.] § 1983." *Edward Valves, Inc. v. Wake Co.*, 117 N.C. App. 484, 493, 451 S.E.2d 641, 647 (1995). The Court of Appeals held that the tax was an illegal tax under N.C.G.S. § 105-381 because defendant Wake County's assessment methodology was based on a "purposeful, though somewhat informal, classification based upon an improper distinction between taxpayers who owned the same class of property, self-created intangibles that have been sold and similar intangibles that have not been sold." *Id.* at 492, 451 S.E.2d at 647. The Court of Appeals also reversed the trial

court's order granting summary judgment in favor of defendant Wake County on Taxpayer's real property claim. The Court of Appeals remanded the action for further proceedings consistent with its opinion.

On 20 January 1995, defendant Wake County filed a petition for a writ of supersedeas under Rule 23 of the North Carolina Rules of Appellate Procedure and a motion for temporary stay, which was allowed on 9 February 1995. On 6 February 1995, defendant Wake County filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31 and a notice of appeal of a constitutional question pursuant to N.C.G.S. § 7A-30. On 20 February 1995, Taxpayer filed a motion to dismiss defendant Wake County's appeal and response to petition for discretionary review. On 6 April 1995, this Court granted defendant's petition for discretionary review, denied Taxpayer's motion to dismiss, granted the requested writ of supersedeas of the judgment of the Court of Appeals, and dissolved the temporary stay.

On appeal to this Court, defendant Wake County presents three issues for review: With respect to the issue of whether the Court of Appeals erred in holding that the County's taxation of Taxpayer's engineering drawings constitutes an illegal tax in violation of the Equal Protection Clause of the United States Constitution, U.S. Const. amend. XIV, and uniformity requirements of Article V, Section 2(2) of the North Carolina Constitution, N.C. Const. art. V, § 2(2), we hold that discretionary review was improvidently allowed. With respect to the issue of whether the Court of Appeals erred in reversing the trial court's order dismissing Taxpayer's real property claim, we again hold that discretionary review was improvidently allowed.

The sole issue remaining before this Court is whether 42 U.S.C. § 1983 is an available avenue of relief upon which Taxpayer may base his equal protection claim. Defendant Wake County contends that Taxpayer is not entitled to relief under Section 1983 because, under *Johnston v. Gaston Co.*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985), and *Snuggs v. Stanly Co. Dep't of Pub. Health*, 310 N.C. 739, 314 S.E.2d 528 (1984), Taxpayer has "plain, adequate and complete" remedies for appeals from taxes under the North Carolina Machinery Act. According to defendant Wake County, *Snuggs* and *Johnston* hold that absent an allegation or evidence demonstrating that a taxpayer does not have "plain, adequate or complete" remedies at state law, a taxpayer who challenges his property tax assessment cannot pursue a Section 1983

claim in state court. Defendant contends that the taxpayer must seek relief by exhausting state law remedies either by pursuing administrative remedies under N.C.G.S. § 105-345 or by paying the taxes owed and then bringing suit directly in Superior Court for a refund of taxes paid pursuant to N.C.G.S. § 105-381.

Under the North Carolina Machinery Act, a taxpayer may seek relief from an unjust property tax assessment by pursuing one of two avenues: (1) administrative review under N.C.G.S. § 105-322(g)(2) and N.C.G.S. § 105-324; followed by judicial review in the North Carolina Court of Appeals, N.C.G.S. § 105-345 (1995); and then to the North Carolina Supreme Court, N.C.G.S. § 105-345.4 (1995); or, in the alternative, (2) direct judicial review in Superior Court, by paying taxes and then bringing a suit against the taxing unit for recovery of taxes paid pursuant to N.C.G.S. § 105-381.

Section 1983 of Title 42 of the United States Code provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). To state a claim under Section 1983, a plaintiff must show actual deprivation of a federal right "under color of law." *See Temkin v. Frederick Co. Comm'rs*, 945 F.2d 716, 719 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095, 117 L. Ed. 2d 417 (1992). Federal rights are those secured by the United States Constitution and federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555 (1980). "But in any given § 1983 suit, plaintiff must prove the underlying constitutional claim." *Daniels v. Williams*, 474 U.S. 327, 330, 88 L. Ed. 2d 662, 667 (1986).

In this case, Taxpayer has sought relief in its complaint from illegal taxes based upon state law under N.C.G.S. § 105-381—direct judicial review—seeking "a refund of taxes, with interest, paid on the engineering drawings." Taxpayer has also sought relief from illegal taxes based upon a separate federal law claim under 42 U.S.C. § 1983, seeking "damages in the amount of taxes illegally assessed and paid, plus interest, plus attorney's fees as provided by 42 U.S.C. § 1988." We

note that, while Taxpayer's Section 1983 claim as alleged in the complaint is based on a violation of both its equal protection *and* due process rights under the Fourteenth Amendment to the United States Constitution, on appeal, Taxpayer seeks appellate review of its Section 1983 claim based solely on equal protection.

The Equal Protection Clause of the Fourteenth Amendment provides: No State shall "deny any person within its jurisdiction the equal protection of the laws." "The purpose of the [E]qual [P]rotection [C]lause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352-53, 62 L. Ed. 1154, 1155-56 (1918) (issue involving denial of equal protection of the laws by the Michigan state board of tax assessors, which assessed the plaintiff's property for 1911 at full value but had assessed other lands throughout the county at one-third of their actual value). Thus, as early as 1918, the United States Supreme Court explicitly recognized the role of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in circumscribing the taxing authorities of the states, their political subdivisions, and their agents.

Here, the Court of Appeals held that "the Wake County methodology for taxing self-created intangible property is unconstitutional under both the Federal and State Constitutions and also violates North Carolina General Statutes § 105-284 and 42 [U.S.C.] § 1983." *Valves*, 117 N.C. App. at 493, 451 S.E.2d at 647. We have held above that discretionary review was improvidently allowed on the issue of whether the taxation of Taxpayer's engineering drawings violates its equal protection rights. To that extent, there is no question left as to the unconstitutionality of the County's assessment methodology. *Cf. Snowden v. Hughes*, 321 U.S. 1, 8, 88 L. Ed. 497, 502-03 (1944) (listing as a "familiar example" of a denial of equal protection "a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination were incorporated in and proclaimed by the state"). We turn to the question now before us—the propriety of Taxpayer's Section 1983 claim. Can Taxpayer pursue Section 1983 remedies in addition to the state law remedies provided by the North Carolina Machinery Act? We conclude that Taxpayer can.

"[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon v. Burch*, 494 U.S. 113, 124, 108 L. Ed. 2d 100, 113 (1990).

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

*Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503 (1961), *overruled on other grounds by Monell v. Department of Social Servs. of N.Y.*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978)). "[L]egislative enactments . . . [such as 42 U.S.C. § 1983] have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48, 39 L. Ed. 2d 147, 158 (1974).

However, "the type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief." *Daniels*, 474 U.S. at 337, 88 L. Ed. 2d at 672 (Stevens, J., concurring). State remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process. *See Zinermon*, 494 U.S. at 125-26, 108 L. Ed. 2d at 114; *see also Daniels*, 474 U.S. at 337, 88 L. Ed. 2d at 672-73 (Stevens, J., concurring). Under that circumstance,

> the constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute . . . .

*Zinermon*, 494 U.S. at 125-26, 108 L. Ed. 2d at 114. On the other hand, in a Section 1983 action based on a violation of a substantive constitutional right,

> "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983.

*Daniels*, 474 U.S. at 338, 88 L. Ed. 2d at 673 (Stevens, J., concurring); *see Zinermon*, 494 U.S. at 125, 108 L. Ed. 2d at 113.

Here, Taxpayer's Section 1983 action is based solely on a violation of equal protection—a substantive violation. In view of the foregoing authority, we are compelled to conclude that where, as in the present case, a taxpayer asserts civil rights violations under Section 1983 based upon a substantive constitutional right, he or she may pursue Section 1983 remedies regardless of the state statutory or administrative remedies provided for by the North Carolina Machinery Act. *See Williams v. Greene*, 36 N.C. App. 80, 84, 243 S.E.2d 156, 159 ("[A]s a general rule[,] the failure of a plaintiff to exhaust his state administrative remedies has not been considered a bar to a claim asserted under § 1983."), *disc. rev. denied and appeal dismissed*, 295 N.C. 471, 246 S.E.2d 12 (1978). We note, however, that on remand to the trial court, Taxpayer may only recover the amount of taxes illegally assessed once.

We also note that the Court of Appeals' decision that Taxpayer may attack the constitutionality of the assessment methodology in a Section 1983 action in state court was based upon language found in the cases of *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428 (2d Cir. 1989), and *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 70 L. Ed. 2d 271 (1981). However, because *Long Island Lighting Co.* and *Fair Assessment* involved the propriety of initiating a Section 1983 action in *federal court* prior to exhausting remedies available in *state court*, we find these two cases on which our Court of Appeals relied inapplicable.

For the foregoing reasons, we hold that Taxpayer's Section 1983 claim is not barred. Thus, the Court of Appeals was correct in reversing the trial court's grant of summary judgment for defendant Wake County with respect to Taxpayer's Section 1983 claim based upon equal protection.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; AFFIRMED AS MODIFIED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. WILBUR WALDRIN FRANCIS

No. 165A95

(Filed 13 June 1996)

**1. Evidence and Witnesses § 3168 (NCI4th)— testimony admitted for corroboration—significant discrepancies—harmless error**

An SBI agent's testimony in a prosecution for two murders about a pretrial statement by a State's witness contained significant discrepancies from the witness's testimony at trial and should not have been admitted as corroborative evidence where the agent testified that the witness stated in the pretrial statement that he saw defendant shoot one victim and that two to three minutes passed between two shots and the witness testified at trial that he did not see who shot either victim and that the shots were not "long apart." However, the admission of the SBI agent's testimony was harmless error in light of the plenary competent evidence of defendant's guilt of the two murders, including testimony by defendant's accomplice that defendant shot both victims, the SBI agent's unchallenged corroborative testimony regarding the accomplice's statement to the agent, and defendant's own trial testimony admitting that he and the accomplice, with weapons, followed the victims into an alley where both victims were shot.

**Am Jur 2d, Witnesses §§ 1001-1026.**

**Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR4th 1014.**

**Admissibility of impeached witness' prior consistent statement—modern state civil cases. 59 ALR4th 1000.**

**2. Evidence and Witnesses § 3111 (NCI4th)— corroborative evidence—sufficiency of limiting instruction**

The trial court's limiting instruction on corroborative evidence adequately informed the jury as to the proper use of such evidence, even though it contained no definition of substantive versus corroborative evidence, where the court instructed the jury that it could not consider a prior statement as evidence of the truth of what was said at the earlier time because it was not under oath at the trial; the court instructed that a prior consistent state-

ment could be considered with all other facts and circumstances in determining whether to believe the witness at trial; and defendant made no special request for an instruction concerning the difference between corroborative and substantive evidence.

**Am Jur 2d, Trial §§ 1219, 1288.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony—state cases. 23 ALR4th 1089.**

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 3 January 1995 Criminal Session of Superior Court, Wilson County, upon jury verdicts of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for robbery with a dangerous weapon and conspiracy to commit murder was allowed 21 April 1995. Calendared for argument in the Supreme Court 11 March 1996; determined on the briefs without oral argument.

*Michael F. Easley, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State.*

*J. Bryan Deans, Jr., for defendant-appellant.*

ORR, Justice.

During the evening of 19 December 1992, Willie Lee Howard, Jr., and Darren Stephone Hale were shot in retaliation for conducting drug transactions in the drug territory claimed by Avery Butts. Both victims died as a result of single gunshot wounds to their heads.

Defendant Wilbur Waldrin Francis was indicted for the 19 December 1992 first-degree murders of Howard and Hale. He was also indicted for robbery with a dangerous weapon and conspiracy to commit murder. He was tried capitally at the 3 January 1995 Criminal Session of Superior Court, Wilson County, and was found guilty as charged. After a capital sentencing proceeding, the jury did not find the existence of the sole aggravating circumstance submitted in each murder case and accordingly recommended sentences of life imprisonment. The trial court imposed two consecutive terms of life imprisonment. The trial court also imposed a sentence of fourteen years' imprisonment for the conviction of robbery with a dangerous weapon

and a sentence of nine years' imprisonment for the conviction of conspiracy to commit murder, both sentences to run consecutively.

Defendant appeals to this Court, asserting that he is entitled to a new trial based on the two assignments of error he raised relating to his first-degree murder convictions. Defendant raises no issues with respect to the robbery and conspiracy convictions.

A complete presentation of the evidence is unnecessary to understand the legal issues raised in this case. In summary, however, the State presented evidence tending to show the following:

Howard and Hale sold crack cocaine in the claimed cocaine territory of Avery Butts. However, they did not work for Butts, and testimony tended to show that Butts was angry that Howard and Hale had been selling cocaine on his block. State's witness Andre Joseph, who was defendant's accomplice in the murders, testified that he was present when Butts informed defendant that he wanted Howard and Hale "taken care of" and that defendant's response was, "Okay." Joseph further testified that Butts later specifically urged Joseph and defendant to kill Hale.

Joseph further testified that on 19 December 1992 at approximately 4:30 p.m., he and defendant stood outside a Minute Mart convenience store located on the corner of Lodge and Banks Streets in Wilson, North Carolina. Defendant told Joseph that he was going to "take care of" Hale and Howard for Butts. Hale and Howard arrived, and Joseph asked Hale for some change, at which time Hale pulled out a large sum of money. Joseph testified that he wanted Hale's money and that defendant told him that Hale and Howard were "going down."

Further, Joseph testified that after retrieving an unloaded .38-caliber pistol, an unloaded shotgun, and a loaded .22 LR caliber rifle and after attempting unsuccessfully to find some shells, he and defendant waited at the convenience store for Hale and Howard, who had left earlier, to return to the store. Hale and Howard arrived and went into the store, and when they exited, defendant and Joseph followed them to an alley, where Joseph pulled out a shotgun. Joseph testified that while he was searching Howard, he heard defendant say to Hale, "Didn't I tell you don't move?" and then defendant shot Hale. Defendant told Joseph to shoot Howard, but when he refused, defendant shot Howard as well. Joseph testified that he only intended

to rob the victims, that he did not know a shooting would take place, and that his shotgun was not loaded.

Defendant's evidence tended to show that he and Joseph followed the victims into the alley with the weapons but that it was Joseph, not defendant, who was the leader behind the robbery and shootings. Defense evidence also tended to show that Joseph shot Hale and Howard.

**[1]** Both of the issues raised by defendant on appeal arise from the trial court's admission of testimony by SBI Agent Jerry Ratley about statements made by State's witness Quentin Whitley during police interrogation on 20 December 1992. In his first assignment of error, defendant contends that the trial court erred by admitting evidence of Whitley's pretrial statement to Agent Ratley as corroborative evidence. Specifically, defendant argues that the statement Whitley gave to Ratley did not corroborate Whitley's testimony but was inconsistent with such testimony and therefore was improperly admitted as corroborative evidence.

> This Court has previously held that prior statements of a witness can be admitted as corroborative evidence if they tend to add weight or credibility to the witness' trial testimony. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony. *Id.* However, the State cannot introduce prior statements which "actually directly contradicted . . . sworn testimony." *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988).

*State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991).

A review of the transcripts reveals that Whitley testified at trial that he observed "the two Jamaicans," referring to defendant and Joseph, retrieve guns. Whitley stated that Joseph retrieved a shotgun from behind a bush and that defendant retrieved a gun, which was in a paper bag, from behind an air conditioner. Specifically, Whitley testified on direct examination as follows regarding the sequence of events surrounding the shootings:

> Q. And once you saw them get these guns, what, if anything, did you see the Jamaicans do?

A. NO RESPONSE

Q. Once you saw the Jamaicans get these guns from the air conditioner and the bush, what, if anything, did you see the Jamaicans do then?

A. They started to follow them into the alley.

Q. Follow who?

A. Speedy [Howard] and Darrien [Hale].

Q. And what happened then, that you saw?

A. After that, I went back across the street, and I got to the corner of the store and I seen they were robbing them.

Q. Who was robbing who?

A. The two Jamaicans were robbing Speedy and Darrien.

Q. Now, what exactly did you see?

A. As I glanced over there I seen them and I stood there for a while and I heard them while they was talking. I really couldn't get all of the conversation. After that, I looked over there and someone called me across the street. I looked back over there and I heard a gunshot and I seen Speedy fall and I took off running.

Q. Did you see anybody fire a weapon?

A. I really can't say so, I just seen the tall one standing in front of Speedy and the short one standing in front of Darrien.

Q. And where was the tall one standing when Speedy went down.

A. He was standing on the right side of the alley there.

Q. Was he standing—was the tall one standing closer to Speedy or was he standing closer to Darrien?

MR. CLARK: Objection.

THE COURT: Overruled.

A. It was like on each side of the little alley there.

Q. Where was the shorter one standing in relationship [sic] to Darrien?

A. He was standing in front of Darrien. They was standing on the left side of the alley.

Q. And where was the taller one standing?

A. They was standing on the right side.

Q. Of the alley?

A. Yes.

Q. Could you tell how close the taller one was to Speedy?

A. They was almost face to face.

. . . .

Q. Now after you heard this gunshot, what did you do?

A. I started to run and then I had stopped. I had ran across the street to a friend girl's house but I stopped there and that's when I heard the second gunshot.

Q. What else did you see at that point?

A. After that, I seen the two running, so when they were running, I ran back towards over there and I seen both of them laying there and I told them to call the police.

On cross-examination, Whitley testified as follows:

Q. And when you saw the Jamaicans walk behind them [towards the alley], the short one was in front, is that right?

A. Yes, I think so. It's hard to think because it's been so long.

Q. I understand. How far in front do you reckon he was?

A. I don't really remember, one went around the store and the other one started walking up the street.

. . . .

Q. Did you see any one of them being shot?

A. No, I told you I heard the gunshot and I ran.

. . . .

Q. You didn't see anybody fall though, did you?

A. Well, like I said, the way I seen, I glanced—when I heard the shot, I glanced at it and I ran. It wasn't really no big stare, but—

Q. Right, but you didn't see anybody fall?

A. No.

Q. Did you ever see which one of the Jamaicans shot?

A. Yes, I did, once but—

Q. Who did?

A. But I can't really say.

Q. Okay, and how long did it take between the first gunshot and the second gunshot?

A. It wasn't that long apart.

. . . .

Q. Did you tell the officers that it was three minutes between the first shot and the second shot?

A. Yes, but it was a mistake. I really wasn't thinking, my mind was going, I was thinking about what was going on.

Q. Well, you were real scared at the time weren't you?

A. Yes, sir.

Q. And you ran right after it happened?

A. Yes.

Q. You really don't know what happened when you start thinking about it, do you?

A. No, sir, when I—

MR. COLVOLO: Objection, Your Honor.

MR. CLARK: That's all I have, Judge.

On redirect examination, Whitley testified that his memory of the situation was a little bit better when he gave Agent Ratley a statement than it was at trial.

Subsequently, the State called SBI Agent Ratley, who testified that on 20 December 1992, he questioned Whitley at the police department and that Whitley picked defendant and Joseph out of a photo-

graphic lineup. Over defendant's objection, Ratley was allowed to testify on direct examination for corroboration purposes as follows with respect to the statement Whitley gave Ratley during the police interrogation:

> Q. And what, if anything, did he tell you as far as the victims were concerned when he got back to the store.
>
> A. He said he saw one of the Jamaicans go pick up a gun out of the bushes. He said that the taller Jamaican picked a gun up behind the air conditioner. He said that the tall Jamaican [defendant] had a small gun like a .22 and the other Jamaican [Joseph] had a larger gun.
>
> Q. And what else did he say about that?
>
> A. He said that after the two Jamaicans picked up the gun that Speedy and Darrien left and that the two Jamaicans followed Speedy and Darrien down Banks Street.
>
> Q. What else did he tell you he witnessed at that point?
>
> A. He said that he followed—he being Whitley—followed them to check on Speedy and Darrien because he had known Speedy since he was a kid. He said that they turned down the alley which would be Walnut Lane and he stopped. He said that at about that time he heard the Jamaican, say, "Put your hands up."
>
> Q. What else, if anything, did he tell you?
>
> A. He said that he heard the gunshot and saw Speedy fall. He said that the tall Jamaican [defendant] just stood there after he shot Speedy.
>
> Q. What else did he tell you?
>
> A. He said that—
>
> MR. CLARK: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> A. He said that he turned and walked down towards Lodge Street and he said that within two or three minutes he heard a second shot, he said he saw the two Jamaicans run behind a white house near the alley. . . .

On cross-examination, Agent Ratley testified as follows:

> Q. Did you receive a statement from him when you initially talked to him that he was very scared at the time that the shooting happened?
>
> A. No, sir, he didn't tell me that.
>
> Q. At the time that you initially interviewed him, did he tell you that he had only glanced in the direction of where the shot came from when he heard the shot?
>
> A. No, sir.
>
> Q. At the time that you initially interviewed him, did he indicate to you that as soon as he heard the shot, he went in the opposite direction?
>
> A. I don't recall him saying that.
>
> Q. At the time that you initially interviewed him, isn't it true that he told you that the first shot was followed by the second shot by two to three minutes?
>
> A. Yeah, he indicated that there was a time of about a couple of minutes between the first and second shot.
>
> Q. [] At the time that you initially interviewed him, did he tell you that he did not know who shot Speedy?
>
> A. When I interviewed him, he indicated to me that the taller of the two Jamaicans had shot Speedy.

Defendant contends that the trial court erred when it failed to sustain his objection and to allow his motion to strike the purported corroboration testimony of Agent Ratley when Ratley's testimony regarding the statement Whitley gave to him was in direct contradiction to Whitley's testimony at trial.

The first discrepancy concerns Ratley's testimony that in Whitley's prior statement, Whitley stated that he saw defendant shoot Howard. However, at trial, Whitley testified that he did not see who shot either of the victims and actually admitted on the stand under cross-examination that he did not know what happened between defendant, Joseph, and the victims. The second discrepancy concerns Ratley's testimony that in Whitley's pretrial statement, Whitley stated that two to three minutes passed between the two shots; whereas at trial, Whitley testified that the shots were not "long apart."

Defendant argues that these statements were admitted under the guise of corroborative evidence but were received as substantive evidence because the statements concern Whitley's observations at the crime scene and that Whitley's trial testimony reveals his uncertainty as to what happened at the crime scene between the victims, Joseph, and defendant. As we have previously stated, "a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence." *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984).

We see no merit in the State's contention that the prior statements testified to by Agent Ratley add to the weight and credibility of Whitley's testimony. Giving due consideration to our prior holding that " 'prior contradictory statements may not be admitted under the guise of corroborating [a witness'] testimony,' " *Burton*, 322 N.C. at 450, 368 S.E.2d at 632 (alteration in original) (emphasis omitted) (quoting *Ramey*, 318 N.C. at 469, 349 S.E.2d at 573-74), we conclude that Ratley's testimony regarding Whitley's pretrial statement contained significant discrepancies from Whitley's testimony at trial and should not have been admitted as corroborative evidence. Essentially, Whitley's testimony at trial was itself contradictory and therefore could not be corroborated.

However, "there remain[s] 'plenary competent evidence . . . from which the jury could have determined defendant's guilt of the crime[s] charged.' " *Stills*, 310 N.C. at 416, 312 S.E.2d at 447 (alteration in original). Because defendant has shown no likelihood of achieving a different result at trial had Ratley's testimony concerning Whitley's prior statement not been admitted into evidence, we hold that the trial court's error is harmless. N.C.G.S. § 15A-1443(a) (1988).

Prior to Ratley's testimony, Joseph, defendant's accomplice, testified, directly implicating the defendant in both murders. Joseph testified that defendant told him that he was going to "take care of the guys for Butts," and later, after he and defendant had seen Hale pull out a large sum of money, defendant told him that Hale and Howard were "going down." Joseph further testified that defendant gave him a .38-caliber pistol to hold while defendant went to get a shotgun. Butts, who was also at the store, left and returned with a .22 LR caliber rifle and then left prior to the shootings. After defendant returned with the shotgun, he and Joseph went somewhere to get some shells, but returned to the store without any. Joseph further tes-

tified that while he was searching Howard, defendant shot Hale. Then defendant demanded that Joseph shoot Howard, but after he refused, defendant shot Howard in the head. Joseph's in-court testimony was bolstered by Agent Ratley's unchallenged corroborative testimony regarding the contents of Joseph's 21 December 1992 statement to Agent Ratley. Finally, defendant's own trial testimony substantially matches the testimony of Joseph, as defendant admitted at trial that he and Joseph, with weapons, followed the victims into the alley where both Hale and Howard were shot.

This Court has previously applied the harmless error standard under N.C.G.S. § 15A-1443(a) to determine whether an erroneous admission of a prior statement for purposes of corroboration entitled defendant to a new trial. In *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993), this Court found the evidence sufficient, if believed by a jury, to support a conviction of first-degree murder, concluding that "the defendant has not met his burden of showing a reasonable possibility that a different result would have been reached at the trial had [the witness'] pretrial written statement been excluded." *Id.* at 193, 424 S.E.2d at 132. Additionally, in the case of *State v. Sidberry*, 337 N.C. 779, 448 S.E.2d 798 (1994), this Court stated that where the witness' "pretrial statement contained significant discrepancies from his testimony at trial and should not have been admitted as corroborative evidence," "the error was harmless" because of the substantial evidence of defendant's guilt presented at trial. *Id.* at 784, 448 S.E.2d at 802. In the instant case, we conclude that defendant has failed to show a reasonable possibility that, had the error not occurred, a different result would have been reached at trial. This assignment of error is overruled.

**[2]** In his second assignment of error, defendant contends that the challenged corroborative evidence was improperly used as substantive evidence. Defendant argues that the trial court failed to adequately inform the jury in its limiting instruction on corroborative evidence as to the proper use of such evidence. "By definition, a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence." *Stills*, 310 N.C. at 415, 312 S.E.2d at 447. Believing that the trial court's limiting instruction on corroborative evidence was confusing, defective, and misleading to the jury, defendant asserts that the trial court's instruction was "sufficiently vague as to make the proper execution of the instruction unlikely or impossible."

The trial court gave the following limiting instruction to the jury:

> All right, ladies and gentlemen of the jury, the evidence that is now being offered and evidence that will be offered is said to be evidence offered in corroboration. When evidence is received tending to show that at an earlier time a witness mad [sic] a statement which may be consistent or may conflict with the witnesses [sic] testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witnesses [sic] truthfulness in deciding whether you will believe or disbelieve the testimony of that witness at this trial. It may not be considered by you for any other purpose.

This instruction substantially comports with the instruction reviewed and approved in *State v. Detter*, 298 N.C. 604, 631, 260 S.E.2d 567, 586 (1979), and is virtually identical to the instruction recently reviewed by this Court in *State v. Williams*, 341 N.C. 1, 11, 459 S.E.2d 208, 214 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 870 (1996). We held in *Williams* that the instruction was proper, stating that "[i]t is well established that in the absence of a special request, it is not error for the trial judge to fail to explain in his charge to the jury the difference between corroborative evidence and substantive evidence." *Id.* at 13, 459 S.E.2d at 215.

Here, the purpose for which the jury could consider the evidence was adequately explained to the jury, and defendant made no special request for further instructions. *Id.* We believe that the limiting instruction given is such that reasonable minds could glean the proper use of the prior statement made by Whitley to Agent Ratley even in the absence of working definitions of substantive versus corroborative evidence. This assignment of error is overruled.

Thus, after reviewing the transcripts, record, and briefs, we find no error in defendant's assignments of error, and, accordingly, uphold his first-degree murder convictions and sentences of life imprisonment.

NO ERROR.

STATE OF NORTH CAROLINA v. DEDRIC BAYLONE BREWINGTON

No. 179A94

(Filed 13 June 1996)

**1. Homicide § 352 (NCI4th)— first-degree murder—voluntary manslaughter based on imperfect self-defense—instruction not given**

There was no prejudicial error in a first-degree murder prosecution arising from a pawn shop robbery where the trial court denied defendant's request to submit to the jury voluntary manslaughter based on imperfect self-defense as a lesser included offense of the first-degree murder. The jury found defendant guilty of first-degree murder based on felony murder with attempted robbery with a dangerous weapon as the underlying felony. Defendant's own statements contained admissions that he twice entered into an agreement to rob the pawn shop using a firearm if necessary and that during the second visit defendant decided to shoot one pawn shop employee to show that he meant business. The fact that defendant and his accomplice left without taking anything is immaterial. A reasonable possibility does not exist that the jury would have convicted defendant of voluntary manslaughter rather than felony murder.

**Am Jur 2d, Homicide §§ 514, 519, 525, 527, 529, 530; Trial § 1483.**

**Modern status of law regarding cure of error, in instruction as to one offense by conviction of higher or lesser offense. 15 ALR4th 118.**

**Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.**

**2. Evidence and Witnesses § 1723 (NCI4th)— first-degree murder—pawn shop robbery—surveillance video—slow motion—admissible**

There was no error in a first-degree murder prosecution arising from the attempted robbery of a pawn shop in which defendant claimed imperfect self-defense in the admission of a surveillance videotape which defendant contended was not a fair depiction of the scene because it showed only defendant's actions

and because it was shown in slow motion. The videotape was relevant to a critical issue in the case, the sequence of events which took place at the time of the shooting, and, in light of its probative value, the court did not abuse its discretion in permitting the jury to view the videotape in real time or in slow motion.

**Am Jur 2d, Evidence § 981.**

**Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR4th 812.**

**3. Criminal Law § 1262 (NCI4th)— assault—sentencing—mitigating factors—voluntary acknowledgement of wrongdoing**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to his arrest where defendant's statement before his arrest contains numerous attempts to deny his culpability. Also, a defendant who tries to minimize his culpability by relying on self-defense has not acknowledged wrongdoing and is not entitled to this mitigating factor.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**4. Criminal Law § 1237 (NCI4th)— assault—sentencing—mitigating factors—aid in apprehending another felon**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find the statutory mitigating factor that defendant aided in the apprehension of another felon where defendant agreed to allow officers to listen to and tape record a telephone conversation with his accomplice but would not give officers his accomplice's name, officers confirmed the identity of defendant's accomplice by observing the telephone number as defendant dialed and utilizing a cross-reference index, and defendant ultimately gave the accomplice's name to officers only after the officers had already obtained the telephone number. Defendant's assistance was not instrumental in the apprehension of the accomplice and defendant is not entitled to the benefit of this mitigator.

**Am Jur 2d, Criminal Law §§ 598, 599.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Weeks, J., at the 15 November 1993 Criminal Session of Superior Court, Cumberland County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon was allowed 24 May 1995. Heard in the Supreme Court 14 February 1996.

*Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.*

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

PARKER, Justice.

Defendant was tried capitally on a multi-count indictment charging him with first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. At the close of the evidence, the trial court quashed the count alleging attempted robbery with a dangerous weapon. The jury returned verdicts finding defendant guilty of first-degree murder under the theory of felony murder, assault with a deadly weapon inflicting serious injury, and conspiracy to commit robbery with a dangerous weapon. Based on the jury's recommendation, defendant was sentenced to life imprisonment for first-degree murder. Defendant was also sentenced to a consecutive sentence of ten years' imprisonment for assault with a deadly weapon inflicting serious injury and to a concurrent sentence of ten years' imprisonment for conspiracy to commit robbery with a dangerous weapon. We find no error.

The State's evidence tended to show that on 30 August 1992, Jimmy Ray Denning and Delmar Moses were working at East Coast Pawn, Inc., located in Cumberland County, North Carolina. For protection the pawn shop was equipped with video surveillance and Denning usually kept a "house" gun under the merchandise counter. The house gun was a .357-caliber revolver. Moses also sometimes carried a .25-caliber weapon.

During the afternoon of 30 August 1992, Moses waited on defendant and another young man, later identified as Dan Lamar Blue, when

they purchased a Nintendo tape. After the men left, Moses mentioned to Denning that he thought the men were going to rob the pawn shop. Later that same afternoon defendant and Blue again entered the pawn shop under the pretense of purchasing another Nintendo tape.

After the men made a tape selection, Denning began writing a sales ticket for the purchase. At this time Moses was standing behind Denning and to his right. While Denning was looking down at the sales ticket, he was shot from the front and fell backward onto the floor. As Denning fell he saw the gun in Moses' hand go off and then heard other shots being fired. Denning did not know who fired the shot that hit him, nor did he know who fired the subsequent shots. The next thing Denning recalled was regaining consciousness. Denning saw Moses lying on the floor. Denning picked up the house gun, which was on the floor next to Moses, put the gun on a chair, and called 911. Moses died as a result of gunshot wounds, and Denning was hospitalized for almost eight weeks.

John B. Sawyer, a deputy sheriff with the Cumberland County Sheriff's Department, testified that at approximately 2:24 p.m. on 30 August 1992, he responded to a call from a trailer at 218 Navajo Street. The trailer was located approximately two-tenths of a mile from the East Coast Pawn shop. Deputy Sawyer observed a "visibly upset" female standing outside the trailer. Deputy Sawyer entered the trailer and found defendant bleeding from the leg. Defendant told Deputy Sawyer that he had been walking in front of East Coast Pawn, that two black teenagers had come out of the store shooting, and that he had been shot. Defendant was taken to the hospital.

James K. Wright, Jr., a deputy sheriff with the Cumberland County Sheriff's Department, testified that at approximately 2:17 p.m. on 30 August 1992, he received a radio call to respond to East Coast Pawn. Deputy Wright arrived at East Coast Pawn at approximately 2:20 p.m. and found two males who appeared to be suffering from gunshot wounds.

Linwood J. Brisbane, a deputy sergeant with the Cumberland County Sheriff's Department, investigated the crime scene at East Coast Pawn. As part of the investigation Sergeant Brisbane dusted areas in the pawn shop for latent fingerprints and lifted a latent palm print from a display case. Mariann Mitchell, a fingerprint identification technician with the Fayetteville Police Department, testified that the latent palm print lifted by Sergeant Brisbane matched defendant's left palm print. Special Agent Ricky L. Navarro of the State Bureau of

Investigation confirmed Mitchell's conclusion that the palm print matched defendant's left palm print.

On 31 August 1992 Sergeant Don Smith and Lieutenant Neill Monroe of the Cumberland County Sheriff's Department took defendant from the hospital to the Law Enforcement Center. Sergeant Smith, Lieutenant Monroe, and Captain Art Binder conducted a tape-recorded interview in which defendant recounted the shooting. Defendant stated that he and his partner entered the pawn shop with the intent to commit a robbery because defendant "needed some money." Although defendant had a gun, defendant stated that he did not plan to shoot anyone; rather, the plan was to "get the guy to open the cash register," rob the shop, and then leave. The first time defendant and his partner entered the shop, defendant was "shaky" and did not want to go through with the robbery. Defendant bought a Nintendo tape, hoping that the employee behind the counter would have to open the cash register to conduct the sales transaction. When the employee did not open the register, defendant and his partner merely walked out after the purchase. After leaving the shop defendant and his partner discussed an alternative plan for the robbery. The two men agreed to enter the pawn shop a second time under the pretext of purchasing another Nintendo tape. They also agreed that if the employee did not open the cash register this time, defendant would "go ahead and pull the gun out."

Defendant stated that when he and his partner entered the pawn shop the second time, a different employee handled their purchase. Defendant feared that the switch meant that the employees suspected a robbery. Defendant whispered his suspicion to his partner, who encouraged defendant to follow through with the robbery. When the second employee did not open the cash register to conduct the sales transaction, defendant became nervous and fumbled in his pocket for his gun. Defendant stated that he was scared one of the employees might also have a gun and that he might himself be shot, so he decided to "shoot one shot, maybe, you know, in the arm or something," to let the employees know he was "not playing." Defendant then pulled out his gun and fired without aiming. Defendant fired one shot at the man handling the sale and then shot the other employee. The other employee then pulled out a gun and shot defendant in the leg. Defendant and his accomplice immediately ran out of the shop without taking any merchandise. Defendant stated that he did not want to shoot anyone and contended that it was the way "they looked at [him] . . . [,] the way that they jumped," that made him do it.

Captain Binder asked defendant to give him the name of his accomplice. Defendant refused to divulge his accomplice's name, but he did agree to call the man and engage him in a taped telephone conversation. While defendant was dialing the telephone number, Sergeant Smith and Captain Binder observed the number dialed. During the telephone conversation defendant referred to his accomplice as "Lamar." The detectives were able to obtain "Lamar's" address by using a cross-reference index. Apparently, defendant also subsequently gave Captain Binder his accomplice's last name. The detectives went to the address listed in the cross-reference index and located Dan Lamar Blue. After defendant made the telephone call to Blue, officers placed defendant under arrest.

Dr. Thomas Clark, a forensic pathologist in the Office of the Chief Medical Examiner, performed the autopsy on Moses. Dr. Clark testified that Moses died as the result of two gunshot wounds to the chest. Dr. Clark also testified that Moses could have fired a gun immediately after being shot.

**[1]** Defendant presents three assignments of error. In his first assignment of error, defendant contends that the trial court erred by denying his request to submit voluntary manslaughter, on the basis of imperfect self-defense, to the jury as a lesser-included offense of the first-degree murder.

During the guilt-innocence phase charge conference, defense counsel requested that the trial court instruct the jury on the lesser-included offense of voluntary manslaughter on the theory of imperfect self-defense. The trial court denied this request and instructed the jury that it could find defendant guilty of first-degree murder on the basis of premeditation and deliberation and/or felony murder, guilty of second-degree murder, or not guilty. The jury found defendant guilty of first-degree murder on the theory of felony murder. Defendant contends that the evidence in this case would have supported a verdict of voluntary manslaughter and that the trial court's ruling, therefore, constituted reversible error.

Defendant originally made this argument as to both theories of first-degree murder presented to the jury. However, this Court recently ruled that self-defense, whether perfect or imperfect, is not a defense to felony murder, and perfect self-defense is applicable only to certain underlying felonies. *State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995). Defendant concedes that his argument as it relates to felony murder is without merit.

Defendant nonetheless contends he is entitled to an instruction on the lesser-included offense of voluntary manslaughter since the jury was also instructed on the charge of first-degree murder under the theory of premeditation and deliberation. Assuming arguendo that defendant was entitled to such an instruction, defendant has not argued, nor can we find, any prejudice to defendant from this omission.

The jury was instructed on first-degree murder based on felony murder, first-degree murder based on premeditation and deliberation, and second-degree murder. The jury found defendant guilty of first-degree murder based on felony murder, but not based on premeditation and deliberation, and rejected second-degree murder. Attempted robbery with a dangerous weapon was the felony underlying this conviction. The evidence presented in this case as to the underlying felony charge was not in conflict and was overwhelming. *See State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994). Significantly, defendant's own statement to law-enforcement officers contains admissions that he and Blue twice entered into an agreement to rob the pawn shop by using a firearm if necessary to carry out their mission. The plan was to pull the gun if the employee did not open the register to complete the sale of the Nintendo tape. During the second visit to the pawn shop, when the employee did not open the cash register, defendant decided to shoot one shot in Denning's arm to let Denning know defendant meant business. The fact that defendant and Blue left without taking anything is immaterial to the charge of attempted robbery with a dangerous weapon. Under these facts a reasonable possibility does not exist that the jury would have convicted defendant of voluntary manslaughter rather than felony murder had the jury been given the opportunity to consider voluntary manslaughter based on imperfect self-defense as a lesser-included offense of premeditated and deliberate murder. *See* N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

**[2]** In his next assignment of error, defendant contends that the trial court erred by overruling his objection to the State's introduction of a surveillance videotape. Defendant contends the videotape was not a fair depiction of the taped scene for two reasons: (i) the videotape showed only defendant's actions during the shooting without also showing Moses' actions; and (ii) the videotape was shown in slow motion, which distorted the actual events. Defendant also contends that admission of the videotape was error because the danger of

unfair prejudice substantially outweighed the probative value of the videotape. *See* N.C.G.S. § 8C-1, Rule 403 (1992).

During the testimony of Denning, the videotape was admitted into evidence without objection. The following exchange occurred at trial:

> [PROSECUTOR]: Your Honor, at this time the State would move to introduce into evidence State's exhibit No. 1-A [the surveillance videotape] in lieu of State's exhibit No. 1 previously identified.
>
> [DEFENSE COUNSEL]: No objection.
>
> THE COURT: Without objection, State's exhibit 1-A is admitted in evidence.
>
> [PROSECUTOR]: The other items, Your Honor—
>
> THE COURT: Is it being offered in for general purposes or limited purposes?
>
> [PROSECUTOR]: Your Honor, it is being offered in as substantive evidence.
>
> THE COURT: It comes in without limitation and without objection; is that correct?
>
> [DEFENSE COUNSEL]: Yes, Sir.
>
> THE COURT: Okay.

After this exchange, but before the videotape was shown to the jury, defendant objected to the videotape being played in slow motion.

Because the videotape was admitted as substantive evidence without objection or limitation, defendant's first contention, that the videotape showed only defendant's actions, is deemed to have been waived. *See* N.C. R. App. P. 10(b)(1). However, even assuming that defendant's objection was timely, we find no merit to defendant's assignments of error as to the introduction of the surveillance videotape.

A videotape may be played for a jury if it is relevant and is not used solely to arouse the passions of the jury. *State v. French*, 342 N.C. 863, 467 S.E.2d 412 (1996). The exclusion of photographic evidence under Rule 403 of the North Carolina Rules of Evidence is generally left to the discretion of the trial court. *State v. Hennis*, 323 N.C.

279, 372 S.E.2d 523 (1988). In the instant case the videotape was relevant to a critical issue in this case: the sequence of events which took place at the time of the shooting. In response to defendant's objection to the videotape being shown in slow motion, the trial court stated:

> [T]he bottom line is that it has been placed in issue what the sequence was. And my recollection of the defendant's opening statement was that that was a significant aspect of the opening statement, that the defendant in opening statement put in issue the sequence of events of what caused, may have caused the sequence of events.
>
> Ultimately it is going to be a determination for the jury to make on the question of whether the defendant is guilty of first degree murder on the theory of premeditation and deliberation, whether he is guilty of first degree murder on the theory of felony murder, or whether he is guilty of some lesser included offense, or whether he is not guilty of any offense. And this tape is probative as to those determinations.

In light of the probative value of this videotape, we conclude the trial court did not abuse its discretion in permitting the jury to view the videotape in real time or in slow motion. This assignment of error is overruled.

**[3]** Finally, defendant contends the trial court erred in sentencing defendant for the charges of assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find two statutory mitigators that he alleges were established by "uncontradicted and manifestly credible evidence." Specifically, defendant contends that the court erred in failing to find as statutory mitigating factors that prior to his arrest, defendant voluntarily acknowledged wrongdoing in connection with the offenses pursuant to N.C.G.S. § 15A-1340.4(a)(2)(*l*)[1] and that he aided in the apprehension of another felon pursuant to N.C.G.S. § 15A-1340.4(a)(2)(h).

Under the Fair Sentencing Act, a trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and manifestly credible evidence. *State v. Jones*, 309 N.C. 214, 218-20, 306 S.E.2d 451, 454-56 (1983). In order to show that the

1. The Fair Sentencing Act, N.C.G.S. § 15A-1340.1 to -1340.7 (1988), was repealed effective 1 October 1994, when the Structured Sentencing Act became effective for offenses occurring on or after that date.

trial court erred in failing to find a mitigating factor, the defendant has the burden of showing that no other reasonable inferences can be drawn from the evidence. *Id.* at 219-20, 306 S.E.2d at 455. Defendant contends that the uncontroverted evidence in this case, that defendant went with law enforcement officers voluntarily from the hospital to the Law Enforcement Center, that he gave a taped confession to the officers, and that he was arrested after he confessed, supports the statutory mitigating factor that prior to arrest, defendant voluntarily acknowledged wrongdoing. *See* N.C.G.S. § 15A-1340.4(a)(2)(*l*) (1988).

We hold the trial court did not err in failing to find this mitigating factor. Defendant did make a statement prior to his arrest as to the conspiracy to rob the pawn shop and the subsequent shooting of Moses and Denning. However, defendant's statement contains numerous attempts by defendant to deny his culpability as to these crimes. For example, defendant stated that upon entering the pawn shop the first time, he "was kind of shaky" and "[did not] want to do it at all." Defendant stated that after the first failed attempt to rob the pawn shop, he did not want to make a second attempt, he told Blue "this ain't gonna work," and Blue then urged defendant to go ahead with the robbery. All of these statements belie defendant's contention that he acknowledged wrongdoing as to the offense of conspiracy to commit robbery. In fact, defense counsel relied on portions of defendant's statement to argue to the jury that defendant had, in fact, abandoned the conspiracy entirely. This mitigating factor was not supported by uncontradicted, substantial, and manifestly credible evidence.

Likewise, defendant did not acknowledge wrongdoing in connection with the offense of assault with a deadly weapon inflicting serious injury. In defendant's statement to officers concerning the shooting, defendant maintained he was scared that one of the employees might have a gun and that he might be shot; so he decided to "shoot one shot, . . . in the arm or something," to let the employees know he was "not playing." Defendant pulled out his gun and shot Denning and then Moses. Defendant further maintained that he did not want to shoot anyone and that it was the way "they looked at [him] . . . [,] the way that they jumped," that made him do it.

A defendant who tries to minimize his culpability by relying on self-defense has not acknowledged wrongdoing and is not entitled to the mitigating factor at issue here. *See State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985); *see also State v. Michael*, 311 N.C. 214, 316

S.E.2d 276 (1984) (statement given by the defendant in which he admitted that he had killed the victim but contended that the shooting was accidental did not constitute an admission of wrongdoing). The policy behind this mitigating factor is that defendant showed remorse for his actions. *See State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). Defendant's attempt to shift responsibility as to the assault on Denning contradicts defendant's contention that he acknowledged any wrongdoing. The trial court did not err in failing to find this mitigating factor.

**[4]** Defendant also contends the evidence in this case supports the statutory mitigating factor that defendant aided in the apprehension of another felon. *See* N.C.G.S. § 15A-1340.4(a)(2)(h). Pursuant to a request by police officers, defendant called his accomplice by telephone and engaged him in a mutually inculpatory conversation. Defendant agreed to allow officers to listen to and tape record the conversation. Defendant would not, however, give officers his accomplice's name. Officers confirmed the identity of defendant's accomplice by observing the telephone number as defendant dialed and by then utilizing a cross-reference index. Defendant ultimately gave the accomplice's name to officers, but after the officers had already obtained the phone number. Thus, defendant's assistance was not instrumental in the apprehension of Blue, and defendant is not entitled to the benefit of this statutory mitigator. *See State v. Vanstory*, 84 N.C. App. 535, 353 S.E.2d 236 (when defendant and codefendant talked with a police officer at the same time and both confessed to the crime charged, defendant's testimony was not instrumental in the apprehension of the codefendant, and defendant was not entitled to this statutory mitigator), *disc. rev. denied*, 320 N.C. 176, 358 S.E.2d 67 (1987). This assignment of error is overruled.

NO ERROR.

KIMBERLY (HICKS) YOUNG v. CHRISTOPHER ALLEN WOODALL IN HIS INDIVIDUAL CAPACITY AND AS AN OFFICER OF THE WINSTON-SALEM POLICE DEPARTMENT AND WINSTON-SALEM POLICE DEPARTMENT AND THE CITY OF WINSTON-SALEM

No. 265PA95

(Filed 13 June 1996)

**1. Automobiles and Other Vehicles § 333 (NCI4th)— pursuing officer—exemption from speed limit—gross negligence standard**

A pursuing officer is exempt from observing the speed limit pursuant to N.C.G.S. § 20-145 except when he acts with "a reckless disregard of the safety of others," which is a gross negligence standard.

**Am Jur 2d, Automobiles and Highway Traffic §§ 207, 208.**

**Necessity and propriety of instruction as to prima facie speed limit. 87 ALR2d 539.**

**2. Automobiles and Other Vehicles § 333 (NCI4th); Sheriffs, Police and Other Law Enforcement Officers § 21 (NCI4th)— pursuing officer—exceeding speed limit—absence of gross negligence**

Although plaintiff's forecast of evidence may have shown ordinary negligence by defendant police officer, it was insufficient to show gross negligence by the officer within the meaning of N.C.G.S. § 20-145 where it tended to show that the officer saw a car approaching him with only one headlight on; the officer started following this vehicle, but he did not activate his blue light and siren; the officer did not know the speed at which he was traveling, but it might have been in excess of the posted limit; a witness said she saw the officer traveling at a high rate of speed immediately before the accident; police department policy required that the blue light and siren be activated when a patrol car exceeded the speed limit; the officer entered an intersection while a yellow caution light was flashing in his direction and struck plaintiff's vehicle while it was making a left turn; and the officer testified that his headlights were on, but a witness stated that she could not tell whether they were on.

**Am Jur 2d, Automobiles and Highway Traffic §§ 207, 208.**

Justice FRYE dissenting.

Justice WHICHARD dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 132, 458 S.E.2d 225 (1995), affirming in part and reversing in part the denial of the defendants' motion for summary judgment, entered by Hooks, J., on 6 April 1994 in Superior Court, Forsyth County. Heard in the Supreme Court 11 December 1995.

This is an action for personal injury and property damage growing from an automobile accident that occurred in the City of Winston-Salem. Defendant Christopher Allen Woodall was an officer with the City of Winston-Salem Police Department and was acting in the performance of his duties at the time of the accident.

The defendants moved for summary judgment. The materials filed in support and in opposition to the summary judgment motion showed that at approximately 2:00 a.m. on 30 May 1992, defendant Woodall was on duty and driving in a northerly direction on Peters Creek Parkway when he saw a Chevrolet Camaro approaching him with only one headlight on. Officer Woodall turned and started following this vehicle. He did not activate his blue light or siren, he said, because if he had done so, it would have given the car he was following a better chance to elude him. He intended to activate his blue light when he was closer to the vehicle he was following.

Officer Woodall said he did not know the speed at which he was traveling, but it might have been in excess of forty-five miles per hour, which was the posted speed limit. The Winston-Salem Police Department's policy requires that the blue light and siren be activated when a patrol car exceeds the speed limit. A witness to the accident said she saw defendant Woodall traveling at a high rate of speed immediately before the accident. The witness said she could not "say for certain whether or not the headlights of the vehicle were on."

At the time defendant Woodall was traveling south on Peters Creek Parkway, the plaintiff was proceeding in a northerly direction on the Parkway, approaching Officer Woodall's oncoming vehicle. A yellow caution light was flashing as Officer Woodall approached the intersection. When plaintiff made a left turn at the intersection of the Parkway and Link Road, her vehicle was hit by the vehicle driven by the defendant.

The City of Winston-Salem did not have liability insurance for the first $2,000,000 of any claim against it and did not participate in a local government risk pool pursuant to N.C.G.S. § 160A-485 at the time of the accident. The superior court granted the motion for summary judgment as to the Police Department and denied the motion as to the City and Officer Woodall.

The Court of Appeals reversed in part. It held that the City and Officer Woodall were entitled to summary judgment based on sovereign immunity for claims up to and including $2,000,000 except claims of negligence based on N.C.G.S. § 20-145.

We allowed defendants' petition for discretionary review.

*Wright, Parrish, Newton & Rabil, L.L.P., by Melvin F. Wright, Jr., and Nils E. Gerber, for plaintiff-appellee.*

*Womble Carlyle Sandridge & Rice, P.L.L.C., by Gusti W. Frankel, for defendants-appellants.*

*AnnFrances M. Shaver, High Point Police Attorney, amicus curiae for North Carolina Association of Police Attorneys.*

WEBB, Justice.

The Court of Appeals' opinion in this case is grounded in large part on its reading of N.C.G.S. § 20-145, which provides in part:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . . This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

N.C.G.S. § 20-145 (1993). The Court of Appeals, relying on *Bullins v. Schmidt,* 322 N.C. 580, 369 S.E.2d 601 (1988), and *Goddard v. Williams,* 251 N.C. 128, 110 S.E.2d 820 (1959), held that the last sentence of section 20-145, which makes police officers liable for "the consequence[s] of a reckless disregard of the safety of others," holds such officers to the standard of care that a reasonably prudent person would exercise in the discharge of his duties. This is ordinary negligence. The Court of Appeals held that because Officer Woodall could

be liable for ordinary negligence, he could be sued in his official capacity, which means the City would be liable for his tort.

The Court of Appeals' reading of *Bullins* and *Goddard* is certainly reasonable. In *Goddard*, we granted a new trial when the court charged the jury "that the defendant would not be liable upon any aspect of negligence unless you . . . find . . . that the conduct of the officer . . . was intentional, purposeful, and made for the purpose of injuring the plaintiff." *Goddard*, 251 N.C. at 132, 110 S.E.2d at 823. In that case, we said, "[A]n officer is liable for his negligent acts as well as his wilful and wanton acts." *Id.* at 133, 110 S.E.2d at 824.

In *Bullins*, the plaintiff's intestate was killed when his automobile was hit by a vehicle being driven at a high rate of speed in an attempt to avoid the police. In *Bullins*, we distinguished *Goddard* on the ground that the collision in *Goddard* was between the pursuing officer and the plaintiff. We said in *Bullins* that when the pursuing law enforcement vehicle does not collide with another vehicle, the statutory standard of reckless disregard of the safety of others applies. *Bullins*, 322 N.C. at 582, 369 S.E.2d at 603.

**[1]** We can see no good reason why there should be a distinction between the standards of care based on whether the officer's vehicle was in the collision. The statute makes no such distinction. The statute sets the standard, and it is gross negligence. In *Goddard*, the Court seemed to rely on that part of the first sentence of the section which says the speed limit shall not apply to vehicles "operated with due regard for safety under the direction of the police." We held, relying on this phrase, that an officer is liable if the jury finds he is either negligent or that he was proceeding in reckless disregard of the safety of others. *Goddard*, 251 N.C. at 133, 110 S.E.2d at 824. We do not believe the General Assembly intended to provide two different standards of care in one section of the statute. It seems clear to us that the standard of care intended by the General Assembly involves the reckless disregard of the safety of others, which is gross negligence.

The plaintiff argues that whatever the intent of the General Assembly when the statute was adopted, this Court held in *Goddard*, which was decided in 1959, that the standard of care provided by the statute is an ordinary negligence standard. *Id.* at 133, 110 S.E.2d at 824. The General Assembly has not amended the statute to change this result, and it is now settled as the law, says the plaintiff. The failure of a legislature to amend a statute which has been interpreted by

a court is some evidence that the legislature approves of the court's interpretation. *But cf. DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 490 (1987) (stating that legislative inaction is not necessarily evidence of legislative approval, and that the inquiry must focus on the statute itself). In this case, the meaning of the statute is clear. We do not need this canon of construction. In order to have recovered against Officer Woodall, the plaintiff would have to have proved Officer Woodall was grossly negligent. So far as *Goddard* is inconsistent with this case, it is overruled.

**[2]** Applying the gross negligence standard, we hold the superior court should have granted Officer Woodall's motion for summary judgment. His following the Camaro without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent. Officer Woodall testified his headlights were on. A witness said she could not tell whether they were on. This is not evidence that the headlights were off. The forecast of evidence did not show Officer Woodall was grossly negligent. If this evidence had been introduced at trial, the plaintiff's claim against Officer Woodall should have been dismissed. Summary judgment should have been allowed in his favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979).

If Officer Woodall is not liable, the City is not liable under the doctrine of *respondeat superior*. Summary judgment should have been allowed for the City.

The defendants and the *amicus curiae* brief filed by the North Carolina Association of Police Attorneys advance several public policy arguments in favor of absolute immunity. The parties argue that public policy is against subjecting a police officer in this situation to a trial. Absolute immunity is necessary to encourage people to enter public service. They say it is also necessary to enable police officers to perform their duties fully and effectively without fear of liability. Although we acknowledge these arguments, we are bound by the language of the statute. N.C.G.S. § 20-145 clearly states that "[t]his exemption shall not, however, protect *the driver* . . . from the consequence of a *reckless disregard of the safety of others*." (Emphasis added.) Any change to the plain language of the statute must be made by the legislature.

We reverse that part of the decision of the Court of Appeals which allowed the plaintiff to proceed under N.C.G.S. § 20-145. We remand

to the Court of Appeals for further remand to the superior court for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Justice FRYE dissenting.

As the majority notes, this Court held in *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959), that the standard of care provided by N.C.G.S. § 20-145 is an ordinary negligence standard. *Goddard*, 251 at 133, 110 S.E.2d at 824. This statute was recently before this Court in *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988), where we said:

> This Court has established the standard of care where the conduct of an officer in the chase or apprehension of a law violator results in the *officer's* vehicle colliding with another person, vehicle, or object. *The officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of a like nature under like circumstances.* If the officer complies with this standard under these circumstances, he is exempt from the statutory speed laws. *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959); *Glossom v. Trollinger*, 227 N.C. 84, 40 S.E.2d 606 (1946); *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

*Id.* at 582-83, 369 S.E.2d at — (emphasis added). As the plaintiff notes, the General Assembly has not amended the statute to change the ordinary negligence standard, and until today it was settled as the law.

The majority now says that the meaning of the statute is clear and overrules *Goddard* in so far as *Goddard* "is inconsistent with this case."

I do not believe the statute is so clear that we should overrule *Goddard* and those cases which have followed it for decades as the proper interpretation of the statute passed by the General Assembly.

While the Court in *Bullins* stated a different standard of care when the injuries complained of do not result from the officer's vehicle colliding with another person, vehicle, or object, the opinion concluded that the officers in that case were not negligent in pursuing and continuing to pursue the vehicle. Thus, the Court apparently

would have reached the same result had it simply applied the *Goddard* standard to the facts of that case without stating a different standard. Having restated the *Goddard* standard so recently, I would not now discard it.

Therefore, I respectfully dissent from the majority's opinion in this case.

Justice WHICHARD dissenting.

Section 20-145 of the North Carolina General Statutes exempts law enforcement officers from speed laws while in pursuit of violators of the law. However, the exemption does not "protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others." N.C.G.S. § 20-145 (1993). In *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959), this Court interpreted Section 20-145 as requiring an officer to "observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances." *Id.* at 134, 110 S.E.2d at 824. Thus, under *Goddard*, "an officer is liable for his negligent acts as well as for his wilful and wanton acts." *Id.* at 133, 110 S.E.2d at 824.

The majority now overrules the ordinary negligence standard from *Goddard* and replaces it with one imposing liability only when the officer acts with gross negligence. I agree. The language of N.C.G.S. § 20-145 is clear. A pursuing officer is exempt from observing the speed limit except when he acts with "a reckless disregard of the safety of others." Gross negligence is wanton conduct done with conscious or reckless disregard for the rights and safety of others. *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988). Therefore, the majority correctly holds that reckless disregard is tantamount to gross negligence, not ordinary negligence as enunciated in *Goddard*, and that gross negligence is the standard to which law enforcement officers should be held under N.C.G.S. § 20-145.

Applying the gross negligence standard, the majority also concludes, however, that the trial court should have granted Officer Woodall's motion for summary judgment. I disagree. Summary judgment is appropriate 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). It is a drastic measure and should be employed with caution. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

Defendant, as the movant, has the burden of establishing that no triable issue of fact exists. *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). All inferences of fact must be drawn against the movant and in favor of the nonmovant. *Id.*

With these principles in mind, the record shows without dispute that upon turning around and giving chase to the Camaro, Officer Woodall entered the intersection of Link Road and Peters Creek Parkway while a yellow caution light was flashing in his direction. He did not activate his blue lights or siren, nor did he notify the police dispatcher of his intentions to pursue the Camaro, as departmental regulations required. Although he testified in his deposition that his speed was not excessive, a witness to the accident alleged in her affidavit that she "observed a police car travelling at a high rate of speed proceeding down Peters Creek Parkway." Woodall concedes that if he was speeding, department policy required him to turn on all of his emergency equipment. Further, whether he even had his headlights on is disputed. He asserts that they were on, while the witness said she could not "say for certain whether or not the headlights of the vehicle were on." This forecast of evidence is sufficient to create a genuine issue of material fact as to whether Officer Woodall acted with "a reckless disregard of the safety of others" within the meaning and intent of N.C.G.S. § 20-145; summary judgment was thus improper.

I therefore respectfully dissent.

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STATE OF NORTH CAROLINA v. LUBY ALVIN KILPATRICK

No. 337A95

(Filed 13 June 1996)

**1. Criminal Law § 107 (NCI4th)— first-degree murder—discovery—criminal records of State's witnesses—motion to compel disclosure denied—due process**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to compel the State to supply defendant with the criminal records of all the witnesses in the case against him. The record shows that the prosecutor informed

the trial court that the State had an "open-file" policy, that defendant's counsel had been given access to the file, and that defendant's counsel would have access to the file throughout the course of the case. Defendant has not met his burden of showing that the State suppressed any material evidence concerning the criminal history of witnesses and the court's refusal to compel the State to supply the criminal records of witnesses did not violate defendant's right to due process.

**Am Jur 2d, Depositions and Discovery §§ 75, 81.**

**Right of defendant to inspect report of presentence investigation of witness previously convicted of crime, under Rule 32(c) of Federal Rules of Criminal Procedure. 38 ALR Fed. 786.**

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

**2. Criminal Law § 107 (NCI4th)— first-degree murder—discovery—criminal records of State's witnesses—motion to compel disclosure denied—Rules of Professional Conduct**

The refusal of the trial court in a first-degree murder prosecution to compel the State to supply defendant with the criminal records of witnesses did not violate Rule 7.3 of the North Carolina Rules of Professional Conduct, which requires the prosecutor to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. Defendant has not shown that the prosecutor failed to make timely disclosure of material evidence with respect to the criminal history of any witness in this case.

**Am Jur 2d, Depositions and Discovery §§ 75, 81, 82, 361-366.**

**Right of defendant to inspect report of presentence investigation of witness previously convicted of crime, under Rule 32(c) of Federal Rules of Criminal Procedure. 38 ALR Fed. 786.**

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

**3. Homicide § 135 (NCI4th)— first-degree murder—short form indictment—sufficient**

The trial court did not err by failing to quash a first-degree murder indictment where defendant contends that the indictment failed to give him particular notice of each element of the charge of first-degree murder. The indictment complies with the short-form indictment authorized by N.C.G.S. § 15-144 and there is no compelling reason to depart from a prior holding that the short-form indictment is sufficient to charge first-degree murder on the basis of premeditation and deliberation.

**Am Jur 2d, Indictments and Informations §§ 70-81.**

**Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 ALR3d 1358.**

**Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 ALR3d 968.**

**Comment Note.—Power of court to make or permit amendment of indictment. 17 ALR3d 1181.**

**4. Indigent Persons § 31 (NCI4th)— first-degree murder—jury selection expert—request for appointment denied**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion requesting funds for the appointment of a jury selection expert where defendant contended that jury selection in capital cases is extremely complicated but failed to present any specific evidence or make any argument showing why a jury selection expert was necessary or how such an expert would assist defendant's counsel in the preparation of this case.

**Am Jur 2d, Criminal Law §§ 984-987.**

**5. Evidence and Other Witnesses § 786 (NCI4th)— first-degree murder—defendant's statements to psychologist before murder—excluded—other evidence of capacity to form intent admitted**

There was no prejudicial error in a first-degree murder prosecution in the exclusion of statements defendant made to a psychologist during treatment prior to the killings where defendant did not make an offer of proof to show what the testimony would

have been, the record shows that defendant's purpose was to present evidence bearing on his ability to form a specific intent to kill, and he was permitted to present substantial expert testimony describing his mental disorders and his capacity to form a specific intent to kill. Defendant failed to demonstrate that there is a reasonable possibility that a different result would have been reached had the statements not been excluded.

**Am Jur 2d, Evidence §§ 441, 556-558.**

**Qualification of nonmedical psychologist to testify as to mental condition or competency. 78 ALR2d 919.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Butterfield, J., at the 10 October 1994 Criminal Session of Superior Court, Lenoir County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 11 March 1996.

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

*Fred W. Harrison for defendant-appellant.*

PARKER, Justice.

Defendant was tried capitally on indictments charging him with the first-degree murders of Angela Rhem Kilpatrick and Lenwood Rhem, Jr. The jury returned verdicts finding defendant guilty of first-degree murder on the basis of premeditation and deliberation in the killing of Angela Rhem Kilpatrick and guilty of second-degree murder in the killing of Lenwood Rhem, Jr. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment for the murder of Angela Rhem Kilpatrick. Upon this recommendation the trial court sentenced defendant to life imprisonment for the first-degree murder conviction and to a consecutive term of fifty years' imprisonment for the second-degree murder conviction. Defendant appeals his first-degree murder conviction. (Defendant gave notice of appeal in both cases to the Supreme Court; the record does not show any motion to bypass the Court of Appeals on the second-degree murder conviction; and defendant makes no argument specifically related to the second-degree murder conviction.) For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error and uphold his conviction and sentence for first-degree murder.

On 4 July 1993 defendant shot and killed his wife, Angela Rhem Kilpatrick, and her brother, Lenwood Rhem, Jr. The State's evidence tended to show that defendant and his wife had a strained and violent relationship prior to the killings including threats to kill Ms. Kilpatrick, their baby, and himself.

Ms. Kilpatrick spent the evening before the killing at her parents' house because she was afraid of defendant. Defendant went to the house and threatened to burn it down if Ms. Kilpatrick spent the night there. Defendant also called Ms. Kilpatrick and threatened to kill her if she returned to their trailer.

On the day of the killings, Ms. Kilpatrick returned to the trailer with her brother and her daughter, Latisha Greene. Unbeknown to them, defendant was hiding under a bed in the back bedroom. Defendant remained in this hiding place for several hours while Ms. Kilpatrick, her brother, and Latisha were in the den talking and watching television. Defendant eventually left his hiding place, obtained a single-shot shotgun, and appeared in the doorway between the living room and the den.

Defendant fired an unprovoked, close-range shot which killed Mr. Rhem. Ignoring Ms. Kilpatrick's plea for mercy, defendant reloaded his shotgun and shot her as well. Defendant then kicked Mr. Rhem and started throwing various items at Ms. Kilpatrick. As she lay on the floor, Ms. Kilpatrick told her daughter to call the police. Latisha ran to a neighbor's house and asked them to call the authorities. She subsequently ran to her grandparents' house and told her grandfather that defendant had killed her uncle and that she believed defendant had also killed her mother.

After Latisha left the trailer to obtain help, defendant attacked his wife, hit her in the head with a brick, and knocked her off the front porch and into the front yard. Defendant then retrieved the shotgun, reloaded it, and shot Ms. Kilpatrick in the chest, killing her.

**[1]** Defendant first argues that the trial court erred in denying his motion to compel the State to supply defendant with the criminal records of all the witnesses in the case against him. Defendant asserts that the State must supply counsel with the criminal history of all witnesses in order to meet the State's obligation to ensure that a defendant being tried for his life receives an adequate defense. Defendant contends that the State is required to provide defendant with the criminal history of witnesses by Rule 7.3 of the North Carolina Rules

of Professional Conduct and the principles underlying the United States Supreme Court's decisions in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d. 215 (1963), *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), and *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985). We disagree.

The statute governing disclosure of evidence by the State, N.C.G.S. § 15A-903 (1988), "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). Similarly, not having shown that any material evidence was actually suppressed by the State, *State v. Smith*, 337 N.C. 658, 664, 447 S.E.2d 376, 379 (1994), defendant cannot prevail under *Brady*, 373 U.S. 83, 10 L. Ed. 2d 215.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. The defendant has the burden of showing that undisclosed evidence was material and that the failure to disclose affected the outcome of the trial. *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983).

To prevail under *Brady* a "defendant must first show that evidence favorable to the accused was actually suppressed and that the suppressed evidence was material either to guilt or punishment such that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different." *Smith*, 337 N.C. at 664, 447 S.E.2d at 379. In the instant case defendant has not alleged, much less shown, that any witness had a significant criminal record or that the State suppressed impeaching information concerning any witness. The record shows that the prosecutor informed the trial court that the State had an "open-file" policy, that defendant's counsel had been given access to the file, and that defendant's counsel would continue to have access to the file throughout the course of the trial. Defendant has not met his burden of showing that the State suppressed any material evidence concerning the criminal history of witnesses. Accordingly, we conclude that the trial court's refusal to

compel the State to supply defendant with the criminal records of witnesses did not violate defendant's right to due process.

**[2]** Defendant also cites Rule 7.3 of the North Carolina Rules of Professional Conduct in support of this assignment of error. Rule 7.3 requires the prosecutor in a criminal case to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." N.C. Rules of Professional Conduct Rule 7.3(4) (1996). Defendant has not shown that the prosecutor failed to make timely disclosure of material evidence with respect to the criminal history of any witness in this case. For this reason we cannot conclude that the prosecutor violated Rule 7.3. This assignment of error is overruled.

**[3]** By another assignment of error, defendant argues that the trial court erred in failing to quash the murder indictment. Defendant contends the indictment failed to give him particular notice of each element of the charge of first-degree murder in violation of the rights guaranteed defendant by the Sixth and Fourteenth Amendments to the United States Constitution. The bill of indictment returned against defendant included the following:

> The jurors for the State upon their oath present that on or about the 4th day of July, 1993 in Lenoir County, Luby Alvin Kilpatrick unlawfully, willfully and feloniously and of malice aforethought did kill and murder Angela Rhem Kilpatrick.

This indictment complies with the short-form indictment for murder authorized by N.C.G.S. § 15-144. We have held that the short-form indictment is sufficient to charge first-degree murder on the basis of premeditation and deliberation. *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985). We find no compelling reason to depart from our prior holding in *Avery* and conclude that the trial court did not err in denying defendant's motion to quash the bill of indictment. This assignment of error is overruled.

**[4]** Defendant next argues that the trial court erred when it denied defendant's motion requesting funds for the appointment of a jury selection expert. Defendant contends that requiring counsel to undertake the defense of a defendant charged with a capital crime without the assistance of a jury selection expert deprived defendant of due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. We disagree.

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

*State v. McCullers*, 341 N.C. 19, 34, 460 S.E.2d 163, 172 (1995).

In *State v. Artis*, 316 N.C. 507, 342 S.E.2d 847 (1986), an indigent defendant contended that the trial court erred by denying his motion for a jury selection expert. In *Artis* we concluded that the defendant had failed to show a particularized need. *Id.* at 512-13, 342 S.E.2d at 850-51.

"The focus in determining whether the trial court erred [in denying defendant's request for expert assistance] . . . must be upon what was before the trial court at the time of the motion[]." *State v. Wilson*, 322 N.C. 117, 126, 367 S.E.2d 589, 594 (1988), *quoted in McCullers*, 341 N.C. at 35, 460 S.E.2d at 172. In his pretrial motion defendant asserted that jury selection in capital cases is extremely complicated and requires special training and study in the fields of sociology and psychology. Defendant failed to present any specific evidence or to make any argument showing why a jury selection expert was necessary or how such an expert would assist defendant's counsel in the preparation of this case. Defendant presented the trial court with "little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985). Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion to grant defendant funds to secure a jury selection expert. This assignment of error is overruled.

**[5]** By another assignment of error, defendant contends that the trial court erred by excluding statements that defendant made to a psychologist during the course of defendant's treatment at Lenoir County Mental Health Center. Defendant argues that the excluded statements

should have been admitted pursuant to N.C.G.S. § 8C-1, Rule 702. We conclude that defendant has failed to show any prejudicial error.

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

*State v. Johnson*, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995).

In this case defendant called Chris Boyle, a psychologist who treated defendant at Lenoir County Mental Health Center prior to the killings, to testify as an expert witness for the defense. The trial court sustained the State's objections to defendant's attempts to elicit statements made by defendant to Boyle during the course of defendant's treatment. Defendant did not make an offer of proof at trial to show what Mr. Boyle's testimony would have been if he had been allowed to answer defendant's questions. The only reference in the record suggesting the substance of the excluded statements is the prosecutor's statement that defendant made the statements when he was admitted to Lenoir County Mental Health Center and that defendant related his "symptoms" and "problems" in the statements. Accordingly, defendant cannot show prejudicial error.

Furthermore, the record shows that defendant's purpose in attempting to elicit the excluded statements was to present evidence bearing on his ability to form a specific intent to kill. In this regard defendant was permitted to present substantial expert testimony describing defendant's mental disorders and his capacity to form a specific intent to kill.

The trial court permitted Boyle to testify with respect to any observations that he made or any conclusions that he reached as a result of his relationship with defendant. Boyle told the jury that he diagnosed defendant as having a borderline personality disorder and that defendant's symptoms included a pattern of unstable and intense

interpersonal relationships, impulsiveness, a lack of anger control, and recurrent suicidal thoughts and gestures.

A second expert witness for the defense, Dr. David Michael Hattem, testified that defendant suffered from three mental disorders: (i) major recurrent depression, (ii) borderline personality disorder, and (iii) alcohol abuse disorder. Hattem opined that defendant's mental disorders reduced defendant's ability to control his emotions, his capacity to control his behavior, and his ability to think clearly. Hattem also testified that defendant experienced a major depressive episode on the day of the killings and that defendant's mental disorders may have reduced his capacity to form a specific intent to kill another person.

Another psychologist, Dr. Gregory Gridley, testified that defendant suffered from major depression and borderline personality disorder. Gridley stated that periods of depression exacerbated defendant's inability to control himself. In Gridley's opinion defendant's mental disorders diminished his mental capacity at the time of the killings.

Defendant, having failed to make the required offer of proof and having presented substantial expert testimony to show that his mental disorders diminished his capacity to form a specific intent to kill, has failed to demonstrate that there is a reasonable possibility that, had the defendant's statements not been excluded, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

In nineteen additional assignments of error, defendant declined to cite any authority or present this Court with any argument. "Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned." *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976); *accord* N.C. R. App. P. 28(b)(5). Accordingly, these assignments of error are deemed abandoned pursuant to Rule 28(b)(5).

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

NO ERROR.

STATE OF NORTH CAROLINA v. SHERRY ALMOND VANHOY AND CASI RAE CLONTZ

No. 279A95

(Filed 13 June 1996)

1. **Criminal Law § 656 (NCI4th)— motion to dismiss—waiver by presentation of evidence**

Where defendant presented evidence, she waived the right to appeal the denial of her motion to dismiss made at the close of the State's evidence. N.C.G.S. § 15-173; N.C. R. App. P. 10(b)(3).

**Am Jur 2d, Trial § 854.**

2. **Homicide § 368 (NCI4th)— first-degree murder—aiding and abetting—constructive presence—sufficiency of evidence**

The State's evidence was sufficient to show that defendants were constructively present during a murder so as to support the trial court's submission of issues of their guilt of first-degree murder under the theory of aiding and abetting where it tended to show that defendants promised the perpetrator $15,000 and a truck if he would kill the victim; defendants explicitly instructed the perpetrator how to enter the victim's trailer, where to find the victim, how to kill the victim, where to find money and how to make the murder scene look as if a breaking and entering had occurred; defendants drove the perpetrator to the trailer so he could commit the murder and remained in close enough proximity to the trailer to drive him away just after he committed the murder; and defendants supplied the perpetrator with money for a motel room so he could escape detection in the hours following the murder. The jury could infer from this evidence that both defendants were constructively present because they remained in close enough proximity to the trailer to render assistance to the perpetrator in carrying out the murder, should it become necessary, and that both defendants communicated this intent to the perpetrator through their actions and words.

**Am Jur 2d, Homicide § 445.**

3. **Criminal Law § 796 (NCI4th); Homicide § 510 (NCI4th)— aiding and abetting—evidence of constructive presence—presence instruction not required**

Evidence of defendants' constructive presence at a murder was sufficiently strong so that no instruction on actual or con-

structive presence at the scene of the crime under the theory of aiding and abetting was required in this first-degree murder prosecution where the evidence tended to show that defendants promised the perpetrator $15,000 and a truck if he would kill the victim; defendants explicitly instructed the perpetrator how to enter the victim's trailer, where to find money and how to make the murder scene look as if a breaking and entering had occurred; defendants drove the perpetrator to the trailer so he could commit the murder and remained in close enough proximity to the trailer to drive the perpetrator away just after he committed the murder; and defendants supplied the perpetrator with money for a motel room so he could escape detection in the hours following the murder.

**Am Jur 2d, Trial § 1256.**

Appeal as of right by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Helms (William H.), J., at the 17 October 1994 Criminal Session of Superior Court, Stanly County, upon jury verdicts finding defendants guilty of first-degree murder. Defendants' motions to bypass the Court of Appeals as to additional convictions were allowed by this Court 11 September 1995 and 9 November 1995. Heard in the Supreme Court 12 April 1996.

*Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, and Elizabeth L. Oxley, Associate Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant Clontz.*

*Jean B. Lawson for defendant-appellant Vanhoy.*

LAKE, Justice.

In this joint trial, defendant Sherry Almond Vanhoy was tried capitally for the first-degree murder, conspiracy to commit murder and solicitation to commit murder of George Adam Vanhoy. The jury returned verdicts of guilty on all charges. After a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury failed to find the existence of the sole aggravating circumstance submitted and recommended a sentence of life imprisonment. The trial court sentenced

this defendant accordingly and additionally imposed concurrent sentences of nine years' imprisonment each for the convictions of conspiracy to commit murder and solicitation to commit murder. Defendant Casi Rae Clontz was tried noncapitally, and the jury returned verdicts of guilty of first-degree murder and guilty of conspiracy to commit murder of George Adam Vanhoy. The trial court imposed the mandatory sentence of life imprisonment for the first-degree murder conviction and a concurrent sentence of nine years' imprisonment for the conviction of conspiracy to commit murder. We find no error and, therefore, uphold defendants' convictions and sentences.

The State's evidence at trial tends to show that defendant Vanhoy was married to the victim, George Adam Vanhoy. Defendant Clontz was defendant Vanhoy's daughter from a previous marriage. Howard Demetrios Shankle, the actual shooter, testified for the State pursuant to a plea arrangement. On the night of 24 December 1992, defendant Clontz told Shankle that her stepfather, the victim, physically abused her mother and her. Defendant Clontz then offered Shankle and Michael Paul Harris $15,000 in insurance proceeds and a truck if they would kill the victim. They agreed and drove to the Vanhoy trailer on Half-Mile Road. Shankle, armed with his .38-caliber pistol, and Harris got out of the car on the main road and waited for defendant Clontz to drive to the trailer, park the car and go inside. Defendant Clontz told defendant Vanhoy that she had found some people who would kill the victim, but defendant Vanhoy rejected the idea because she believed it would look strange if she was not hurt as well. Shankle and Harris then left.

Several weeks later, on 19 January 1993, defendants saw Shankle walking down the road, and they pulled their car up beside him. Shankle got into the car, and defendant Vanhoy asked if he would still kill the victim for them. Shankle agreed on the condition that he would still receive the $15,000 and the truck in return; defendant Vanhoy said he would. While defendant Clontz drove the car to the Vanhoy trailer, defendant Vanhoy told Shankle that he would find the front door of the trailer unlocked and that when he entered the trailer, he would see the light from a television on in a bedroom and that in that bedroom, he would find the victim in the bed. Defendant Vanhoy also told Shankle he would find some money in the victim's pants pocket. Additionally, Shankle was instructed to take anything he wanted from the trailer and to break a window in order to make it look as if there had been a breaking and entering.

When defendants and Shankle arrived at the main road in front of the trailer, Shankle got out and ran to the trailer. Defendants drove away. Shankle entered the trailer as he was told and shot the victim several times. After taking the victim's wallet, Shankle broke a window and then ran outside and across a field. Defendants arrived in the car, picked Shankle up and drove him away. After giving Shankle approximately $30 for a motel room, defendants pulled into a driveway and let Shankle out of the car.

Both defendants testified on their own behalf, and their evidence tends to show that defendant Vanhoy did not meet Harris or Shankle on 24 December 1992 or any other time and that neither she nor defendant Clontz ever offered anything of value to anyone in exchange for murdering the victim. On the night of the murder, defendant Vanhoy and the victim had dinner, and at approximately 8:10 p.m., defendant Vanhoy went to pick up defendant Clontz from work. The victim stayed home because he was not feeling well, although defendant Vanhoy asked him to ride with her. At about this same time, defendant Clontz called the trailer to tell her mother that a co-worker had offered her a ride home, but no one answered the telephone. Defendant Vanhoy arrived to pick up defendant Clontz, and they left at approximately 8:30 p.m. On the way back home, defendants stopped at a small convenience store to buy a newspaper, but the newspaper box was empty. Defendants then drove to Crossroads Grocery, arriving at approximately 9:00 p.m. They purchased a newspaper, potato chips and bread. Upon returning to the trailer, defendants noticed glass on the porch, and when the victim failed to respond to defendants' calls, they drove to a relative's house for help. Several relatives accompanied defendants back to the trailer, where they discovered the victim's body in the bedroom.

**[1]** Both defendants assign error to the trial court's denial of their motions to dismiss the charges of first-degree murder, under the theory of aiding and abetting, at the close of all the evidence on the grounds that the evidence was insufficient to show defendants were constructively present during the murder. Specifically, defendants argue that because the evidence shows that at the time of the murder, defendants were at Crossroads Grocery, located several miles from the trailer, they were too far away to be in a position to help Shankle commit the murder and, thus, cannot be said to have been constructively present. Defendant Vanhoy additionally argues, under this assignment of error, that the trial court erred in denying her motion to dismiss made at the close of the State's evidence. However, we

hold that because defendant Vanhoy presented evidence on her behalf, she has waived the right to appeal the denial of this motion. N.C.G.S. § 15-173 (1983); N.C. R. App. P. 10(b)(3).

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991). "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). In the context of a motion to dismiss relating to the theory of aiding and abetting, this Court has held:

> [T]he State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

*State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976). We have further elaborated that:

> One who procures . . . another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close . . . to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator.

*State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971).

The law governing motions to dismiss is well established. "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). The evidence is viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *State v. Benson*, 331 N.C. 537, 417 S.E.2d

756 (1992). Any contradictions or discrepancies raised by the evidence do not warrant dismissal of the case; rather, they are for the jury to resolve. *Id.* at 544, 417 S.E.2d at 761.

**[2]** Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, we conclude substantial evidence exists demonstrating defendants' constructive presence. The evidence tends to show that defendants promised Shankle $15,000 and a truck if he would kill the victim. Defendants explicitly instructed Shankle how to carry out the murder. Shankle followed defendants' instructions, and just after the murder was committed, defendants returned and drove Shankle away from the murder scene and gave him $30 for a motel room to ensure he would not be discovered by police in the hours immediately following the murder. From this evidence, the jury could reasonably infer and find as fact that both defendants were constructively present because they remained in close enough proximity to the trailer to render assistance to Shankle in carrying out the murder, should it become necessary, and further that both defendants communicated this intent to Shankle through their actions and words. The evidence, taken in the light most favorable to the State, shows that the defendants fully orchestrated and directed the victim's murder. Accordingly, we conclude that the evidence of defendants' constructive presence was sufficient for the jury's consideration and determination, and that the trial court did not err in denying defendants' motions to dismiss. This assignment of error is overruled.

**[3]** In their final assignment of error, defendants assert that the trial court erred in failing to instruct the jury on defendants' actual or constructive presence at the scene of the crime under the theory of aiding and abetting. This error, defendants contend, amounted to a partial directed verdict on an element of an offense. The trial court's instruction on first-degree murder based on the theory of aiding and abetting, as to defendant Clontz, was, in part, as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that . . . Howard Demetrios Shankle committed first degree murder, that is, that . . . Shankle intentionally killed the victim with a deadly weapon, and that Howard Demetrios Shankle acted with malice and with premeditation and with deliberation, and that the defendant . . . knowingly advised, instigated, encouraged, procured or aided Shankle to commit the crime, and that in so doing her actions or statements caused or contributed

> to the commission of the crime by Shankle, and that the defendant herself had the specific intent to kill the victim formed after premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder.

The trial court instructed the jury in a similar manner with respect to defendant Vanhoy.

Initially, we note that the instructions were in substantial accord with the pattern jury instructions. *See* N.C.P.I.—Crim. 202.20A (1989). Although defendants failed to object to the trial court's instructions, defendants nevertheless contend, for a variety of reasons, that this Court should not review this assignment of error for plain error. After careful consideration of defendants' arguments, we find them unpersuasive and continue to adhere to our previous cases holding that review of unpreserved instructional errors is conducted under the plain error standard of review. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); N.C. R. App. P. 10(b)(2). Plain error is error "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).

In *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), this Court held that the trial court did not commit plain error by failing to instruct the jury on defendant's actual or constructive presence at the scene of the crime, under the theory of acting in concert, because the evidence was sufficiently strong to demonstrate defendant's actual or constructive presence. *Id.* at 277, 464 S.E.2d at 465; *accord State v. Gilmore*, 330 N.C. 167, 409 S.E.2d 888 (1991). We have previously recognized that "[t]he distinction between aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty and are equally punishable." *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980) (citations omitted). Given this stated recognition, we discern no persuasive reason why the rule from *Jaynes* regarding the lack of a specific instruction on actual and constructive presence in the context of the theory of acting in concert cannot apply with equal force to the lack of a specific instruction on actual or constructive presence in the context of the theory of aiding and abetting.

Applying the rule from *Jaynes*, our review of the record reveals sufficient evidence to demonstrate defendants' constructive presence such that a specific instruction in this regard was unnecessary. As noted above, defendants explicitly instructed Shankle how to enter

the trailer, where to find the victim, how to kill the victim, where to find money and how to make the murder scene look as if a breaking and entering had occurred. Defendants drove Shankle to the trailer so he could commit the murder and remained in close enough proximity to the trailer to whisk Shankle away just after he committed the murder. Defendants supplied Shankle with money for a motel room so he could escape detection in the hours following the murder. We conclude that evidence of defendants' constructive presence was sufficiently strong that no instruction on presence was required in this case. Defendants have failed to show plain error, and therefore, this assignment of error is overruled.

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

NO ERROR.

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STATE OF NORTH CAROLINA v. JOHN WILLIAM LYNCH

No. 349A95

(Filed 13 June 1996)

**1. Criminal Law § 453 (NCI4th)— prosecutor's closing argument—punishment for second-degree murder—response to defense counsel's argument**

The trial court in a first-degree murder prosecution did not err by refusing to correct the prosecutor's statement during closing argument, "Don't let anyone cause you to believe that the punishment for Second Degree Murder is life, it isn't" where, at the time of the killing, the presumptive term of imprisonment for second-degree murder was fifteen years although the maximum punishment was life imprisonment, and the prosecutor's argument was in response to defense counsel's statement concerning punishment that defendant contended that this was only a second-degree murder case and "it carries life." Even if it is assumed that the prosecutor's statement was improper, the evidence of defendant's guilt of first-degree murder was so overwhelming that a reasonable possibility does not exist that the outcome would have been different but for the statement.

**Am Jur 2d, Trial §§ 564, 572, 575, 584.**

**Prejudicial effect of statement of prosecutor as to possibility of pardon or paarole. 16 ALR3d 1137.**

**2. Jury § 260 (NCI4th)— peremptory challenge—racially neutral reasons**

The trial court did not err by finding that the reasons articulated by the State for peremptorily challenging a prospective juror in a first-degree murder trial were racially neutral and did not show any purposeful discrimination where the prosecutor stated that he peremptorily challenged the juror because he lived or worked near the community where the murder occurred and had the same last name as defendant but denied knowing defendant or anything about the facts of this case; he gave hesitant answers indicating a possible unwillingness to deliberate or to reach a verdict thereby causing a hung jury; and he stated that he did not want to sit on the case.

**Am Jur 2d, Jury §§ 7, 131-139, 156.**

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

**Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L. Ed. 2d 1078.**

**3. Homicide § 706 (NCI4th)— failure to instruct on voluntary manslaughter—error cured by verdict**

Defendant was not prejudiced by the trial court's failure to instruct on voluntary manslaughter where the court instructed on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder.

**Am Jur 2d, Trial §§ 1482, 1483.**

**Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Sitton, J., at the 17 October 1994 Criminal Session of Superior Court, Rutherford County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to addi-

tional judgments imposed for assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury was allowed 20 December 1995. Heard in the Supreme Court 15 May 1996.

*Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.*

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

PARKER, Justice.

Defendant John William Lynch was found guilty of the first-degree murder of James Ronald Hall, guilty of assault with a deadly weapon with intent to kill inflicting serious injury as to Nancy Head Green, and guilty of assault with a deadly weapon inflicting serious injury as to Mattie Jean Murray. Following a capital sentencing proceeding, the jury recommended and the trial court imposed a life sentence on the murder conviction. The trial court also imposed consecutive sentences of six and three years on the assault convictions. For the reasons discussed herein, we conclude defendant received a fair trial, free from prejudicial error.

The evidence at trial tended to show that in June 1993, Nancy Green lived in a trailer park with her son, Steve. For several months William and Mattie Murray had also been living with Nancy Green. Green and defendant had known each other for many years and in the past had been romantically involved. Green also had a friendship with James Hall.

Approximately a week or two prior to the shootings, Green told defendant that she did not want to have anything to do with him. On 26 June 1993 defendant went to Green's trailer and saw James Hall sitting in the living room. Defendant said, "Yeah, this is what I figured was going on."

In the late afternoon of 29 June 1993, Steve Green, James Hall, William Murray, and Wayne Coggins were all gathered in Green's trailer playing cards. Mattie Murray was also present, and Nancy Green was asleep in the bedroom. Defendant walked into the trailer and shot Hall once in the throat and two or three times in the chest, killing him. Defendant shot Mattie Murray in the side as she turned to run out of the trailer. Defendant then went to the bedroom where Green was sleeping and hit her two or three times in the head with the butt of the gun. Green ran out of the trailer with defendant chasing

her. Green fell as she ran, and defendant caught up with her. Defendant told Green that he loved her but that she was going to die. Green was able to run from defendant, but she fell again as she ran. Defendant drove his truck over the lower part of Green's body, breaking her pelvic bone. Defendant then drove out of the trailer park.

**[1]** In his first assignment of error, defendant contends that the trial court erred in refusing "to correct the prosecutor's statement that the punishment for second degree murder is not life imprisonment." The State answers that the prosecutor was merely "responding to the mischaracterization of the law of sentencing by the defense attorney." Our review of the record reveals that the following took place during defendant's closing argument:

> So we say or that we've certainly shown that he was intoxicated and if you find from the evidence that he was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for a conviction of First Degree Murder. The only different [sic] in First Degree Murder is premeditation and deliberation. We say that he didn't have that and we contend that this is only a Second Degree case. And when I say only that's not saying there's nothing to it because it carries life, it carries life.

During the prosecutor's argument to the jury, the following transpired:

> [PROSECUTOR]: Don't let anyone cause you to believe that the punishment for Second Degree Murder is life, it isn't, and I don't want you to go back there assuming that.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Under the version of the Fair Sentencing Act in effect at the time of the killing, the presumptive term of imprisonment for second-degree murder was fifteen years, N.C.G.S. § 15A-1340.4(f)(1) (1988) (repealed effective 1 October 1994), though as a Class C felony second-degree murder was punishable "by imprisonment up to 50 years, or by life imprisonment." N.C.G.S. § 14-1.1(a)(3) (1993) (repealed effective 1 October 1994). Defendant argues that since a defendant found guilty of second-degree murder can be punished by life imprisonment, the prosecutor's statement to the contrary was designed to prejudice the jurors and dissuade them from finding defendant guilty of the lesser charge.

Arguments of counsel rest within the control and discretion of the presiding trial judge. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). In hotly contested cases, counsel is granted wide latitude in closing arguments. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). Furthermore, in the absence of a showing of prejudice, an improper prosecutorial comment does not require reversal. *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985).

The argument at issue was made by the prosecutor in response to an inaccurate, incomplete statement concerning punishment made by defendant's counsel. The prosecutor is entitled to respond to arguments made by defense counsel. *See State v. Perdue*, 320 N.C. 51, 62, 357 S.E.2d 345, 352 (1987). Hence, the trial court did not err in overruling defendant's objection.

Furthermore, even if it be assumed that the prosecutor's statement was improper, the evidence of defendant's guilt of first-degree murder was so overwhelming that a reasonable possibility does not exist that the outcome would have been different but for the statement. N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

**[2]** Defendant next argues that the trial court erred by overruling his objection to the State's peremptory challenge of prospective juror Julian Lynch. Defendant contends his constitutional rights, as interpreted by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), were violated by the trial court's action.

When an objection is made to the exercise of a peremptory challenge on the ground that the challenge is racially motivated, the defendant must first "make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race." *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991). If the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. *Id.* at 358-59, 114 L. Ed. 2d at 405. "Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Id.* at 359, 114 L. Ed. 2d at 405.

In the instant case the record is unclear as to whether the trial judge determined that defendant had made a *prima facie* showing of racial discrimination. Nonetheless, the prosecuting attorney stated

his reasons for exercising the challenge. Hence, under *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 296 (1991), we do not need to address the first prong of the test. The reasons cited by the prosecution for excusing juror Lynch were that he lived or worked near the community where the murder took place and had the same last name as defendant but nevertheless denied knowing defendant or anything about the facts of this case; that he gave hesitant answers indicating a possible unwillingness to deliberate or to reach a verdict thereby causing a hung jury; and that he stated he did not want to sit on the case. Responding to the prosecutor's articulated reasons, defense counsel asserted that there was no reason not to believe juror Lynch and that the reasons given for excusing him were a pretext. Having heard the juror's responses and observed his demeanor and having heard statements by counsel for the State and defendant, the court found that the State had "satisfied its burden to explain and to set forth neutrality as to the reason for excusing this juror and that the neutral explanation does not show any discrimination in the excuse and peremptory challenge by the [S]tate of juror Mr. Lynch."

We find no error in the ruling by the trial court on the peremptory challenge of juror Lynch. The State articulated its reasons for the challenge, and the court found that the reasons articulated by the State were racially neutral and did not show any purposeful discrimination in the excuse of juror Lynch. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406; *see also Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839-40 (1995) (per curiam). Since the trial court's findings as to race neutrality and purposeful discrimination will depend in large measure on the trial judge's evaluation of credibility, these findings should be given great deference. *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. We conclude that the trial court's findings were supported by the record and hold that the trial court properly overruled defendant's objection to the State's excusal of this prospective juror. This assignment of error is overruled.

**[3]** Finally, defendant contends the trial court erred in refusing to submit the lesser-included offense of voluntary manslaughter, even though the jury rejected a verdict of guilty of second-degree murder and found defendant guilty of first-degree murder. Defendant candidly acknowledges this Court's previous holdings to the contrary, *see, e.g., State v. Tidwell*, 323 N.C. 668, 374 S.E.2d 577 (1989), but requests that we reconsider this issue.

In *State v. Tidwell* we held that a trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder. *Id.* at 674-75, 374 S.E.2d at 581. In the instant case the trial court instructed the jury on first-degree and second-degree murder. After deliberations the jury returned a verdict of guilty of first-degree murder.

Defendant has presented us with no persuasive reasons to depart from our previous holdings on this issue, and we decline to do so. Therefore, we hold that defendant was not prejudiced by the trial court's refusal to give the requested instruction. This assignment of error is overruled.

NO ERROR.

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STATE OF NORTH CAROLINA v. TIMOTHY LEONARD JOHNSON

No. 503A95

(Filed 13 June 1996)

**1. Evidence and Witnesses § 2273 (NCI4th)— first-degree murder—opinion of pathologist—formal training as forensic pathologist not complete—distance from which gun fired**

The trial court did not err in a first-degree murder prosecution by allowing a doctor to testify to the cause of death and the distance from which the shot was fired where the doctor was a Fellow in the Office of the Chief Medical Examiner in Chapel Hill, was not yet certified, and had not completed his formal training as a forensic pathologist. The doctor had performed a number of autopsies and was admitted as an expert in pathology as opposed to an expert in forensic pathology. An expert in pathology has long been permitted to testify as to the victim's cause of death and it has been held that an expert certified in pathology is qualified to give an opinion regarding the range from which a gun might have been fired when that opinion, as here, is incident to his examination.

**Am Jur 2d, Expert and Opinion Evidence § 262.**

**2. Homicide § 471 (NCI4th)— first-degree murder—instructions—no error**

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court erred by reading the pattern jury instructions to the jury and not giving the self-defense instruction in connection with the instruction on the felony of discharging a firearm into occupied property, in instructing the jury that the State need only prove that defendant was the aggressor in bringing on the fatal altercation in order to find him guilty of first-degree murder, and in omitting essential elements of specific intent to kill and self-defense in portions of its final mandate regarding first-degree murder on the basis of premeditation and deliberation. The trial judge completely and correctly instructed the jury on self-defense and first-degree murder in accord with the pattern jury instructions, the jury found defendant guilty of first-degree murder on the bases of felony murder and of premeditation and deliberation, and there was overwhelming evidence to support the jury verdict.

**Am Jur 2d, Homicide §§ 482 et seq.**

**Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.**

**3. Homicide § 596 (NCI4th)— first-degree murder—instructions—self-defense**

The trial court did not err in a first-degree murder prosecution by instructing the jury that, in order to be entitled to the benefit of self-defense, defendant must have reasonably believed that it was necessary to kill the victim in order to protect himself from death or serious bodily injury. Defendant has given no compelling reason to depart from the precedent in *State v. Richardson*, 341 N.C. 585.

**Am Jur 2d, Homicide §§ 519 et seq.**

**Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Jenkins, J., at the 15 May 1995 Criminal Session of Superior Court, Johnston County,

upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 14 May 1996.

*Michael F. Easley, Attorney General, by James P. Erwin, Jr., Special Deputy Attorney General, for the State.*

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

FRYE, Justice.

Defendant, Timothy Leonard Johnson, was indicted for the first-degree murder of Willie Gene Spence. He was tried noncapitally and found guilty of first-degree murder on the basis of premeditation and deliberation as well as under the felony murder rule. The trial court imposed the mandatory sentence of life imprisonment.

Defendant makes five arguments on appeal to this Court. After reviewing the record, transcript, and briefs, we conclude that defendant received a fair trial, free of prejudicial error.

The State's evidence tended to show the following facts and circumstances: On 1 August 1994, defendant, the victim, and Angela Burrell were participants in a love triangle. Burrell, her brother, defendant, and Burrell's two children lived together in a trailer in Bell Hope Trailer Park in Smithfield, North Carolina. After observing the victim and Burrell conversing together outside by the victim's automobile, defendant approached the couple. Defendant appeared to be carrying a shotgun. There were two other men with defendant, but neither of them was carrying a gun. Burrell suggested to the victim that he leave; he got into his automobile, and she went into her trailer. The victim started to drive away. As the victim was driving away, defendant fired once into the windshield of the automobile. Defendant then fired a second time into the open driver's side window of the automobile. Several witnesses saw defendant carrying a shotgun, walking towards the trailer he shared with Burrell, and firing into the driver's side window of the victim's automobile.

The victim was found slumped over in his automobile. Deputy James McIver, the first officer to arrive on the scene, discovered a "fake" gun that shot "blanks". The officer determined that the gun, which was in the waistband of the victim's pants and under the victim's shirt, had not recently been fired. The victim's automobile had backed into the trailer across from Burrell's trailer and had caused

minimal damage to both the automobile and the trailer. There was blood in the interior of the automobile on the passenger's side, and there was a hole in the passenger window.

An autopsy revealed pellet wounds to the victim's head from a single gunshot blast, and a gunshot wound to the chest. The pathologist concluded that the victim died from the second blast to his chest. The shot to the victim's chest had been delivered at close range, estimated by the pathologist to have been within three or four feet. The head wound was a scalp wound that was not potentially fatal.

Defendant testified at trial. He stated that when he got up at 11:00 a.m., he went outside and found Burrell and the victim standing outside talking. Defendant asked Burrell when she was going to cook breakfast. After she responded to defendant, the victim asked Burrell, "Who is he?" Burrell replied that defendant was "her boyfriend." Defendant testified that the victim began to go "off the handle" and that the victim told defendant, that if defendant knew "what's good" for him, defendant would take his "punk a— back in the house." The victim then pulled out a handgun, pointed it at defendant, and repeated the statement. Burrell ran into the trailer, and defendant did not see her come back out.

According to defendant, he and the victim were standing at the victim's automobile facing one another. At this point, David Turpentine walked up and handed defendant a gun, stating that defendant would need it. After handing defendant the gun, Turpentine walked away. Defendant and the victim aimed their guns at one another, and defendant fired. The shot hit the front windshield of the victim's automobile. After firing the shot, defendant ran, trying to get away. The victim got into his automobile, began backing up and the front of the automobile was facing Burrell's trailer. Defendant feared the victim was going to shoot him, so he ran past the victim's automobile and fired a second shot.

**[1]** As his first argument, defendant contends that the trial court erred by allowing Dr. Ricky Thompson to testify, over defendant's objection, as to the cause of death and the distance from which the shot was fired. At the time the autopsy in this case was performed, Dr. Thompson, a Fellow in the Office of the Chief Medical Examiner in Chapel Hill, was not yet certified, nor had he completed formal training as a forensic pathologist. However, Dr. Thompson had performed a number of autopsies prior to performing the autopsy on the victim. Defendant objected to Dr. Thompson's testimony at trial, and the wit-

ness was admitted as an expert in pathology, as opposed to an expert in forensic pathology. Over defendant's objection, Dr. Thompson was allowed to testify as to the cause of death as well as the possible range from which the shots were fired.

This Court has long held that an expert in pathology is permitted to testify as to the victim's cause of death and has consistently allowed testimony as such. *See State v. Sanders*, 280 N.C. 67, 71, 185 S.E.2d 137, 139 (1971); *State v. Perry*, 276 N.C. 339, 345, 172 S.E.2d 541, 545 (1970). This Court has also held that "[a]n expert certified in pathology is qualified to give an opinion regarding the range from which a gun might have been fired when that opinion is incident to his examination." *State v. Pridgen*, 313 N.C. 80, 92, 326 S.E.2d 618, 626 (1985); *see also State v. Mack*, 282 N.C. 334, 344, 193 S.E.2d 71, 78 (1972). In the instant case, Dr. Thompson's opinion as to the range of the shot was incident to the autopsy he performed on the victim. Accordingly, the trial court did not err in allowing the doctor's testimony; therefore, defendant's first argument is rejected.

**[2]** For defendant's second through fifth arguments, he contends that he is entitled to a new trial because the trial court erred by reading the pattern jury instructions to the jury. We disagree.

At the outset, we note that defendant failed to object at trial to any of these alleged errors. Now, defendant argues that he is entitled to a new trial under the plain error rule. As we have stated previously,

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

*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.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), *quoted in State v. Weathers*, 339 N.C. 441, 450, 451 S.E.2d 266, 271 (1994).

Defendant contends in his second, fourth, and fifth arguments that the trial court erred in not giving the self-defense instruction in connection with the instruction on the felony of discharging a firearm into occupied property, in instructing the jury that the State need only prove that defendant was the aggressor in bringing on the fatal altercation in order to find him guilty of first-degree murder, and in omitting essential elements of specific intent to kill and self-defense in portions of its final mandate regarding first-degree murder on the basis of premeditation and deliberation. We note that the trial judge did completely and correctly instruct the jury on self-defense and first-degree murder in accord with the pattern jury instructions. We further observe that the jury found defendant guilty of first-degree murder on the bases of felony murder and of premeditation and deliberation and that there was overwhelming evidence to support the jury verdict.

Therefore, we conclude that this is not the exceptional case where, after reviewing the entire record, we can say that the claimed errors are so fundamental that justice could not have been done or that the claimed errors had a probable impact on the jury's finding that the defendant was guilty. Accordingly, we reject defendant's second, fourth, and fifth arguments.

**[3]** As his third argument, defendant contends that the trial judge erred by instructing the jury that, in order to be entitled to the benefit of self-defense, defendant must reasonably believe that it was necessary to kill the victim in order to protect himself from death or serious bodily injury. Defendant concedes that this Court recently found no error in jury instructions on self-defense that are identical to the ones given in the instant case. *State v. Richardson*, 341 N.C. 585, 560, 461 S.E.2d 724, 728 (1995). Defendant has given no compelling reason for this Court to depart from its precedent. Accordingly, we reject defendant's third argument.

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

NO ERROR.

STATE OF NORTH CAROLINA v. WILLIAM K. CHAPMAN

No. 221A95

(Filed 13 June 1996)

**1. Criminal Law § 86 (NCI4th)— first-degree murder—no unnecessary delay in initial appearance before magistrate**

There was no error in a first-degree murder prosecution where defendant contended that his confession should have been suppressed based on a delay in having a magistrate determine whether there was probable cause for the issuance of an arrest warrant. Defendant was arrested at 9:30 a.m. by officers without a warrant and a magistrate issued an arrest warrant based on probable cause after his interrogation was complete at 12:30 p.m.

**Am Jur 2d, Criminal Law §§ 859-864.**

**2. Arrest and Bail § 57 (NCI4th)— first-degree murder—confession—delay in initial appearance before magistrate**

There was no constitutional violation requiring the suppression of defendant's confession in a first-degree murder prosecution where defendant contended that his confession was obtained in violation of Article I, Section 20 of the North Carolina Constitution based on delay in having a magistrate determine whether there was probable cause for issuance of an arrest warrant. Article I, Section 20 concerns the impropriety of general warrants and is not applicable here.

**Am Jur 2d, Arrest §§ 37 et seq.**

**Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace. 58 ALR2d 1056.**

**Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial. 85 ALR2d 980.**

**Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged. 92 ALR2d 570.**

**3. Criminal Law § 86 (NCI4th)— first-degree murder—initial appearance before magistrate**

A first-degree murder defendant's right to be taken before a magistrate without unnecessary delay as required by N.C.G.S.

§ 15A-501(2) was not violated where defendant was arrested at 9:30 a.m. and a large part of the time until defendant was taken before a magistrate at 8:00 p.m. was spent interrogating the defendant. There were several crimes involved, the officers had the right to conduct these interrogations, and it did not cause an unnecessary delay for them to do so.

**Am Jur 2d, Criminal Law §§ 859-864.**

**4. Arrest and Bail § 135 (NCI4th)— first-degree murder—right to communicate with friends—failure to advise—not prejudicial**

A first-degree murder defendant was not prejudiced by the failure to advise him of his right to communicate with his friends, in light of the language of *State v. Curmon*, 295 N.C. 453, that "[I]n view of the findings that defendant was informed of his *Miranda* rights, waived these rights, and voluntarily submitted his statement to police, we do not see how defendant could have suffered prejudice had he actually been denied his statutory right to communicate with friends." N.C.G.S. § 15A-501(5)

**Am Jur 2d, Criminal Law §§ 737, 738.**

**Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.**

**5. Evidence and Witnesses § 1221 (NCI4th)— first-degree murder—confession—delay in initial appearance before magistrate—atmosphere of interrogation**

A first-degree murder defendant's confession should not have been suppressed as involuntary where defendant contended that there was an unreasonable delay in bringing him before a magistrate and that the atmosphere in which he made the confession was so coercive that it was not the product of his own free will. It has been held elsewhere in this opinion that there was not an unreasonable delay in taking the defendant before a magistrate. The fact that defendant saw a photograph of the deceased in every direction he turned does not indicate that his free will was overturned; the photographs contained no threat or promise of reward which would invalidate the confession. The deceit practiced by the detective in implying that a note found next to the victim had been determined to be in defendant's handwriting and that defendant's fingerprints were on the note, when the detective knew that this was not true, did not require the court to find that

the confession was not of defendant's own free will, that it was the product of fear or hope of reward, or that the deceit was calculated to produce an untrue statement. The trial court specifically found that there were no promises, offers of reward, or inducements to the defendant to make a statement, that there were no threats or suggestions of violence to persuade or induce the defendant to make a statement, and that defendant appeared coherent and not under the influence of drugs or alcohol, and those findings are supported by competent evidence.

**Am Jur 2d, Evidence §§ 735, 736, 749.**

**Civil liability, under federal civil rights statute (42 USC § 1983) of state officers who coerce or attempt to coerce confessions or pleas of guilty. 55 ALR2d 512.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Ross, J., in a case tried capitally to a jury at the 17 October 1994 Criminal Session of Superior Court, Guilford County, upon a verdict of first-degree murder. The defendant's motion to bypass the Court of Appeals as to an additional conviction for robbery with a dangerous weapon was allowed 24 May 1995. Heard in the Supreme Court 15 February 1996.

The defendant was tried for first-degree murder and robbery with a dangerous weapon. The State asked for the death penalty. The defendant made a motion to suppress a statement he had made, and a hearing on this motion was held prior to trial. The evidence at the hearing showed that on 31 May 1993, Mr. Eugene Bullard was murdered in his home. His body was found with three stab wounds. The defendant was questioned in regard to the murder, but no charges were filed.

On 23 August 1993, at approximately 9:30 a.m., the defendant was arrested at the First Union National Bank on Main Street in High Point for attempting to cash a forged check. He waived his *Miranda* rights and admitted to police officers Walter Heaviland and Kenneth Leonard that he had attempted to cash a check that he had forged after taking it in a robbery. The two officers placed the defendant under arrest and took him to the police station. They then took the defendant to Kirkland Park School to search for a purse that had been taken in the robbery. The officers returned with the defendant to the police station, where he was questioned by Detective Sandy Vuncannon, who was investigating the uttering and forgery charges.

The defendant waived his constitutional rights and confessed to both crimes. Det. Vuncannon procured warrants for the charges at 12:15 p.m. and served them on the defendant.

The defendant was then questioned by a detective who was investigating the robbery in which the checks were taken, and the defendant confessed to this crime at 1:27 p.m. A warrant was typed for this crime but was not delivered to a magistrate at that time.

The defendant was then interviewed by Detective Mark McNeill in regard to the robbery and murder of Eugene Bullard. Det. McNeill testified that he put nine photographs of Mr. Bullard on the walls of the room and one photograph on the floor directly in front of the chair in which the defendant sat during the interrogation. This was done so that the defendant would see a photograph of Mr. Bullard in every direction he turned. During the interview, Det. McNeill implied to the defendant that a note found next to Mr. Bullard's body had been the subject of a handwriting analysis that showed it was in the handwriting of the defendant and that the defendant's fingerprints were on the note. Det. McNeill knew that this was not true. The defendant confessed to the murder at approximately 7:05 p.m. He was taken before a magistrate at approximately 8:00 p.m.

The court found facts consistent with the evidence and overruled the motion to suppress. The defendant was convicted of the robbery of Mr. Bullard. He was also convicted of the murder of Mr. Bullard based on premeditation and deliberation and felony murder. The jury recommended that the defendant be sentenced to life in prison, which sentence was imposed. He was also sentenced to a consecutive term of forty years in prison for robbery with a dangerous weapon.

The defendant appealed.

*Michael F. Easley, Attorney General, by Wm. Dennis Worley, Associate Attorney General, for the State.*

*John Bryson and Stanley Hammer for the defendant-appellant.*

WEBB, Justice.

**[1]** The defendant's only argument on appeal is that his confession should have been suppressed. He says this is so for several reasons. He first contends, relying on *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49 (1991), and *Gerstein v. Pugh*, 420 U.S. 103,

43 L. Ed. 2d 54 (1975), that there was an unreasonable delay in having a magistrate determine whether there was probable cause for the issuance of an arrest warrant. These two cases deal with the promptness required for a determination of probable cause by a neutral magistrate after a person has been arrested without a warrant. They make clear that this determination does not have to be made after an adversarial hearing with the defendant present.

In this case, the defendant was arrested at 9:30 a.m. by officers without a warrant. After his interrogation was complete at 12:30 p.m., a magistrate issued an arrest warrant for him based on probable cause. This satisfies the requirement of *Riverside* and *Gerstein* that a magistrate promptly determine probable cause. The defendant was then lawfully in custody and could be interrogated in regard to other crimes.

**[2]** The defendant also contends that his confession was obtained in violation of Article I, Section 20 of the North Carolina Constitution. This section concerns the impropriety of general warrants and is inapplicable to this case. We find no constitutional violation requiring the suppression of the defendant's confession.

**[3]** The defendant next contends that his right to be taken before a magistrate without unnecessary delay as required by N.C.G.S. § 15A-501(2) was violated. From the time the defendant was arrested at 9:30 a.m. until he was taken before a magistrate at 8:00 p.m., a large part of the time was spent interrogating the defendant. There were several crimes involved. The officers had the right to conduct these interrogations, and it did not cause an unnecessary delay for them to do so. *See State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995).

**[4]** The defendant also says the officers did not advise him of his right to communicate with friends in violation of N.C.G.S. § 15A-501(5). The superior court found and the State concedes that the defendant was not advised of this right. We faced this question in *State v. Curmon*, 295 N.C. 453, 245 S.E.2d 503 (1978). We said, "[I]n view of the findings that defendant was informed of his *Miranda* rights, waived these rights, and voluntarily submitted his statement to police, we do not see how defendant could have suffered prejudice had he actually been denied his statutory right to communicate with friends." *Id.* at 456-57, 245 S.E.2d at 505. We hold, based on the language of *Curmon*, that the defendant was not prejudiced by the failure to advise him of his right to communicate with his friends.

**[5]** The defendant next contends the confession should have been suppressed because it was involuntary. "The standard for judging the admissibility of a defendant's confession is whether it was given voluntarily and understandingly. Voluntariness is to be determined from consideration of all circumstances surrounding the confession." *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982) (citation omitted).

The defendant does not challenge the findings of fact of the superior court but does contend that considering the totality of the circumstances, it was error for the court to conclude the confession was voluntary. *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993). The defendant says that the atmosphere in which he made the confession was so coercive that it was not the product of his own free will. He says the unreasonable delay in bringing him before a magistrate, the placing of photographs of the deceased so that he had to look at the photographs in every direction he turned, and the deceit of the officers in telling him that his handwriting matched the handwriting on a note found next to the body and that his fingerprints were on the note compel a finding that the confession must be excluded.

We have held that there was not an unreasonable delay in taking the defendant before a magistrate. The fact that defendant saw a photograph of the deceased in every direction he turned does not indicate his free will was overborne. The photographs contained no threat or promise of reward to him which would invalidate the confession. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). We held in *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983), that the fact that an officer told the defendant that his fingerprints were found on the murder weapon and at other places in the victim's home, which statement was not true, did not require the court to suppress the confession. The deceit practiced by Det. McNeill did not require the court to find that the confession was not of the defendant's own free will, that it was the product of fear or hope of reward, or that the deceit was calculated to produce an untrue statement.

The trial court in this case specifically found that there were no promises, offers of reward, or inducements to the defendant to make a statement; that there were no threats or suggestions of violence to persuade or induce the defendant to make a statement; and that the defendant appeared coherent and not under the influence of drugs or alcohol. Careful review of the record reveals that these findings are

supported by competent evidence and that the trial court properly concluded that the defendant's statements were voluntarily and freely made.

It was not error to deny the defendant's motion to suppress the confession.

NO ERROR.

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STATE OF NORTH CAROLINA v. WALTER GOLDSTON

No. 1A96

(Filed 13 June 1996)

**Homicide § 266 (NCI4th)— attempted robbery and felony murder—sufficiency of evidence**

The State's evidence was sufficient for the jury to find defendant guilty of attempted robbery and felony murder where it tended to show that the victim was found shot to death behind the counter of his convenience store; the drawer to the cash register was open; four shots had been fired from the victim's pistol, which was lying next to the victim's hand; three of the bullets fired from the victim's pistol were located in the store and the fourth was removed from defendant's arm at a hospital; and defendant went to considerable lengths to concoct a story that would explain his wound.

**Am Jur 2d, Evidence §§ 1430-1499.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hudson, J., at the 21 April 1995 Criminal Session of Superior Court, Durham County, upon a verdict of guilty of first-degree murder in a case tried capitally. The defendant's motion to bypass the Court of Appeals as to an additional conviction for attempted robbery with a firearm was allowed 5 January 1996. Heard in the Supreme Court 16 May 1996.

The defendant was tried for the first-degree murder and attempted robbery with a firearm of General Wesley Cheek, Jr. The evidence showed that on 16 December 1992, the victim was found shot to death behind the counter of his Durham convenience store, B's Stop and Shop, at approximately 8:30 a.m. The drawer to the cash

register was open. The victim had six gunshot wounds, and five bullets were recovered from the body, three from a .38- or .357-caliber gun and two from a .22-caliber gun. A .25-caliber automatic pistol was lying by Mr. Cheek's hand, and four shots had been fired from the gun. Three of the bullets were located in the store. The fourth was removed from the defendant's arm at a hospital that afternoon. Blood not matching the victim's was also located at the scene.

Sometime before 9:00 a.m., the defendant went to the home of Curtis McPherson, who was asleep with his girlfriend. Robert Davis arrived at approximately the same time carrying a .22-caliber revolver and what appeared to be a .38- or .357-caliber gun that McPherson and his girlfriend had seen the defendant carrying on previous occasions. Davis said the defendant had been shot by someone trying to rob him with a small gun. Davis said he had to get rid of the guns, and the defendant told him to get rid of the defendant's gloves as well.

The defendant refused to go to the hospital and asked Davis to cut the bullet out of his arm with a razor blade. When Davis's attempts were unsuccessful, the defendant asked if anyone knew someone who owned a .22- or .25-caliber gun. Davis contacted Reginald Wall, told him there had been a shoot-out, and asked him to bring his gun to McPherson's house. When Wall arrived, the defendant explained that he needed to use the gun "for a cover." The defendant fabricated a story that they had been making a taped program about teenagers and drugs at a housing project when Wall dropped his gun, which accidentally discharged and shot the defendant in the arm. The group then went to the housing project, where the defendant reminded Wall to scrape the gun on the concrete so it would appear to have been dropped. Wall fired the gun at the ground, and the defendant and his nephew made a recording about the scene. The defendant determined that in the event that the bullet in his arm had not been fired from a .25-caliber gun, he would add to the story that once that gun went off, two people started shooting at them. McPherson then drove the defendant to the hospital.

At the hospital, the defendant told a nurse in the emergency room that he had been struck by a stray bullet and had not realized it for awhile. He then told a doctor that he had been shot when a friend dropped a gun that went off when it hit the ground. The bullet removed from the defendant's arm was determined to have been fired by the gun found near the victim.

The jury returned a verdict of guilty of first-degree murder under the felony murder rule and attempted robbery with a firearm. After a capital sentencing proceeding, the jury recommended a sentence of life imprisonment. The court consolidated the attempted robbery with a firearm and murder convictions for sentencing and imposed a life sentence. The defendant appealed.

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

*William J. Cotter and Craig B. Brown for the defendant-appellant.*

WEBB, Justice.

In his sole assignment of error, the defendant contends that the trial court erred in denying his motion to dismiss on the ground that the evidence was insufficient to support the defendant's conviction of felony murder. The defendant does not argue that there was not substantial evidence that a murder and attempted robbery were committed. He argues that all the evidence was circumstantial and that there was not substantial evidence that he committed the crimes. In order to withstand a motion to dismiss, there must be substantial evidence of all elements of the offense. It is immaterial whether the evidence is circumstantial or direct. *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). A jury, when considering circumstantial evidence, may make an inference on an inference. *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987); Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 82 (4th ed. 1993).

There is strong circumstantial evidence in this case that the defendant shot and attempted to rob Mr. Cheek. Mr. Cheek was shot to death behind the cash register in his store. Four bullets had been fired from Mr. Cheek's pistol; three of the bullets were found in the store, and one was removed from the defendant's arm.

The most logical conclusion from this evidence is that when a robbery attempt was made on Mr. Cheek, he fired four times to prevent the robbery, and one of the bullets struck the robber who was the defendant. It is hardly likely that Mr. Cheek fired four times in his store if a robbery was not in progress. It is also improbable that Mr. Cheek or some other person shot the defendant before or after the attempted robbery.

There was also evidence that the defendant went to considerable lengths to concoct a story that would explain his wound. This showed guilty knowledge and could be considered by the jury.

We hold that the evidence was sufficient for the jury to find the defendant guilty of attempted robbery with a firearm and felony murder.

The felony upon which the first-degree murder conviction was based in this case was the attempted robbery with a firearm. The jury did not convict the defendant based on premeditation and deliberation, and the attempted robbery conviction merged into the felony murder conviction. Therefore, judgment should have been arrested on the attempted robbery with a firearm conviction. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981). The court consolidated the murder and attempted robbery with a firearm convictions and imposed a life sentence, which was required for the murder conviction. The defendant was thus not prejudiced by this consolidation. Accordingly, we arrest judgment on the sentence for attempted robbery with a firearm and do not disturb the sentence for felony murder.

CASE NO. 93CRS1274, FIRST-DEGREE MURDER—NO ERROR.

CASE NO. 93CRS1275, ATTEMPTED ROBBERY WITH A FIREARM—JUDGMENT ARRESTED.

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ADOLPH A. JUSTICE, JR. v. N.C. DEPARTMENT OF TRANSPORTATION

No. 54A96

(Filed 13 June 1996)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 121 N.C. App. 314, 465 S.E.2d 554 (1996), reversing the judgment entered by Smith (W. Osmond, III), J., on 7 November 1994, in Superior Court, McDowell County, and remanding this case to the trial court. Heard in the Supreme Court 14 May 1996.

*John R. Mull for petitioner-appellee.*

*Michael F. Easley, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and Bryan E. Beatty, Assistant Attorney General, for respondent-appellant.*

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Johnson, the decision of the Court of Appeals is

REVERSED.

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EVELYN MARIE MUNDAY HINES, EMPLOYEE/PLAINTIFF v. CALDWELL MEMORIAL HOSPITAL, EMPLOYER/DEFENDANT, AND AMERISURE INSURANCE COMPANIES, CARRIER/DEFENDANT

No. 62A96

(Filed 13 June 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 121 N.C. App. 624, 470 S.E.2d 362 (1996), affirming an Opinion and Award of the Industrial Commission filed 9 February 1995, which held that there was no basis on which to amend a prior award of workers' compensation to plaintiff. Heard in the Supreme Court 14 May 1996.

*Randy D. Duncan for plaintiff-appellant.*

*Henry C. Byrum, Jr., for defendant-appellee.*

PER CURIAM.

AFFIRMED.

BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT v. JUSTIN S. BLICKENSDERFER AND WIFE, CAROL H. BLICKENSDERFER; JERONE C. HERRING, TRUSTEE; AND BRANCH BANKING AND TRUST COMPANY

No. 565PA95

(Filed 13 June 1996)

On writ of certiorari to review a unanimous unpublished decision of the Court of Appeals, 120 N.C. App. 645, 463 S.E.2d 430 (1995), affirming summary judgment for plaintiff entered by Downs, J., on 27 June 1994 in Superior Court, Catawba County. Heard in the Supreme Court 17 May 1996.

*Sigmon, Clark, Mackie & Hutton, by E. Fielding Clark, II, and Jeffrey T. Mackie, for plaintiff-appellee.*

*Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for defendant-appellants.*

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

**BOARD OF EDUCATION OF HICKORY v. BRITTAIN**

[343 N.C. 507 (1996)]

BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT v. RALPH C. BRITTAIN AND WIFE, HILDA F. BRITTAIN; WILLIAM CHAMBLEE, TRUSTEE; AND BANK OF GRANITE

No. 563PA95

(Filed 13 June 1996)

On writ of certiorari to review a unanimous, unpublished decision of the Court of Appeals, 120 N.C. App. 645, 463 S.E.2d 430 (1995), affirming summary judgment for plaintiff entered by Downs, J., on 27 June 1994, in Superior Court, Catawba County. Heard in the Supreme Court 17 May 1996.

*Sigmon, Clark, Mackie & Hutton, by E. Fielding Clark, II, and Jeffrey T. Mackie, for plaintiff-appellee.*

*Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for defendant-appellants.*

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT v. LOUISE D. LATTA

No. 564PA95

(Filed 13 June 1996)

On writ of certiorari to review a unanimous, unpublished decision of the Court of Appeals affirming summary judgment against defendant entered by Downs, J., on 27 June 1994 in Superior Court, Catawba County. Heard in the Supreme Court 17 May 1996.

*Sigmon, Clark, Mackie & Hutton, by E. Fielding Clark, II, and Jeffrey T. Mackie, for plaintiff-appellee.*

*Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for defendant-appellants.*

PER CURIAM.

WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT v. CAM R. SEAGLE, WIDOW; BENJAMIN F. SEAGLE, III AND WIFE, ANN SEAGLE; THOMAS CALDWELL SEAGLE AND WIFE, LINDA SEAGLE; CAMELLIA SEAGLE WEIR AND HUSBAND, WILLIAM C. WEIR

No. 518PA95

(Filed 13 June 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 566, 463 S.E.2d 277 (1995), affirming summary judgment entered 27 June 1994 by Downs, J., in Superior Court, Catawba County. Heard in the Supreme Court 17 May 1996.

*Sigmon, Clark, Mackie & Hutton, by E. Fielding Clark, II, and Jeffrey T. Mackie, for plaintiff-appellee.*

*Patrick, Harper & Dixon, by Donald R. Fuller, Jr., and Kimberly A. Huffman, for defendant-appellants.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CAMPBELL v. ROBERT BOSCH CORP.

No. 192P96

Case below: 122 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S 7A-31 denied 12 June 1996.

CITY OF CONCORD v. DUKE POWER CO.

No. 196PA96

Case below: 122 N.C.App. 248

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

CITY OF GREENSBORO v. PEARCE

No. 121PA96

Case below: 122 N.C.App. 582

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

CORNETT v. PATTERSON BUICK

No. 21P96

Case below: 122 N.C.App. 216

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

EVANS v. COWAN

No. 213P96

Case below: 122 N.C.App. 181

Notice of appeal by Attorney General (substantial constitutional question) retained 12 June 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

HEDRICK v. RAINS

No. 105PA96

Case below: 121 N.C.App. 466

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

HORTON v. NEW SOUTH INS. CO.

No. 194P96

Case below: 122 N.C.App. 265

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996. Alternative petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 June 1996. Alternative petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 June 1996.

IN RE HUANG

No. 123P96

Case below: 121 N.C.App. 626

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1996. Petition by petitioner (Dr. Barney K. Huang) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

IN RE JENKINS

No. 132P96

Case below: 121 N.C.App. 626

Notice of appeal by respondent (George Russell Jenkins) (substantial constitutional question) dismissed ex mero motu 12 June 1996. Petition by respondent (George Russell Jenkins) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

KNIGHTEN v. BARNHILL CONTRACTING CO.

No. 187P96

Case below: 122 N.C.App. 109

Petition by defendant or discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

LEANDRO v. STATE OF NORTH CAROLINA

No. 179PA96

Case below: 122 N.C.App. 1

Alternative notice of appeal by defendants retained 12 June 1996. Alternative petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996. Petition by plaintiff intervenors (Ingram, et al) for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

McKOY v. STATE FARM MUT. AUTO. INS. CO.

No. 89A96

Case below: 121 N.C. App. 626

Motion by defendant (State Farm) to dismiss appeal dismissed 30 May 1996. Motion by plaintiff (McKoy) to withdraw notice of appeal allowed 30 May 1996.

MILTLAND RALEIGH-DURHAM v. MUDIE

No. 208P96

Case below: 122 N.C. App. 168

Notice of appeal by defendant (substantial constitutional question) dismissed ex mero motu 12 June 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

MONK v. COWAN TRANSPORTATION, INC.

No. 120PA96

Case below: 121 N.C. App. 588

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

MOORE v. STERN

No. 228P96

Case below: 122 N.C. App. 270

Petition by defendants (Fowler and Fowler) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

N.C. BD. OF EXAM. FOR SPEECH PATH. v.
N.C. STATE BD. OF EDUC.

No. 177A96

Case below: 122 N.C. App. 15

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 12 June 1996.

N.C. CHIROPRACTIC ASSN. v. N.C. STATE BD. OF EDUC.

No. 176PA96

Case below: 122 N.C. App. 122

Petition by petitioner (N.C. Chiropractic Assn.) for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

N.C. FARM BUREAU MUT. INS. CO. v. STAMPER

No. 226P96

Case below: 122 N.C. App. 254

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

OWEN v. UNC-G PHYSICAL PLANT

No. 162PA96

Case below: 121 N.C. App. 682

Petition by Attorney General for writ of supersedeas allowed 12 June 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

PITTMAN v. THOMAS & HOWARD

No. 204P96

Case below: 122 N.C. App. 124

Petition by plaintiff or discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

PLEASANT VALLEY PROMENADE v. LECHMERE, INC.

No. 531PA95

Case below: 120 N.C. App. 650

Petition by defendant (Lechmere, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996. Petition by defendant (AEW Partners, L.P.) for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

RYALS v. HALL-LANE MOVING AND STORAGE CO.

No. 227P96

Case below: 122 N.C. App. 134

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

SALAAM v. N.C. DEPT. OF TRANSPORTATION

No. 183PA96

Case below: 122 N.C. App. 83

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 12 June 1996.

SMITHERS v. TRU-PAK MOVING SYSTEMS

No. 170P96

Case below: 121 N.C. App. 542

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. BLUE

No. 178P96

Case below: 122 N.C. App. 195

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. BUTLER

No. 190P96

Case below: 122 N.C. App. 197

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. KIRKMAN

No. 151P96

Case below: 111 N.C. App. 267

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 June 1996.

STATE v. LITTLE

No. 206P96

Case below: 122 N.C. App. 197

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. MASON

No. 108P96

Case below: 121 N.C. App. 624

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. MOORE

No. 245P96

Case below: 122 N.C. App. 576

Motion for temporary stay allowed 4 June 1996 pending receipt and determination of Attorney General's petition for discretionary review.

STATE v. SEXTON

No. 499A91-2

Case below: Wake County Superior Court

Petition for writ of certiorari to review the order of the Wake County Superior Court denied 12 June 1996.

STATE v. SMITH

No. 173P96

Case below: 121 N.C. App. 628

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 12 June 1996.

STATE v. WELLS

No. 97P96

Case below: 121 N.C. App. 625

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

STATE v. WILKES

No. 130P96

Case below: 121 N.C. App. 628

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 12 June 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

TROUTMAN v. WHITE & SIMPSON, INC.

No. 13P96

Case below: 121 N.C. App. 48

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

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

UPCHURCH v. UPCHURCH

No. 195P96

Case below: 122 N.C. App. 172

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

WENTZ v. WENTZ

No. 219P96

Case below: 121 N.C. App. 628

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 12 June 1996.

PETITIONS TO REHEAR

DEMOCRATIC PARTY OF GUILFORD CO. v.
GUILFORD CO. BD. OF ELECTIONS

No. 116A95

Case below: 342 N.C. 856

Petition by defendants to rehear pursuant to Rule 31 denied 9 May 1996.

TAYLOR v. TAYLOR

No. 191A95

Case below: 343 N.C. 50

Petition by defendant to rehear pursuant to Rule 31 denied 12 June 1996.

STATE OF NORTH CAROLINA v. STEVEN MARK BISHOP a/k/a KEITH DARREN WILLIAMS

No. 207A94

(Filed 31 July 1996)

**1. Jury § 154 (NCI4th)— capital murder—jury selection—attitudes toward death penalty**

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by sustaining the State's objection to the defendant's question, "Would you find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?" where the court sustained the objection because it disagreed with the wording of the question but permitted defendant to ask other questions that gave defendant a fair opportunity to make the inquiries allowed under *Morgan v. Illinois*, 504 U.S. 719.

**Am Jur 2d, Jury § 279; Criminal Law § 685.**

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

**2. Jury § 102 (NCI4th)— capital murder—jury selection—questions regarding pretrial publicity**

The trial court did not improperly limit *voir dire* of prospective jurors during jury selection for a first-degree murder prosecution where defendant contended that the court did not allow defendant to question prospective jurors concerning the content of pretrial publicity to which they had been exposed, but defendant cites no instance where a question he asked was not allowed and defendant did not show that he was forced to accept any juror who expressed or formed an opinion based on pretrial publicity.

**Am Jur 2d, Jury § 294; Criminal Law § 688.**

**3. Jury § 132 (NCI4th)— capital murder—jury selection—questions concerning law enforcement officer known to juror**

There was no abuse of discretion during jury selection for a first-degree murder prosecution where defendant was not allowed to ask which division or department employed a law

enforcement officer whom a prospective juror knew but the court allowed defendant to ask whether any juror had a bias in favor of law enforcement, knew anyone who was a law enforcement officer, and knew any law enforcement officer on the witness list. Nothing in this juror's responses indicated that she was partial or biased.

**Am Jur 2d, Jury §§ 303, 304.**

**4. Jury § 132 (NCI4th)— capital murder—jury selection—juror with murdered friend—ability to be fair**

There was no prejudice during jury selection for a first-degree murder prosecution where a prospective juror indicated that she had had a friend who had been a homicide victim but stated that she would try to do her best to base her verdict only on the evidence and instructions in the present case and the court sustained an objection to the question "Are there any factors that you think may interfere with that ability?" The juror subsequently responded "Yes" when asked whether she could look defendant in the eye and assure him she would be fair. Assuming that sustaining the objection was error, the juror's ability as a fair juror was adequately expressed.

**Am Jur 2d, Jury §§ 303, 304.**

**Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification. 65 ALR4th 743.**

**5. Jury § 127 (NCI4th)— capital murder—jury selection—membership in clubs or organizations**

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by not allowing defendant to ask if any juror was a member of any type of club, social club, or community civic or political organization. The court declined to allow a question that was not closely tied to the prospective jurors' fitness and competency to serve as jurors or to their ability to render a fair and impartial verdict, but did allow similar questions that were more closely tied and that provided adequate inquiry into the jurors' fitness and competency.

**Am Jur 2d, Jury § 311.**

**6. Jury § 119 (NCI4th)— capital murder—jury selection—questions to alternate juror limited—no prejudice**

There was no prejudice in juror selection for a first-degree murder prosecution where defendant claimed the court limited the scope of his *voir dire* of a prospective juror, but that juror was an alternate throughout the case and did not deliberate or return a verdict against defendant.

**Am Jur 2d, Jury § 126.**

**7. Jury § 141 (NCI4th)— capital murder—jury selection—possibility of parole**

The trial court did not err during jury selection in a first-degree murder prosecution by not instructing the jury venire on the meaning of a life sentence where defendant did not ask the trial court to instruct the prospective juror or the jury panel on the meaning of life imprisonment. The trial court's direction of the *voir dire* of the prospective juror adequately communicated to her and the jury panel that jurors were not to consider parole in their deliberations. Furthermore, defendant did not persuade the Supreme Court that the trial court's failure to give further instruction caused the jury to consider the possibility of parole.

**Am Jur 2d, Jury §§ 205, 206.**

**8. Evidence and Witnesses § 2047 (NCI4th)— capital murder—defendant's relationship with accomplice—lay opinions**

The trial court did not err in a first-degree murder prosecution by admitting lay testimony that defendant and his younger brother, who testified for the State as an alleged accomplice, had a codependent relationship that was like a father/son relationship and that defendant dominated his brother. The testimony met the requirements of N.C.G.S. § 8C-1, Rule 701 for opinion testimony by lay witnesses in that it was rationally based on the perception of the witnesses, who worked with the two men, and was helpful to a clear understanding of a fact in issue, whether the brother acted at the direction of defendant and was acting in concert.

**Am Jur 2d, Expert and Opinion Evidence §§ 26-31, 53, 54.**

**9. Criminal Law § 398 (NCI4th)— capital murder—jury—judge's comment concerning employers—not expression of opinion**

The trial court did not express an opinion with respect to defendant's guilt in a first-degree murder prosecution where a juror approached the judge concerned about his employment and the judge made a statement which, read in context, commented on the attitude he perceived employers to have and expressed no opinion on any question of fact to be decided by the jury. Immediately before that conversation, the judge had instructed the jury that he may have "fussed" at one of the lawyers from impatience, not because he had an opinion and that they should not infer it to mean that he had an opinion, and also instructed the jurors during the guilt-innocence phase charge that he had no opinion.

**Am Jur 2d, Trial §§ 272, 276, 307.**

**10. Constitutional Law § 309 (NCI4th)— financial card fraud—closing argument—not a concession of guilt**

Defendant's counsel did not concede defendant's guilt of financial transaction card fraud during his closing argument in a prosecution arising from a breaking and entering, robbery, kidnapping, and murder where defense counsel stated in his argument that the State had put on evidence that an accomplice gave money to defendant when he used the card, that the jury would apply that evidence to the crime of financial transaction card fraud, that it would be for the jury to find that defendant was guilty of financial transaction card fraud if they believed the evidence beyond a reasonable doubt, and that, even if defendant had received and spent the money, that did not show that defendant committed the other crimes charged against defendant.

**Am Jur 2d, Trial §§ 533 et seq.**

**11. Criminal Law § 464 (NCI4th)— capital murder—prosecutor's closing argument—supported by other than corroborative evidence**

The trial court did not err by not intervening *ex mero motu* in the prosecutor's closing argument in a first-degree murder prosecution where the prosecutor argued that defendant pulled the trigger rather than his brother and accomplice. Defendant argued that this argument used evidence admitted for corroborative or

impeachment purposes as substantive evidence, specifically the brother's first statement to officers. However, any argument that defendant pulled the trigger was supported by evidence other than the brother's first statement to police.

**Am Jur 2d, Trial §§ 533 et seq.**

**12. Criminal Law § 443 (NCI4th)— capital murder—prosecutor's argument—victim's personal representative**

The trial court did not err by not intervening *ex mero motu* in the prosecutor's closing argument in a first-degree murder prosecution where defendant claimed that the prosecutor improperly described his role as the victim's personal representative. Counsel may defend their own tactics when challenged and the prosecutor's argument was a response to allegations by defendant's counsel.

**Am Jur 2d, Trial §§ 533 et seq.**

**13. Criminal Law § 468 (NCI4th)— capital murder—prosecutor's argument—victim died without trial—no gross error**

The trial court did not err by not intervening *ex mero motu* in the prosecutor's closing argument in a first-degree murder prosecution where defendant claimed that the prosecutor implicitly criticized his decision to exercise his right to fair trial by an impartial jury when he argued that the victim died without a trial. A similar argument was held not grossly improper in *State v. Basden*, 339 N.C. 288.

**Am Jur 2d, Trial §§ 533 et seq.**

**14. Criminal Law § 793 (NCI4th)— acting in concert—instructions—intent**

The trial court did not err in its instructions on acting in concert by failing to require the jury to find that defendant had the intent necessary to support a finding of guilty of felonious breaking and entering, conspiracy, first-degree murder, and financial transaction card fraud. The challenged instruction on acting in concert is substantially similar to the pattern jury instruction and to the jury instruction upheld in *State v. McCarver*, 341 N.C. 364. Moreover, the court's instructions on the individual crimes clearly required the jury to find that defendant had the specific intent to commit the crimes in order to find him guilty.

**Am Jur 2d, Trial §§ 1251, 1253.**

**15. Criminal Law § 1337 (NCI4th)— capital murder—sentencing—aggravating circumstance—prior felony involving violence—timing of conviction**

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance of a prior felony involving the use or threat of violence where defendant had committed an assault with a deadly weapon with intent to kill inflicting serious injury on 4 July 1991, this murder occurred on 7 October 1991, defendant was convicted of the felony assault on 31 March 1992, and judgment was entered in this case on 27 April 1994. Although defendant argues that he had not been convicted of the prior felony at the time this murder occurred, the evidence shows that the conduct upon which the assault conviction was based occurred prior to the date of the events out of which the capital felony charge arose. *State v. Silhan*, 302 N.C. 223, is directly on point. N.C.G.S. § 15A-2000(e)(3).

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

**16. Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstances—murder committed in the commission of kidnapping and for pecuniary gain—not redundant**

The trial court did not err in a capital sentencing proceeding by permitting the jury to consider as statutory aggravating circumstances that the murder was committed while the defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Although defendant argued that these circumstances were redundant because the felony underlying the (e)(5) circumstance was motivated by a desire to obtain something of monetary value, the evidence underlying the circumstances was not the same. The trial court should have instructed the jury that it could not use the same evidence as the basis for finding both circumstances, but there was no prejudice because there was sufficient independent evidence to warrant a finding of each aggravating circumstance.

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

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

**17. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—codefendant avoiding death penalty with plea bargain**

The trial court did not err in a capital sentencing proceeding by not submitting to the jury the nonstatutory mitigating circumstance that a codefendant or accomplice will avoid the death penalty based upon a plea agreement. Evidence of a codefendant's sentence for the same offense is not relevant to the jury's sentencing determination.

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

**18. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—abuse of sister**

The trial court did not err in a capital sentencing proceeding by not submitting to the jury the nonstatutory mitigating circumstance that defendant's father sexually abused his older sister. Defendant failed to show that the evidence supported the requested circumstance as written, defendant does not argue that the evidence supports the assertion that defendant's father sexually abused defendant and his older brother, and, while defendant argues that the abuse of his sister led to his parents' divorce, which led to defendant's personal feelings of guilt for his father leaving him, the court submitted the nonstatutory mitigating circumstance that defendant's father was significantly absent from his life, which subsumed any indirect mitigating value that his father's abuse of his sister may have had. Finally, the catchall mitigating circumstance was submitted and the jury was not precluded from considering any mitigating evidence.

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

**19. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—poor impulse control**

The trial court did not err in a capital sentencing proceeding by not submitting the nonstatutory mitigating circumstance that

defendant has significantly poorer impulse control than others due to his mental and emotional disturbances where the court submitted the statutory circumstances that the murder was committed while defendant was under the influence of a mental or emotional disturbance and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(2); N.C.G.S. § 15A-2000(f)(6).

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

**20. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—family cares for him**

There was no prejudicial error in a capital sentencing hearing where the trial court failed to submit the requested nonstatutory mitigating circumstance that defendant's family loves and cares about defendant. The evidence to support this circumstance relates only to defendant's family relationships in his childhood, not at the time of the crime or of trial; however, any error was harmless because the court instructed on the catchall circumstance, which no juror found to exist. The court's ruling did not prevent defendant from presenting, or the jury considering, any such evidence.

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

**21. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—defendant not wanting to die**

The trial court did not err in a capital sentencing proceeding by failing to submit the nonstatutory mitigating circumstance that defendant does not want to die. No evidence was entered in either phase of the trial in support of this requested circumstance.

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

**22. Criminal Law § 1316 (NCI4th)— capital sentencing—prior sentencing as habitual felon**

The trial court did not err in a capital sentencing hearing by allowing the State to inform the jury that defendant had already been sentenced to life imprisonment as an habitual felon. In support of the aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of vio-

lence, the prosecutor introduced into evidence a certified copy of a judgment and commitment form showing that defendant had been found guilty of "Assault with a deadly weapon with intent to kill inflicting serious injury while being a Habitual Felon." The habitual felon language was part of the full name of the offense for which defendant had been convicted. Moreover, defendant was free to offer evidence of the felonies he had committed and was not required to leave the jury free to speculate that defendant's habitual felon status rested upon other convictions for violent felonies. N.C.G.S. § 15A-2000(e)(3).

**Am Jur 2d, Criminal Law § 599.**

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

**23. Criminal Law § 1348 (NCI4th)— capital sentencing—definition of mitigating circumstance**

The trial court did not err during a capital sentencing proceeding by not intervening when the prosecutor defined mitigating circumstance. The prosecutor's definition was a correct statement of the law and, although evidence of defendant's age, character, education, environment, habits, mentality, and prior record may be relevant considerations in a sentencing hearing, these words are not essential to the basic definition of a mitigating circumstance.

**Am jur 2d, Criminal Law §§ 598, 599.**

**24. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's argument—mitigating circumstances weighed against a human life**

A prosecutor's argument in a capital sentencing proceeding was not grossly improper and the court did not err by not intervening *ex mero motu* where the prosecutor argued that the mitigating circumstances should be weighed against "a human life, and the way in which [the victim] died, and the reasons why she died." Although defendant argues that the capital sentencing scheme requires the jury to balance the mitigating evidence against the aggravating evidence rather than to balance the mitigating evidence against the victim's life, the prosecutor simply

encouraged the jury to focus on the facts he believed justified the imposition of the death penalty and did not urge the jury to disregard the law.

**Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1760.**

**25. Criminal Law §442 (NCI4th)— capital sentencing—prosecutor's argument—sympathy**

A prosecutor's argument in a capital sentencing proceeding was not so grossly improper that the court erred by not intervening *ex mero motu* where defendant contended that the prosecutor improperly advised jurors not to let feelings of mercy or sympathy overwhelm their objectivity, but the meaning was not necessarily to ask the jurors to disregard feelings of mercy or sympathy altogether, but to do so only where they were divorced from the evidence, thereby overwhelming the jurors' objectivity.

**Am Jur 2d, Trial §§ 648, 649, 1457.**

**26. Criminal Law § 447 (NCI4th)— capital sentencing—prosecutor's argument—sympathy for victim**

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor improperly urged the jury to impose the death penalty as a result of the victim's good qualities by attempting to play upon sympathy for the victim and by referring to what she could have accomplished had she lived. The United States Supreme Court has upheld the use of victim impact statements, stating that victim impact evidence is simply another method of informing the sentencing authority about the specific harm, and in this case the prosecutor's arguments about the victim and what she could have accomplished served to inform the jury about the specific harm caused by the crime.

**Am Jur 2d, Trial §§ 648, 649, 664-667, 1457.**

**27. Criminal Law § 436 (NCI4th)— capital sentencing—prosecutor's argument—defendant pulling trigger rather than accomplice**

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor's argument that defendant pulled the trigger rather than an accomplice was based on impeachment evidence, but the argument was in direct response to defendant's argument that the prosecutor had given the actual

murderer a life sentence and the argument was adequately supported by other evidence.

**Am Jur 2d, Trial §§ 533 et seq.**

**28. Criminal Law § 455 (NCI4th)— capital sentencing—prosecutor's argument—deterrence**

There was no prejudicial error in a capital sentencing proceeding where defendant contended that the prosecutor improperly argued that defendant should be sentenced to death to deter others by reading from reported cases. The prosecutor's arguments, in context, focused on the appropriateness of capital punishment for "exceptionally vicious crimes" and "particularly offensive conduct," and could not be construed as urging the death penalty to deter others. However, assuming that these arguments could have been interpreted as indirect general deterrence arguments, defendant was allowed rebuttal with a lengthy direct argument on the subject.

**Am Jur 2d, Trial § 572.**

**29. Criminal Law § 1341 (NCI4th)— capital sentencing—aggravating circumstance—pecuniary gain**

There was no plain error in a capital sentencing proceeding in the court's instructions concerning the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance of pecuniary gain where the instruction was substantially similar to the pattern jury instructions and the jury indicated that the motivation and purpose of the murder was pecuniary gain by answering "Yes" to the question "Was this murder committed for pecuniary gain?" on the issues and recommendation form.

**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.**

**30. Criminal Law § 682 (NCI4th)— capital sentencing—mental or emotional disturbance and impaired capacity—no peremptory instruction**

The trial court did not err in a capital sentencing proceeding by failing to peremptorily instruct on the statutory mitigating cir-

cumstances of mental or emotional disturbance and impaired capacity and the nonstatutory circumstances that defendant was less able than others to visualize or anticipate social consequences due to his disturbances and that his turbulent family history significantly affected his mental and emotional development where the testimony of the clinical social worker on which defendant relied was developed for trial rather than to treat defendant. It lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment and is not manifestly credible. Moreover, even if it supported finding that the two statutory mitigating circumstances existed, it was controverted by other evidence. N.C.G.S. § 15A-2000(f)(2), N.C.G.S. § 15A-2000(f)(6).

**Am Jur 2d, Trial § 1441.**

**31. Criminal Law § 680 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—abuse of defendant and siblings as children—no peremptory instruction**

There was no error in a capital sentencing proceeding where the trial court did not give peremptory instructions on the nonstatutory mitigating circumstance that defendant's father physically abused defendant and the other children in the family where the testimony of a clinical social worker was prepared for trial and therefore lacks the indicia of reliability and is not manifestly credible, defendant's mother was unable to describe any specific instances of abuse against defendant or the other children, and defendant presented no medical records or other evidence of specific instances of abuse. Furthermore, the testimony of defendant's mother may have been influenced by her obvious bias.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**32. Criminal Law § 1373 (NCI4th)— death penalty—not disproportionate**

A death sentence was not disproportionate where the record fully supports the four aggravating circumstances found by the jury, the jury's failure to find certain submitted mitigating circumstances was a rational result from the evidence, and there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration. This case is distinguishable from each of those cases in which the North Carolina Supreme Court has found the death penalty dis-

proportionate. Defendant here was convicted on the theory of premeditation and deliberation as well as under the felony murder rule, and the jury findings of a prior conviction of a violent felony, that the murder was committed for the purpose of avoiding a lawful arrest, and that the victim was surprised in her own home before she was kidnapped and murdered were significant.

**Am Jur 2d, Criminal Law § 628.**

**33. Criminal Law § 1286 (NCI4th)— habitual felon sentencing—evidence of prior adjudication as habitual felon**

There was no prejudicial error during a habitual felon proceeding in the admission of evidence showing that defendant previously had been adjudicated to be a habitual felon where defendant's confrontation rights were not at jeopardy because he was also the defendant in the prior proceeding, there was no prejudice in that the State presented evidence of defendant's prior convictions and defendant does not contend that any of the prior convictions supporting the habitual felon adjudication do not exist. The admission of evidence showing that defendant previously had been adjudicated a habitual felon could not have affected the outcome.

**Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 20-22.**

**34. Criminal Law § 1073 (NCI4th)— sentencing—forfeiture of vehicles used in felony**

The trial court did not err in ordering the forfeiture of defendant's truck and automobile under N.C.G.S. § 14-86.1 where defendant was found guilty of robbery with a dangerous weapon. Both vehicles were used in the armed robbery; defendant drove to the victim's house in the truck and he effected his escape in the car after his girlfriend drove it to pick him up.

**Am Jur 2d, Forfeitures and Penalties §§ 15, 17.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., on 27 April 1994 in Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments and sentences was allowed 25 April 1995. Heard in the Supreme Court 15 November 1995.

*Michael F. Easley, Attorney General, by Ellen B. Scouten, Special Deputy Attorney General, for the State.*

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

ORR, Justice.

The State's evidence, predominantly through the testimony of Kenneth Kaiser, defendant's younger brother, tended to show the following. In August of 1991, defendant and Kaiser worked on a paint crew that painted the home of Nan Martin Schiffman, the victim. On one occasion while they were painting, defendant told Kaiser that Schiffman had some jewelry and expensive items in the house and that they could get her key duplicated and come back later and get what they wanted. Kaiser and defendant agreed they should wait a month or more so that they would not be suspected. Later that day, defendant left; when he returned, he showed Kaiser a copy of the house key that he had made.

On 3 October 1991, both defendant and Kaiser lost their jobs. On 6 October, they applied for a job selling vacuum cleaners, and on 7 October, they went for a training session. At lunch, Kaiser told defendant that the job was not what they thought it was going to be and that maybe it would be a good time to go into Schiffman's house and get what they could because they needed some money. When defendant agreed, Kaiser asked what would happen if Schiffman came home and recognized them. Defendant responded that they could kill her, and Kaiser agreed.

About 3:00 p.m. on that day, defendant and Kaiser drove defendant's Datsun pickup truck to Schiffman's house. Kaiser got out and let himself into the house with the duplicate key while defendant parked the truck at another location and returned on foot. Kaiser took some jewelry while defendant placed a box of silver by the back door. As they continued to look for things to steal, Schiffman drove into the driveway. Defendant and Kaiser hid in the master bedroom and bathroom, defendant holding a loaded .32-caliber revolver and Kaiser holding a loaded .22-caliber revolver.

After Schiffman entered the house, defendant and Kaiser came out of the master bedroom, and defendant told Schiffman that if she would be quiet, she would not get hurt. Kaiser went through her purse and took two one-hundred-dollar bills and her Citibank card. Kaiser asked her for the personal identification number used to get money

out of a teller machine with the card. She responded that she did not know, but that it would be in her files.

Defendant said they should move out of the sunroom so that no one would see them. Schiffman began to run down the hall, but defendant caught her and put his gun against her and told her that if she tried that again, they would kill her. Then defendant and Kaiser took Schiffman to a bedroom where she told them where to find the personal identification number. Defendant said that they were going to the bank. He loaded the silver into the trunk of Schiffman's car, and Kaiser put Schiffman into the car.

Defendant drove Kaiser and Schiffman to the Troxler farm. They took Schiffman into the house, which was abandoned. Defendant told Kaiser to move the car and take the silver out of the trunk. When Kaiser returned, defendant was zipping up his pants, and Schiffman was pulling up her pants. Defendant asked Kaiser if he wanted oral sex, and Kaiser said he did not. Defendant then whispered to Kaiser, "She knows who we are. We're going to have to do that." Defendant told Kaiser to take Schiffman out to a pit beside the house and "do it." The evidence is conflicting as to who actually pulled the trigger, killing Schiffman. Kaiser's first statement to police indicated that defendant killed Schiffman. Kaiser subsequently gave a revised statement that he shot Schiffman. Kaiser also testified at trial that he killed her. A prison inmate testified that defendant told him, "I killed the b----." Dr. Butts, the medical examiner, testified that the wound was caused by a bullet of at least .32-caliber in size. Kaiser testified that on the day of the murder, he carried a .22-caliber revolver and defendant carried a .32. After she was killed, defendant and Kaiser put Schiffman's body in the pit and covered it. Then, they drove Schiffman's car to Winston-Salem.

After parking the car at Hanes Mall, defendant and Kaiser wiped off their fingerprints, withdrew $200.00 from an automatic teller machine (ATM) with Schiffman's Citibank card, went to a restaurant to drink beer, and then withdrew another $500.00. They called the vacuum cleaner sales company to see if they had the job because defendant thought it would look suspicious to spend money without a job. They paid for this call at a pay phone rather than calling collect because defendant said a collect call would place them in Winston-Salem at the time the card was used. Defendant then called Robin Heath and asked her to pick them up. When Heath arrived in defend-

ant's Cadillac, defendant drove them back to Greensboro in his Cadillac, and they picked up the Datsun truck.

The next day, defendant gave Kaiser the keys to Schiffman's car and told him to leave the window down and the keys in it so someone would steal it and get their fingerprints on it; Kaiser did so. Then defendant and Kaiser went back to the Troxler farm, tried to shovel more dirt over Schiffman's body, and retrieved the box of silver. The following day, they bought twenty bags of potting soil and ten or fifteen bags of lime from Lowe's because defendant said the lime would make the body decompose faster. They subsequently spread the lime and the soil into the pit where Schiffman was buried.

Between 7 October and 23 October, defendant and Kaiser used Schiffman's Citibank card to withdraw $17,050 from automatic teller machines (ATMs). Investigators used a computer program to determine when and where the card was being used. They learned that the card was being used at the Wachovia ATM in Yanceyville and contacted the tellers there. On 23 October 1991, one of the tellers gave a description of two men and the truck they drove. Later that day, officers located and stopped the truck and arrested the occupants, defendant and Kaiser, for financial transaction card fraud and carrying concealed weapons. When police conducted a search incident to the arrest of Kaiser, they found Schiffman's credit card in his shoe. Kaiser's fingerprints matched those lifted from Schiffman's car. Some of Schiffman's personal property was found in the truck that defendant and Kaiser were stopped in, as well as in defendant's home. Kaiser told his cellmate where the body was buried, the cellmate told a police detective, and police found the body.

Defendant presented an alibi defense. The parents of defendant's girlfriend testified that they helped defendant work on his girlfriend's car on the day of the murder from 5:00 p.m. until 6:00 p.m. A coworker of Schiffman's testified that Schiffman left work to go home around 4:00 p.m. Kaiser testified that he and defendant broke into the house around 3:30 p.m. Defendant argued that he could not have been home to work on his girlfriend's car by 5:00 p.m. if Kaiser's story were true. Defendant argued that Kaiser committed the murder alone.

The jury found defendant guilty of first-degree murder based both upon premeditation and deliberation and upon the felony murder rule. The jury also found defendant guilty of breaking and entering, robbery with a dangerous weapon, first-degree kidnapping, financial transaction card fraud, and conspiracy, as well as guilty of being a

habitual felon by reason of the convictions for breaking and entering and financial transaction card fraud. Judge Rousseau sentenced defendant to death for the first-degree murder conviction. Judge Rousseau also sentenced defendant to forty years imprisonment on the conviction of robbery with a dangerous weapon, thirty years on the conviction of second-degree kidnapping, a life sentence on the conviction of felonious breaking or entering while being a habitual felon, a life sentence on the conviction of financial transaction card fraud while being an habitual felon, and one year on the conviction of conspiracy, all sentences to run consecutively.

## JURY SELECTION

### I.

**[1]** Defendant first contends that the trial court violated *Morgan v. Illinois*, 504 U.S. 719, 119 L. E. 2d 492 (1992), during defendant's *voir dire* of prospective juror Whitaker. The court sustained the State's objection to the defendant's question, "Would you find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?" Defendant has shown neither an abuse of discretion nor prejudice, both of which are required to establish reversible error relating to *voir dire*. *See, e.g., State v. Miller*, 339 N.C. 663, 678, 455 S.E.2d 137, 145, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995).

In *Morgan v. Illinois*, the Supreme Court held that during *voir dire* in a capital case, the trial court's refusal to permit inquiry into whether a prospective juror would automatically vote to impose the death penalty upon defendant's conviction regardless of the evidence of mitigating circumstances is inconsistent with the Due Process Clause of the Fourteenth Amendment. "Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion." *State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993).

In the case at bar, the trial court did not refuse *Morgan* inquiry. The court permitted defendant to ask juror Whitaker and other jurors other questions that gave defendant a fair opportunity to make the *Morgan* inquiries. The court sustained the objection to the question at issue because it disagreed with the wording. The court told the jury, "All these cases are difficult . . . ," and allowed defendant to make the inquiry with more specific wording. We conclude that the trial court did not abuse its discretion in making this clarification and that

defendant was not prejudiced because the *Morgan* inquiry was allowed. Therefore, this assignment of error is overruled.

## II.

**[2]** Next, defendant contends that the trial court improperly limited defendant's *voir dire* of several prospective jurors. Again, defendant must show abuse of discretion and prejudice to establish reversible error relating to *voir dire*. We find that he has failed to do so.

First, defendant contends that the trial court erred by not allowing defendant to question prospective jurors concerning the content of the pretrial publicity to which they had been exposed. However, the record reveals no such limitation. Before the jury selection proceedings began, the court stated:

> All right. As I said earlier, I assume there's been a lot of publicity on this case, Mr. Maddox. And as I told you back in January, I'll let you ask the jurors how many of them have heard about the case, how they heard about it, when they heard about it, if they heard about it this morning or last night. You can ask them if they've formed any opinion about the case. And I'll rule on it from there. You can ask them who told them—I mean, whether they heard by word of mouth, newspaper, radio, television or whatnot.

Defendant cites no instance where a question he asked was not allowed. We do not find any abuse of discretion here, and because defendant did not show that he was forced to accept any juror who expressed or formed an opinion based on pretrial publicity, he has shown no prejudice. *See State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347-48 (1983) (to show prejudice, defendant must show that a juror objectionable to defendant sat on the jury).

**[3]** Second, defendant contends that the trial court refused to allow significant questioning about the relationships between prospective jurors and the law enforcement community, thus depriving defendant of an opportunity to determine whether the venire contained "prosecution-prone" jurors. The record reveals that the court allowed defendant to ask questions to determine whether any juror had any bias in favor of law enforcement, whether any juror knew anyone who was a law enforcement officer, and whether any juror knew any law enforcement officer on the witness list, but refused to allow defendant to ask which division or department employed a law enforcement officer whom prospective juror Latta knew. Nothing in Ms. Latta's responses indicated that she was partial or biased.

Therefore, the trial court did not abuse its discretion in refusing to allow this question.

**[4]** Third, prospective juror Tanner indicated that she had had a friend who had been a victim of a homicide but stated that she would try to do her best to base her verdict only on the evidence and instructions in the present case. Defendant claims the trial court erred in sustaining an objection to the question, "Are there factors that you think may interfere with that ability?" In sustaining the objection, the court said, "Well, she said she'd do her best to be fair about it." Prospective juror Tanner subsequently responded "Yes" when defendant's counsel asked her, "[C]an you look at Mr. Steven Mark Bishop right now in the eye and assure him that you would be able to—if you sat on this case, that you would be fair to him?" Assuming *arguendo* that sustaining the objection was error, Tanner's ability as a fair juror was adequately addressed, and defendant has failed to show prejudice.

**[5]** Fourth, defendant assigns error to the trial court's refusal to allow defendant to ask prospective jurors if any juror was a member of any type of club, social club, or community civic or political organization. The court said that defendant could "ask them if they belong to any groups that are opposed or in favor of the death penalty, something like that." After reviewing the *voir dire* transcript, we find no abuse of discretion. A defendant may question prospective jurors concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. N.C.G.S. § 15A-1214(c) (1988). The court declined to allow a question that was not closely tied to the prospective jurors' fitness and competency to serve as jurors or to their ability to render a fair and impartial verdict, but did allow similar questions that were more closely tied and that provided adequate inquiry into the jurors' fitness and competency. This action did not constitute an abuse of discretion.

**[6]** Finally, defendant claims the trial court erroneously limited the scope of defendant's *voir dire* of prospective juror Hodgin. Hodgin was an alternate throughout the case and did not deliberate or return a verdict against defendant. Therefore, assuming *arguendo* that the court erred, defendant has shown no prejudice.

## III.

**[7]** Next, defendant contends the trial court erred in failing to instruct the jury venire on the meaning of a life sentence. While the prosecutor, Mr. Goodman, was interviewing prospective juror Pleasants during *voir dire*, the following exchange occurred:

> MR. GOODMAN: All right. Now, do you have any personal views about capital punishment that would either prevent or substantially impair your ability to perform your duties as a juror in this case, in accordance with Judge Rousseau's instructions?
>
> MS. PLEASANTS: I have mixed emotions about capital punishment—
>
> MR. GOODMAN: All right.
>
> MS. PLEASANTS:—in—Do you want me to tell you what they are?
>
> MR. GOODMAN: Well, if you can elaborate just a bit.
>
> MS. PLEASANTS: Well, I feel that I would prefer parole—I mean, life without—
>
> THE COURT: Well, wait just a minute now.
>
> MS. PLEASANTS: Okay. Capital punishment—
>
> THE COURT: No. Wait a minute.
>
> MS. PLEASANTS: Okay.
>
> THE COURT: Do you believe in capital punishment?
>
> MS. PLEASANTS: In some circumstances.
>
> THE COURT: In other words, depending on the facts of the case?
>
> MS. PLEASANTS: Yes. As you put it before, I agree with you, as North Carolina puts it.
>
> THE COURT: Well, in other words, you hear the evidence, you hear the aggravating and mitigating [circumstances], weigh them and consider them, and you could impose the death penalty, if that's what the evidence called for?
>
> MS. PLEASANTS: If that were the best option. I don't know what the law is, as far as the options.

THE COURT: Well—

MS. PLEASANTS: If it's the most heinous crime and there were no other better options, I would consider life without parole—then I would vote for the death penalty.

THE COURT: Well—

MS. PLEASANTS: I don't know.

THE COURT:—the jury would be called upon to make a recommendation as to punishment, either life imprisonment or death. Now, could you consider both of those?

MS. PLEASANTS: Yes, I could.

THE COURT: And if the facts and the evidence and the law called for it, could you impose the death penalty?

MS. PLEASANTS: Yes, I could.

THE COURT: All right.

Go ahead, Mr. Goodman.

MR. GOODMAN: If I could just ask one further point in clarification. You wouldn't automatically vote for life imprisonment as a result of your mixed emotions on this topic?

MS. PLEASANTS: Well, I don't know what the judge would instruct us yet, so it would be very difficult to say that right now, what the options would be. But if it were a terrible crime and there were no better options, that would be what I would vote for.

MR. GOODMAN: Okay. And you understand that the judge would instruct you that the choices are between the death penalty and life imprisonment, as opposed to the way you termed it, of life without parole? Do you understand that?

MS. PLEASANTS: Yes.

[DEFENSE COUNSEL]: Object.

MS. PLEASANTS: I don't know if I—

THE COURT: Well, the only thing is that the recommendation will be either death or life imprisonment. That's it.

MS. PLEASANTS: Then I would be fine with that. I would—the way you described it, I could go with that. I would agree with that.

THE COURT: You could consider both, and if it called for—

MS. PLEASANTS: Yes.

THE COURT:—the law and the evidence called for death, you could vote for death; if it called for life, you could vote for life?

MS. PLEASANTS: Yes.

Defendant did not ask the trial court to instruct Ms. Pleasants or the jury panel on the meaning of life imprisonment. However, on appeal, defendant argues that as a result of this exchange, the trial court had a duty to instruct the jury on the meaning of a life sentence. We disagree.

We find *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996), to be directly on point. In *State v. Burr*, we found no error in the trial court's failure to instruct the jury on the meaning of a life sentence after a prospective juror asked, during *voir dire* by defendant, if life imprisonment was "without privilege of parole," and counsel for the defense responded:

> The judge will have to instruct you with regards [sic] to the life imprisonment or the possibility of life imprisonment. Whether or not he mentioned that or not, would you be able to follow the judge's instructions as they . . . apply to this case? [The prospective juror responded affirmatively.]

*Id.* at 287-88, 461 S.E.2d at 615.

"A defendant's eligibility for parole is not a proper matter for consideration by a jury." *State v. Campbell*, 340 N.C. 612, 632, 460 S.E.2d 144, 154 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 871 (1996). In the case at bar, the trial court's direction of the *voir dire* of prospective juror Pleasants adequately communicated to Pleasants and the jury panel that jurors were not to consider parole in their deliberations. Furthermore, defendant has not persuaded us that the court's failure to give any further instruction caused the jury to consider the possibility of parole in its deliberations. On these facts, we find no error in the court's failure to specifically instruct the jury on the meaning of a life sentence.

## GUILT-INNOCENCE PROCEEDING

### IV.

**[8]** Defendant contends that the trial court erred by admitting testimony by the State's witnesses, Terry Mack Alton and Sam Roberts, that defendant and his younger brother, Kenneth Kaiser, had a codependent relationship, that it was like a father/son relationship, and that defendant dominated Kaiser. Defendant argues that this testimony amounts to expert opinion from persons who are not qualified by any psychiatric or psychological training to give such opinions. We disagree.

Rule 701 of the Rules of Evidence provides:

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

N.C.G.S. § 8C-1, Rule 701 (1992). In *State v. Jennings*, 333 N.C. 579, 607, 430 S.E.2d 188, 201, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993), we held proper the admission of testimony by a witness describing a meeting between the witness, the defendant, and the defendant's husband and stating that defendant had no compassion for her husband. We concluded that

> this witness's "opinions or inferences" as to the emotions displayed by defendant toward her husband, and her husband's responses, manifested by a change in his physical aspect, were rationally based on the witness's perceptions and were helpful to a clear understanding of his testimony or the determination of a fact in issue.

*Id.*

In the case at bar, the testimony meets the requirements of parts (a) and (b) of Rule 701. The testimony was rationally based on the perception of the witnesses. The witnesses worked with defendant and Kaiser, saw them interact, and heard their conversations. The testimony was rationally based on these observations. The testimony was also helpful to a clear understanding of a fact in issue: whether Kaiser acted at the direction of defendant when he committed the crimes with defendant. This fact was in issue because it supported the "acting in concert" theory of the State's case. The testimony was

therefore admissible opinion testimony by lay witnesses under Rule 701. This assignment of error is overruled.

V.

**[9]** Defendant next contends that the trial court erred by expressing an opinion with respect to defendant's guilt in front of a member of the petit jury. We disagree.

At a lunch recess, juror Hawkins approached the trial judge, concerned that his employer would only pay him for two of the weeks he served on jury duty. At the conclusion of the day's proceedings, after the rest of the jury had left, the judge discussed the problem with juror Hawkins. Judge Rousseau made the following statement to juror Hawkins:

> [T]he clerk's office here has talked to [the president of your company]. Of course, he says that they have a certain policy, which I can't interfere with. He says you can take some vacation time or maybe work some extra time about it. How about calling him again about it and see if you can work something out satisfactory.
>
> You know, we have these crimes occur in each county in North Carolina. Looks like all over the country. We have the jury trials. Somebody's got to serve on jury duty. I'm not fussing at you about it. But, you know, these business people want criminals locked up, don't like breaking and entering, people stealing their—

At that point, the judge was interrupted by the bailiff approaching the bench, and the conversation ended. On the next morning, juror Hawkins informed the court that he had everything worked out with his employer.

"The 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." N.C.G.S. § 15A-1222 (1988). In *State v. Campbell*, 340 N.C. at 628-29, 460 S.E.2d at 152-53, we held that the court's comment about "this particular sad situation" was not an expression of opinion, but an innocuous, universal sentiment regarding a murder.

Similarly, in the case at bar, read in context, the trial judge expressed no opinion on any question of fact to be decided by the jury; instead he commented on the attitude he perceived employers to have. Immediately before the conversation with juror Hawkins that is at issue, the trial judge instructed the jury that he may have "fussed"

at one of the lawyers more than another because he gets impatient, not because he had an opinion, and that the jury should not infer it to mean he had an opinion. The judge also instructed the jurors during the guilt-innocence phase charge that he had no opinion as to what their verdict should be. We conclude that the judge's comment was neither intended nor interpreted as an opinion about any fact to be decided by the jury. This assignment of error is overruled.

## VI.

**[10]** Defendant contends that his trial counsel deprived him of effective assistance of counsel by conceding defendant's guilt of financial transaction card fraud without defendant's consent during his closing argument to the jury. We disagree. The relevant portion of the argument follows:

> But I say to you that after that the only thing the State has put into evidence that connects Steven Mark Bishop to the Nan Schiffman case whatsoever is spending money. Spending money that seems so obvious to have come from Kenny Kaiser using her credit card to obtain money out of her account.
>
> And you heard him testify. Kenny Kaiser said he used the card every time and that he would then give a cut to his brother. Give money to his brother. He gave money to his brother to buy the truck from him. He gave money to him each time he used the card.
>
> The State did put on that evidence. The State does have that evidence. And they have credible and believable witnesses that have testified to that. You weigh that evidence as to how that evidence applies to the crime charged of financial transaction card fraud.
>
> If you believe from that evidence that that proves beyond a reasonable doubt to you that Steven Mark Bishop is guilty of financial transaction card fraud, then that will be for you to find.
>
> But I say to you getting money and spending money that your brother gives you that he's stealing does not make you a murderer; does not make you a kidnapper; does not make you an armed robber. It doesn't mean you broke and entered in anybody's house. It makes you nothing more than a fool. That's the State's case.

In his closing argument, defendant's counsel did not concede defendant's guilt of financial transaction card fraud. He simply stated that the State put on evidence that Kaiser gave money to defendant when Kaiser used the card, that the jury would apply that evidence to the crime charged of financial transaction card fraud, and that if the jury believed that the evidence proved beyond a reasonable doubt that defendant was guilty of financial transaction card fraud, then that would be for the jury to find. This was a correct statement of the law, not a concession of guilt. Defendant's counsel then emphasized that even if defendant had received and spent the money, that did not show that defendant committed the other crimes charged against defendant. The argument attempted to separate the evidence of receiving and spending money from the crimes charged against defendant other than financial transaction card fraud. We conclude that defendant's counsel did not concede defendant's guilt to financial transaction card fraud during his closing argument; therefore, this assignment of error is overruled.

## VII.

**[11]** Defendant next contends that the trial court erred in failing to intervene *ex mero motu* to stop the prosecutor from making three improper arguments to the jury during his closing argument. We disagree.

Since defendant failed to object, he must demonstrate that the prosecutor's arguments amounted to gross impropriety. *E.g.*, *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995). In making this inquiry, it must be stressed that prosecutors are given wide latitude in their argument. *Id.* Counsel have wide latitude to argue the law, the facts, and reasonable inferences supported thereby. *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996). Prosecutors may create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable. *State v. Ingle*, 336 N.C. 617, 645, 445 S.E.2d 880, 895 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 222 (1995).

Defendant first claims that the prosecutor's argument that defendant, rather than Kaiser, pulled the trigger was improper because it used evidence admitted for corroborative or impeachment purposes—Kaiser's first statement to police—as substantive evidence. N.C.G.S. § 8C-1, Rule 607, provides: "The credibility of a wit-

ness may be attacked by any party, including the party calling him." However, prior statements of a witness which are inconsistent with his present testimony may only be used to impeach the witness' credibility. They are not admissible as substantive evidence because of their hearsay nature. *State v. Buckner*, 342 N.C. 198, 223, 464 S.E.2d 414, 428 (1995); *State v. Williams*, 341 N.C. 1, 9, 459 S.E.2d 208, 213 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 870 (1996). Defendant claims that the prosecutor's argument relied on the fact that Kaiser stated in his first statement to police that defendant killed Schiffman, a fact admitted to impeach Kaiser's trial testimony that Kaiser killed Schiffman.

Any argument by the prosecutor that defendant pulled the trigger was adequately supported by facts in evidence other than Kaiser's first statement to police. Dr. Butts testified that the wound was caused by a bullet of at least .32-caliber in size. Kaiser testified that on the day of the murder, he carried a .22-caliber revolver and defendant carried a .32. Also, Timothy Watlington testified that defendant told him that defendant killed Schiffman, and Ronald Haith testified that defendant told him that Kaiser had told another inmate where the body of the woman "they had killed" was located. The prosecutor's argument was a reasonable inference supported by this evidence; therefore, the argument was not improper.

**[12]** Defendant also claims that the prosecutor improperly described his own role as Schiffman's personal representative by stating, "I have a different function and a different role than [defendant's counsel]. I have to see that justice is done for Nan Martin Schiffman. Not just to Mr. Bishop." Counsel may defend their own tactics when challenged. *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985). The prosecutor's argument was a response to the allegations by defendant's counsel that the prosecutor had made an improper deal with Kaiser. The argument was not grossly improper so as to require *ex mero motu* intervention.

**[13]** Finally, defendant claims the prosecutor's argument was improper because he implicitly criticized defendant's decision to exercise his right to a fair trial by an impartial jury when he argued that Schiffman died without a trial. Defendant concedes that we held that a similar argument was not grossly improper in *State v. Basden*, 339 N.C. 288, 451 S.E.2d 238 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995). We decline to reconsider our holding in *Basden*,

and we hold that the prosecutor's argument in this case also fell short of the gross impropriety standard.

For the foregoing reasons, defendant's contention that the trial court erred in failing to intervene *ex mero motu* in the prosecutor's closing argument has no merit.

## VIII.

**[14]** Defendant also contends that the trial court's jury instructions on the acting in concert theory erroneously failed to require the jury to find that defendant had the intent necessary to support a finding of guilty of the crimes of felonious breaking and entering, conspiracy, first-degree murder, and financial transaction card fraud. We disagree.

Although he failed to object on these grounds at trial, we elect to review this assignment of error because defendant was sentenced to death. *See State v. Gregory*, 342 N.C. 580, 585, 467 S.E.2d 28, 31 (1996). Defendant challenges the court's general, introductory instructions on the acting in concert theory, which stated:

> Now, members of the jury, the law in this state—there is a law in this state called "acting in concert." That is, for a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute that crime. If a defendant is present with one or more persons, and they act together with a common purpose to commit breaking and entering, each of them is held responsible for the acts of the others done in the commission of that crime, breaking or entering, as well as conspiracy to commit breaking and entering, robbery, murder, financial transaction card fraud, and kidnapping, as well as any other crime committed by the other in furtherance of that common purpose.

This instruction is substantially similar to the pattern jury instruction and to the jury instruction held proper in *State v. McCarver*, 341 N.C. 364, 386-87, 462 S.E.2d 25, 37-38 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996). Moreover, the court's instructions on the individual crimes of felonious breaking and entering, conspiracy, first-degree murder, and financial transaction card fraud clearly required the jury to find that defendant had the specific intent to commit the crimes in order to find him guilty. We find no merit in defendant's argument.

## SENTENCING PROCEEDING

## IX.

**[15]** Defendant contends that the trial court erred by submitting to the jury the statutory aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(3), which provides 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). We disagree. Defendant argues that the submission of the (e)(3) aggravating circumstance was error because he had not been convicted of the prior felony at the time this murder occurred. Defendant committed the felony (assault with a deadly weapon with the intent to kill inflicting serious injury) on 4 July 1991. This murder occurred on 7 October 1991. Defendant was convicted of the felony assault on 31 March 1992.

In *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979), we held that N.C.G.S. § 15A-2000(e)(3)

> requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose.

In applying these requirements, we found in *State v. Silhan*, 302 N.C. 223, 266, 275 S.E.2d 450, 480 (1981), that there was evidence of the (e)(3) aggravating circumstance where the defendant committed kidnapping, crime against nature, and assault with intent to rape in September of 1976; committed the murder for which he was being sentenced on 13 September 1977; and was tried for the prior felonies, of which he was convicted, in October of 1977. Because the order of these events is the same, we find that *State v. Silhan* is directly on point. The timing element is addressed in the third evidentiary requirement: "[T]he conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose." *Id.* The evidence shows that the conduct upon which the assault conviction was based occurred on 4 July 1991, prior to 7 October 1991, the date of the events out of which the capital felony charge arose. Therefore, the evidence supported submission of N.C.G.S. § 15A-2000(e)(3), and this assignment of error is overruled. *See also State v. Burke*, 343 N.C. 129, 157-60, 469 S.E.2d

901, 915-17 (1996); *State v. Lyons*, 343 N.C. 1, 22, 468 S.E.2d 204, 214 (1996).

## X.

**[16]** Defendant contends that, under the rule announced in *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), the trial court erred by permitting the jury to consider as statutory aggravating circumstances that the murder was committed while the defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Defendant argues that these circumstances were redundant because the felony underlying the (e)(5) circumstance was motivated by a desire to obtain something of monetary value. We disagree.

> In *Quesinberry*, we held that the trial court erred in submitting the aggravating circumstances 1) that the murder was committed during the course of a robbery and 2) that the murder was committed for pecuniary gain. Because the evidence showed that the defendant committed the robbery for the purpose of pecuniary gain, as opposed to some other purpose, the circumstances were redundant. 319 N.C. at 238, 354 S.E.2d at 452. In effect, the trial court permitted the jury to use the same evidence—that the defendant killed for pecuniary gain—to aggravate the murder twice. *Id.* at 239, 354 S.E.2d at 452-53.

*State v. Sanderson*, 336 N.C. 1, 21, 442 S.E.2d 33, 45 (1994). However, if the circumstances are supported by different evidence, they cannot be redundant. *Id.*; *State v. Jennings*, 333 N.C. at 627-28, 430 S.E.2d at 213-14.

In the case at bar, the evidence underlying the (e)(5) and (e)(6) aggravating circumstances was not the same. In the sentencing instructions to the jury, the trial court limited the evidence which the jury could rely on in considering the (e)(5) circumstance to kidnapping for the purpose of facilitating defendant's commission of financial transaction card fraud. The court also limited the evidence on which the jury could rely in considering the (e)(6) circumstance to the taking of the "jewelry, silver, and credit cards". Assuming *arguendo*, without so holding, that the evidence of the taking of credit cards is also evidence of financial transaction card fraud, the evidence of the taking of the jewelry and silver, apart from the evidence of the taking of the credit cards, supports a finding that the

capital felony was committed for pecuniary gain. Thus, the case at bar is distinguishable from *State v. Quesinberry*, where this Court found a complete overlap of evidence supporting two aggravating circumstances. *See State v. Jennings*, 333 N.C. at 628, 430 S.E.2d at 214 (trial court did not err in submitting two aggravating circumstances where there was sufficient independent evidence apart from the overlapping evidence to support a finding of the existence of each aggravating circumstance). Therefore, it was not error to submit both aggravating circumstances.

We note, as we did in *State v. Jennings*, that the trial court should have instructed the jury that it could not use the same evidence as the basis for finding both circumstances. However, because there was sufficient independent evidence to warrant a finding of each aggravating circumstance, the court's failure to give such an instruction did not prejudice defendant. *Id.* This assignment of error is overruled.

## XI.

**[17]** Defendant next contends that the trial court erred by refusing to submit to the jury certain nonstatutory mitigating circumstances requested by defendant. Defendant argues that the court was required to submit the requested circumstances because "where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form." *State v. Cummings*, 326 N.C. 298, 324, 389 S.E.2d 66, 80 (1990). We will address each requested nonstatutory mitigating circumstance separately.

First, the defendant requested as a nonstatutory mitigating circumstance that the "co-defendant or accomplice in the crimes for which the defendant has been convicted will avoid the death penalty based upon the plea agreement entered into by the State with the co-defendant or accomplice." We have consistently held that evidence of a codefendant's sentence for the same offense is not relevant to the jury's sentencing determination in the case before it. *State v. Ward*, 338 N.C. 64, 114, 449 S.E.2d 709, 737 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 1013 (1995). As we did in *State v. Simpson*,

> [w]e decline to depart from this precedent and reiterate that such information deals with matters unique to another person and

does not in any way reflect upon defendant's character, record, or background. It is, accordingly, irrelevant as to sentencing.

*State v. Simpson*, 341 N.C. 316, 353, 462 S.E.2d 191, 212 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 194 (1996). This assignment of error has no merit.

**[18]** Second, defendant claims he requested the nonstatutory mitigating circumstance that the "defendant's father sexually abused Mark's older sister Debbie." However, the record reveals that defendant's written request states this requested circumstance differently: "The defendant's father sexually abused Mark's older sister Debbie and there is evidence that he also sexually abused Mark and his older brother Sonny." Defendant has failed to show that the evidence supported this requested nonstatutory mitigating circumstance as written. Defendant does not argue that any evidence supports the assertion that defendant's father sexually abused defendant and his older brother, Sonny. Furthermore, defendant argues that his father's sexual abuse against his sister has mitigating value because it led to his parents' divorce and to defendant's personal feelings of guilt for his father leaving him. However, the trial court did submit the nonstatutory mitigating circumstance that asked, "Was the defendant's father significantly absent from Mark's life from age five to the present, and does that have mitigating value?" Thus, the indirect mitigating value that defendant argues that his father's abuse of defendant's sister may have had was subsumed in the submitted mitigating circumstances.

In *State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 38, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994), we found that certain submitted mitigating circumstances as well as the catchall mitigating circumstance provided a vehicle for the jury to consider all of the evidence tending to support a requested nonstatutory mitigating circumstance which was not submitted. We held that the trial court's error in failing to submit the defendant's requested nonstatutory mitigating circumstance was harmless beyond a reasonable doubt because it was clear that the jury was not prevented from considering any potential mitigating evidence. *Id.*; *accord State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Likewise, in the case at bar, the catchall mitigating circumstance was submitted, and the jury was not precluded from considering any mitigating evidence. Therefore, assuming *arguendo* that the trial court erred, the error was harmless beyond a reasonable doubt.

**[19]** Third, defendant requested the nonstatutory mitigating circumstance that "[d]ue to his mental and emotional disturbances, the defendant has significantly poorer impulse control than others." The trial court stated that it refused to submit this circumstance because it was covered under the submitted statutory mitigating circumstances N.C.G.S. § 15A-2000(f)(2), "Was the capital felony committed while the defendant was under the influence of a mental or emotional disturbance?" and N.C.G.S. § 15A-2000(f)(6), "Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired?" It is not error for a trial court to refuse to submit a requested nonstatutory mitigating circumstance that has been incorporated into a statutory mitigating circumstance that was submitted to the jury. *See State v. Skipper*, 337 N.C. 1, 55-56, 446 S.E.2d 252, 282-83 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). We find no error in the trial court's decision that the requested nonstatutory mitigating circumstance was incorporated in the submitted statutory (f)(2) and (f)(6) circumstances and therefore should not be submitted separately.

**[20]** Fourth, defendant requested the nonstatutory mitigating circumstance that the "defendant's family loves and cares about the defendant." A review of the record reveals that the evidence that defendant claims supports this circumstance relates only to defendant's family relationships in his childhood, not at the time of the crime or of trial. Furthermore, because the court instructed on the "catchall" circumstance, N.C.G.S. § 15A-2000(f)(9), which no juror found to exist, the trial court's ruling did not prevent defendant from presenting, or the jury from considering, any such mitigating evidence. Therefore, assuming *arguendo* that the court erred in failing to submit this circumstance, the error was harmless beyond a reasonable doubt. *See State v. Daughtry*, 340 N.C. 488, 525, 459 S.E.2d 747, 766 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996).

**[21]** Finally, defendant requested the nonstatutory mitigating circumstance that the "defendant does not want to die." However, defendant cites no evidence that was admitted in either phase of the trial in support of this requested circumstance. Therefore, the court properly refused to submit this requested nonstatutory mitigating circumstance. For the foregoing reasons, this assignment of error is overruled.

## XII.

**[22]** Defendant contends that the trial court erred by allowing the State, in support of the N.C.G.S. § 15A-2000(e)(3) statutory aggravating circumstance that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person," to inform the sentencing jury that defendant had already been sentenced to life imprisonment as an habitual felon. Defendant argues that this constituted plain error because it allowed the jury to speculate that defendant's habitual felon status rested upon other convictions for violent felonies rather than upon the convictions for nonviolent felonies that defendant had actually received. We disagree.

"[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). "[T]he most appropriate way to show the 'prior felony' aggravating circumstance would be to offer duly authenticated court records." *State v. Silhan*, 302 N.C. at 272, 275 S.E.2d at 484.

As evidence of the existence of the (e)(3) aggravating circumstance, the prosecutor introduced into evidence a certified copy of a judgment and commitment form showing that defendant had been found guilty by a jury of "Assault with a deadly weapon with intent to kill inflicting serious injury while being a Habitual Felon." The habitual felon language was part of the full name of the offense for which defendant had been convicted. The court did not err in allowing the State to use the judgment and commitment form to prove that defendant had been previously convicted of a felony involving the use or threat of violence to the person.

Furthermore, defendant was not required to leave the jury free to speculate that defendant's habitual felon status rested upon other convictions for violent felonies. A defendant may offer evidence to minimize or rebut the State's evidence of the circumstances of the prior felony. *See State v. Green*, 321 N.C. 594, 611, 365 S.E.2d 587, 597 (where State's witness testified about details of prior violent felony to prove the (e)(3) aggravating circumstance, defendant was able to bring out evidence which gave a "more favorable impression of defendant's character" than would be present had only the armed robbery conviction been introduced), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). Defendant was free to offer evidence of the

felonies defendant had committed that gave him the status of habitual felon. This assignment of error is overruled.

## XIII.

**[23]** Defendant next contends that six statements made by the prosecutor during his final argument at the sentencing proceeding were improper. Defendant claims that the trial court erred by failing to stop these statements. We disagree. We note at the outset that although wide latitude is allowed the arguments of counsel in both the guilt-innocence and sentencing phases of a trial, "the foci of the arguments in the two phases are significantly different, and rhetoric that might be prejudicially improper in the guilt phase is acceptable in the sentencing phase." *State v. Artis*, 325 N.C. 278, 324, 384 S.E.2d 470, 496 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

First, defendant cites as improper the prosecutor's definition of a mitigating circumstance, arguing that it was incomplete because it ignored the critical importance of evidence concerning defendant's age, character, education, environment, habits, mentality, and prior record. However, the prosecutor's definition was a correct statement of the law, *see id.* at 326, 384 S.E.2d at 497, and was substantially similar to the definition of a mitigating circumstance stated in *State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985), and in the North Carolina pattern jury instructions.

> A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.

N.C.P.I.—Crim. 150.10 (1995). Although evidence of defendant's age, character, education, environment, habits, mentality, and prior record may be relevant considerations in a sentencing hearing, these words are not essential to the basic definition of a mitigating circumstance. Therefore, this assignment of error has no merit.

**[24]** Second, defendant contends the prosecutor improperly argued that the mitigating circumstances should be weighed against "a human life, and the way in which Nan Martin Schiffman died, and the reasons why she died." Defendant argues that this argument was

improper because the capital sentencing scheme requires the jury to balance the mitigating evidence against the aggravating evidence rather than to balance the mitigating evidence against Schiffman's life. However, the prosecutor did not urge the jury to disregard the law, he simply encouraged the jury to focus on the facts he believed justified imposition of the death penalty. "Such encouragement is the job of a prosecutor in a criminal case." *State v. Powell*, 340 N.C. 674, 694, 459 S.E.2d 219, 229 (1995) (prosecutor's argument telling the jurors to focus on the crime instead of the mitigating evidence was not grossly improper), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 688 (1996). Defendant failed to object to this argument, and we do not find that the argument was so prejudicial and grossly improper as to require corrective action by the trial court *ex mero motu*.

**[25]** Third, defendant contends that the prosecutor improperly advised jurors not to let feelings of mercy or sympathy overwhelm their objectivity. In *State v. Rouse*, 339 N.C. at 93, 451 S.E.2d at 561, we held that statements by the prosecutor that the jury should not base its decision on mercy or sympathy were not grossly improper. In *State v. Artis*, 325 N.C. at 325, 384 S.E.2d at 497, we held that statements by the prosecutor urging the jury to try the case without prejudice and without sympathy, but strictly on the facts of the lawsuit, were not improper.

> In [*California v. Brown*, 479 U.S. 538, 93 L. Ed. 2d 934 (1987)], the United States Supreme Court held that a jury instruction that jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" did not unconstitutionally preclude a fair consideration of the full range of possible mitigation, for its meaning was not necessarily to disregard those impulses altogether, but to do so only where they were divorced from the evidence. *Id.* at 540, 93 L. Ed. 2d at 939.

*State v. Artis*, 325 N.C. at 325-26, 384 S.E.2d at 497. We believe that the prosecutor's statement asking jurors not to let feelings of mercy or sympathy overwhelm their objectivity had similar meaning to the *Brown* jury instruction asking jurors not to be swayed by such feelings. The meaning was not necessarily to ask the jurors to disregard feelings of mercy or sympathy altogether, but to do so only where they were divorced from the evidence, thereby overwhelming the jurors' objectivity. Defendant failed to object to this argument, and we do not find that the argument was so prejudicial and grossly

improper as to require corrective action by the trial court *ex mero motu*.

**[26]** Fourth, defendant contends that the prosecutor's argument improperly urged the jury to impose the death penalty upon defendant as a result of Schiffman's good qualities by attempting to play upon the jury's sympathy for Schiffman and by referring to what Schiffman could have accomplished had she lived. In *Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735-36 (1991), the United States Supreme Court upheld the use of victim-impact statements during closing arguments unless the victim-impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair. The Court stated that victim-impact evidence is simply another method of informing the sentencing authority about the specific harm caused by the crime and held that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. *Id.* In *State v. Gregory*, 340 N.C. 365, 427, 459 S.E.2d 638, 674 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996), we held that a closing argument including references to the victims' loss of life and a statement that "[t]hey had a right to a life that went beyond a muddy ditch behind [the college]" did not render the defendant's trial fundamentally unfair. In the case at bar, the prosecutor's arguments about Schiffman and what she could have accomplished served to inform the jury about the specific harm caused by the crime. We conclude that the argument did not render the trial fundamentally unfair.

**[27]** Fifth, defendant contends that the prosecutor's argument that defendant, rather than Kaiser, actually pulled the trigger was improper because it relied on Kaiser's first statement, thereby using for substantive purposes evidence that was admitted to impeach Kaiser's trial testimony. The prosecutor's argument was a direct response to defendant's argument that the prosecutor had given the actual murderer, Kaiser, a life sentence. We have already held in part VII of this opinion that any argument by the prosecutor that defendant pulled the trigger was adequately supported by facts in evidence other than Kaiser's first statement to police. This assignment of error is overruled.

**[28]** Finally, defendant contends that in reading direct quotes from two different reported cases, the prosecutor improperly argued that

defendant should be sentenced to death in order to deter others from committing capital crimes.

> We have long recognized that argument of counsel must be left largely in the discretion of the trial judge and that counsel are entitled to a wide latitude in argument during a hotly contested case. Nevertheless counsel may not by his argument place before the jury incompetent and prejudicial matter not admissible into evidence . . . .

*State v. Cousins*, 289 N.C. 540, 547, 223 S.E.2d 338, 343 (1976) (citations omitted).

We have held that evidence of the general deterrent effect of the death penalty is inadmissible because it is not relevant to defendant, his character, his record, or the circumstances of the charged offense. *E.g.*, *State v. Cherry*, 298 N.C. 86, 97-98, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). Consequently, jury arguments about the general deterrent effect of the death penalty are likewise improper. *See State v. Hill*, 311 N.C. 465, 475, 319 S.E.2d 163, 169-70 (1984) (general deterrence argument improper, but not so offensive as to warrant *ex mero motu* action by the court); *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983) (general deterrence argument improper, but not so egregious as to require corrective action by the trial judge *sua sponte*), *overruled in part on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 *and by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988).

Although the prosecutor did not directly argue that the jury should recommend a sentence of death in this case in order to deter others from committing capital crimes, defendant claims that the prosecutor indirectly argued this principle by reading direct quotes from two different reported cases. N.C.G.S. § 7A-97 (formerly N.C.G.S. § 84-14) grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes that are relevant and refer to authoritative rules of law. *See State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986).

After reviewing the arguments in the transcript, we conclude that the prosecutor's arguments, in context, could not be construed as urging the jury to recommend the death penalty in this case to deter others from committing capital crimes. Instead, the arguments focused on the appropriateness of capital punishment for "exception-

ally vicious crimes" and "particularly offensive conduct," such as were committed in this case.

Assuming *arguendo* that these arguments could have been interpreted by the jury as indirect general deterrence arguments, on the specific facts of this case, defendant was not prejudiced because defense counsel was allowed to rebut the arguments with a lengthy direct argument on the subject, emphasizing that "[s]cholar after scholar, in doing research on the issue, has proven that the death penalty does not act as a deterrent." This assignment of error is overruled.

## XIV.

**[29]** Defendant next contends that the trial court committed plain error because its instructions concerning the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that "[t]he capital felony was committed for pecuniary gain" did not emphasize that the jury must find that defendant killed Schiffman for the purpose of pecuniary gain in order to find that the circumstance existed. "[T]o reach the level of 'plain error' . . . , the error in the trial court's jury instructions must be 'so fundamental [that it] amount[ed] to a miscarriage of justice or . . . 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)). We decline to find plain error.

The trial court instructed the jury on pecuniary gain as follows:

> Number four: Was this murder committed for pecuniary gain. A murder is committed for pecuniary gain if the defendant, when he commits this, has obtained money or some other thing which can be valued in money as a result of the death of Ms. Schiffman.
>
> If you find from the evidence beyond a reasonable doubt, that when the defendant killed Ms. Schiffman, or someone acting in concert with him killed her, the defendant took jewelry, silver and credit cards, you would find this aggravating circumstance, and would so indicate by having your foreman write "Yes" in the space provided.

This instruction is substantially similar to the pattern jury instructions. N.C.P.I.—Crim. 150.10. Also, on the issues and recommendation form, the issue regarding the pecuniary gain aggravating circum-

stance was stated: "Was this murder committed for pecuniary gain?" By answering "yes," the jury indicated on the form that the motivation and purpose of the murder was pecuniary gain. *State v. Bacon*, 337 N.C. 66, 100, 446 S.E.2d 542, 560 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1995). Assuming *arguendo* that the trial court's instructions did not clearly state that the jury must find that murder was committed for the purpose of pecuniary gain in order to find the circumstance existed, any such error in the trial court's instructions was not so fundamental as to amount to a miscarriage of justice and did not have a probable result of the jury reaching a different verdict than it otherwise would have reached. Therefore, this assignment of error is overruled.

## XV.

**[30]** Defendant contends that the trial court erred by failing to peremptorily instruct the jury with respect to certain statutory and nonstatutory mitigating circumstances. We disagree.

If requested, a trial court should give a peremptory instruction for any statutory or nonstatutory mitigating circumstance that is supported by uncontroverted and manifestly credible evidence. *State v. McLaughlin*, 341 N.C. 426, 449, 462 S.E.2d 1, 13 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996). If the evidence supporting the circumstance is controverted or is not manifestly credible, the trial court should not give the peremptory instruction. *Id.* The trial court's refusal to give the peremptory instruction does not prevent defendant from presenting, or the jury from considering, any evidence in support of the mitigating circumstance.

The trial court declined to give requested peremptory instructions with respect to two statutory mitigating circumstances: N.C.G.S. § 15A-2000(f)(2), "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," and N.C.G.S. § 15A-2000(f)(6), "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired."

With respect to these two statutory mitigating circumstances, defendant relies on the testimony of Beth McAllister, a clinical social worker employed as a mitigation specialist by the Appellate Defender's office. McAllister testified that she was asked to put together a social history of defendant for use in his trial. Because McAllister developed the social history to prepare for testifying at

trial, rather than to treat defendant, it lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment. *See, e.g., State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986) (testimony of pediatrician not admissible in guilt-innocence proceeding because based on statements made in preparation of trial rather than for purposes of medical diagnosis or treatment); *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975) (testimony of psychiatrist not admissible in guilt-innocence proceeding because based on history given by defendant and his family to prepare for testifying at trial rather than to treat and cure defendant), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976). Although the testimony was admissible in the sentencing proceeding, because it lacks indicia of reliability, we cannot conclude that it is manifestly credible.

Even if McAllister's testimony supported a finding that the two statutory mitigating circumstances existed, this testimony was controverted by evidence presented at both the guilt-innocence and sentencing proceedings. The State presented evidence regarding behavior of defendant that was not consistent with a finding that the two statutory mitigating circumstances existed. The State's evidence tended to show that defendant was able to work at two jobs; that he planned and carried out the crimes of robbery, kidnapping, and murder that are the subjects of this case; and that he took careful steps to conceal these crimes. Because the evidence supporting N.C.G.S. § 15A-2000(f)(2) and (f)(6) was controverted and was not manifestly credible, we do not find the trial court's refusal to give peremptory instructions with respect to these mitigating circumstances to be improper.

The trial court also declined to give requested peremptory instructions with respect to three nonstatutory mitigating circumstances. Two are conditioned on a finding that defendant suffers from mental or emotional disturbances or developmental impairment: "[T]he defendant, due to his mental and emotional disturbances, [is] less able than others to visualize or anticipate social consequences"; and "[T]he defendant's turbulent family history significantly affect[ed] his mental and emotional development." Again, defendant relies on the testimony of Beth McAllister to support these findings. As discussed above, this evidence is controverted and is not manifestly credible. Therefore, we do not find the trial court's refusal to give peremptory instructions with respect to these mitigating circumstances to be improper.

**[31]** The third nonstatutory mitigating circumstance in question stated that "defendant's father physically abuse[d] [defendant] and the other children in the family." To support this mitigating circumstance, defendant relies on the social history developed by Beth McAllister and on the testimony of defendant's mother, Jacqueline Kaiser. As discussed above, McAllister's testimony of abuse lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment and is therefore not manifestly credible.

Defendant's mother was unable to describe any specific instances of abuse against defendant or the other children. In fact, she testified that the abuse was not directed toward the youngest child as much because she was still a baby. Defendant presented no medical records or other evidence of specific instances of abuse.

Furthermore, the testimony of defendant's mother may have been influenced by her obvious bias, shown in her understandably emotional response of, "Yes. Oh, yes," when asked if she wanted her son to live. Because of the potential for bias to influence the witnesses' testimony, the trial court instructed the jurors at the end of the sentencing proceeding that in determining whether to believe any witness, they should consider any interest, bias, or prejudice the witness may have.

After reviewing the record, we conclude that the evidence that defendant's father physically abused defendant and the other children in the family was not manifestly credible so as to mandate a peremptory instruction. Therefore, the trial court properly declined to give a peremptory instruction with respect to this mitigating circumstance.

## PROPORTIONALITY REVIEW

## XVI.

**[32]** We now turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have examined the record, transcripts, and briefs in the present case and conclude that the record fully supports the four aggravating circumstances found by the jury; that the defendant had been previously convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); that the murder was committed for the purpose of avoiding a lawful arrest, N.C.G.S. § 15A-2000(e)(4); that the murder was committed by the defendant while the defendant was engaged in the commission of kidnapping, N.C.G.S. § 15A-2000(e)(5);

and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). We also find that the jury's failure to find certain submitted mitigating circumstances was a rational result from the evidence. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must now turn to our final statutory duty of proportionality review.

Proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355 *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); *accord* N.C.G.S. § 15A-2000(d)(2). We do not conclude that the imposition of the death penalty in this case is aberrant or capricious.

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, 433 S.E.2d 144 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994). 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. *Id.* Although we review all of the cases when engaging in this statutory duty, we will not undertake to discuss or cite all of those cases each time we carry out that duty. *Id.*

This case is distinguishable from each of those cases in which this Court has found the death penalty disproportionate. In three of those cases, *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant either pled guilty or was convicted by the jury solely under the theory of felony murder. Here, defendant was convicted on the theory of premeditation and deliberation as well as under the felony murder rule. We have said that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

The jury's finding of the prior conviction of a violent felony aggravating circumstance is also significant. *See id.* at 342, 384 S.E.2d at

507. "[N]one of the cases in which the death sentence was determined by this Court to be disproportionate have included this aggravating circumstance." *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).

The jury's finding of the aggravating circumstance that the murder was committed for the purpose of avoiding a lawful arrest is also significant. The evidence shows that defendant told Kaiser that they were going to have to kill Schiffman because she knew who they were.

> [W]e have never found a death sentence to be disproportionate in witness-elimination cases. The reason is clear: "Murder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion." *State v. Oliver*, 309 N.C. 326, 375, 307 S.E.2d 304, 335 (1983). . . . The purposeful and deliberate killing of witnesses or possible witnesses strikes a blow at the entire public—the body politic—and directly attacks our ability to apply the rule of law and to bear witness against the transgressors of law in our society.

*State v. McCarver*, 341 N.C. at 407, 462 S.E.2d at 49 (citation omitted).

The fact that Schiffman was surprised in her own home by defendant before she was kidnapped and murdered is also significant. As this Court has consistently stated,

> [t]he sanctity of the home is a revered tenet of Anglo-American jurisprudence. . . . And the law has consistently acknowledged the expectation of and right to privacy within 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 (citations omitted), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

We conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have consistently returned recommendations of life

imprisonment. Therefore, the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

## HABITUAL FELON PROCEEDING

## XVII.

**[33]** Defendant also contends that the trial court erred during the habitual felon proceeding (the hearing held to determine whether defendant should be sentenced as an habitual felon in the present case) by admitting evidence showing that defendant previously had been adjudicated to be an habitual felon. We disagree.

Defendant cites *State v. Brown*, 319 N.C. 361, 354 S.E.2d 225 (1987), and *Holton v. Lee*, 173 N.C. 105, 91 S.E. 602 (1917), for the proposition that the judgment or finding of another court is not admissible in a subsequent proceeding as evidence of the fact found at the prior proceeding. However, defendant's reliance on these cases is misplaced. Both *State v. Brown* and *Holton v. Lee* address the protection of a defendant's constitutional right to confrontation. Both cases hold that a fact found in a prior proceeding is not admissible against a defendant who was not a defendant in the prior proceeding and did not have the opportunity to present a full defense at the prior proceeding. In the case at bar, defendant's confrontation rights are not at jeopardy because he was also the defendant in the prior proceeding.

Furthermore, even if the evidence showing that defendant previously had been adjudicated to be an habitual felon was admitted improperly, defendant can show no prejudice. N.C.G.S. § 14-7.1 provides that "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." The State presented evidence of defendant's prior convictions that supports a declaration that defendant is an habitual felon. Defendant does not contend that any of the prior convictions supporting the habitual felon adjudication in the present case do not exist. We conclude that the admission of evidence showing that defendant previously had been adjudicated an habitual felon could not have affected the outcome of defendant's habitual felon proceeding in the case at bar. Therefore, this assignment of error is overruled.

## FORFEITURE PROCEEDING

## XVIII.

**[34]** Defendant finally contends that the trial court erred by ordering the forfeiture of defendant's Datsun truck and Cadillac automobile because the forfeiture was not authorized by N.C.G.S. § 90-112. Defendant correctly argues that N.C.G.S. § 90-112, which pertains to the forfeiture of vehicles involved in violations of the Controlled Substances Act, is not applicable in this case. However, the forfeiture was authorized by N.C.G.S. § 14-86.1, which, among other things, authorizes the forfeiture of certain vehicles used by any person in the commission of armed robbery. Defendant was found guilty of robbery with a dangerous weapon, which is another name for armed robbery. *See State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992); *State v. Roddey*, 110 N.C. App. 810, 431 S.E.2d 245 (1993). Both vehicles were used in the commission of the armed robbery; defendant drove to Schiffman's house in the Datsun truck, and he effected his escape in the Cadillac after his girlfriend drove it to pick him up. This assignment of error is overruled.

## PRESERVATION ISSUES

## XIX.

Defendant concedes that his remaining assignments of error, enumerated XIX through XLI and set out on pages 195 through 216 in his brief, concern issues that this Court has previously decided contrary to his position. Defendant raises these issues to provide this Court an opportunity to reexamine its prior holdings and to preserve the issues for any future *habeas corpus* review. We have carefully considered defendant's arguments on these issues. We find no compelling reason to depart from our prior holdings, and we are not persuaded that prejudicial error occurred so as to warrant a new trial. However, the issues are preserved for any necessary future review by a federal court.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. Comparing this case to similar cases in which the death penalty was imposed and considering both the crime and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Therefore, the

sentence of death entered against defendant must be and is left undisturbed.

NO ERROR.

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STATE OF NORTH CAROLINA v. JOSEPH EARL BATES

No. 145A91-2

(Filed 31 July 1996)

**1. Homicide § 555 (NCI4th)— first-degree murder—proof of premeditation and deliberation—instruction on second-degree murder not required**

The State's evidence satisfied its burden of proof on the elements of premeditation and deliberation in a prosecution for first-degree murder, and the trial court did not err in refusing to instruct the jury on second-degree murder, where the evidence tended to show that defendant beat the victim with a shovel handle, bound him with ropes, and placed him in defendant's vehicle; when defendant stopped at his employer's house, he told a friend that he had in his truck a person who might know something about who shot into defendant's house and asked if he wanted to "help or watch"; defendant then transported the victim to defendant's campsite, tied him to a tree, and questioned him at gunpoint; the victim was asking defendant what he had done and what was going on; after shooting the victim in the neck, defendant tied cement blocks to the victim's body and later threw the body over a bridge into a river; afterwards, defendant stated that what he had done did not bother him and that he could not let the victim go after what he had done to him; and defendant stated in his confession that he was not drunk or doing drugs at the time he shot the victim. Defendant's statements in his confession that the reason he shot the victim was because the victim acted like he knew who shot into his house, the victim spit on him and swore at him, and "this made me mad and I shot him" did not show a lack of premeditation and deliberation which required the trial court to instruct on second-degree murder.

**Am Jur 2d, Homicide §§ 496, 511.**

**Lesser-related state offense instructions: modern status. 50 ALR4th 1081.**

**Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.**

**Propriety of lesser-included-offense charge to jury in federal homicide prosecution. 101 ALR Fed. 615.**

2. **Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—circumstances unlikely to recur—emotional fear—insufficient evidence**

The trial court did not err by refusing to submit to the jury in a capital sentencing proceeding defendant's proposed mitigating circumstances that his criminal conduct was the result of circumstances unlikely to recur and that he was suffering emotional fear at the time of the offense because he believed his life was in danger where no evidence in the record suggested that defendant's depression, personality disorder, or alcohol abuse were unlikely to recur, and there was insufficient evidence of the emotional fear circumstance where the victim was hog-tied and strapped to a tree at the time defendant shot and killed him.

**Am Jur 2d, Criminal Law § 628.**

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

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

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

3. **Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—influence of alcohol—subsumption by statutory circumstances submitted**

The trial court did not err by refusing to submit to the jury in a capital sentencing proceeding defendant's proposed mitigating circumstances that he was under the influence of alcohol at the time of the offense and that the influence of alcohol on defendant's life was significant where the proposed circumstances were subsumed by the statutory mental or emotional disturbance and

impaired capacity mitigating circumstances submitted to the jury. N.C.G.S. §§ 15A-2000(f)(2), 15A-2000(f)(6).

**Am Jur 2d, Criminal Law § 628.**

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

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

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

**4. Criminal Law § 680 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—peremptory instructions not required**

The trial court did not err by refusing to give peremptory instructions on mitigating circumstances that defendant was one of seven children reared by poor, hardworking parents and he worked to help out the family while at home, and that before his marital problems, defendant was kind, friendly, and compassionate since the evidence relating to those circumstances was not uncontroverted.

**Am Jur 2d, Criminal Law § 628.**

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

**5. Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstances—heinous, atrocious, or cruel murder—murder while committing kidnapping—different evidence**

The same evidence was not used in a capital sentencing proceeding to support the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a felony (kidnapping) and the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, even though the trial court instructed the jury that it must find defendant guilty of kidnapping the victim for the purpose of terrorizing him in order to find the (e)(5) circumstance, where (1) the evidence establish-

ing the especially heinous, atrocious, or cruel circumstance concerned the brutality of the murder in that it tended to show that defendant hit the victim over the head several times with a shovel handle; the victim suffered for hours before being killed; defendant hog-tied the victim, laid the victim out on the ground, tied the victim to a tree, and placed a gun to his throat while interrogating him; and after beating and interrogating the victim at gunpoint for several hours, defendant shot the victim in the neck, and (2) the kidnapping was shown by evidence that defendant loaded the victim into his truck and took him to his employer's house, and the purpose to terrorize the victim was shown by evidence that defendant invited his employer and another person to participate or watch him as he got answers from the victim, that defendant had earlier expressed to a third person his intent to get answers from the victim, and that defendant carried out this intent by interrogating the victim at gunpoint.

**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 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—pose-*Gregg* cases. 67 ALR4th 887.**

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

**6. Criminal Law § 1320 (NCI4th)— capital sentencing—two aggravating circumstances—consideration of same evidence prohibited—failure to instruct—no plain error**

The trial court did not commit plain error by failing to instruct the jury that it could not consider the same evidence in support of the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in a kidnapping and the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel in light of the strong evidence in the case, including evidence of psychological torture, and the

fact that there was independent evidence supporting each aggravating circumstance.

**Am Jur 2d, Criminal Law § 628; Trial § 1441.**

**7. Criminal Law § 427 (NCI4th)— capital sentencing—prosecutor's argument—defendant's demeanor—no comment on failure to testify**

The prosecutor did not suggest that defendant should take the stand and improperly comment on defendant's failure to testify by her argument in a capital sentencing proceeding about defendant's lack of remorse and his absence of emotion when the victim's mother, defendant's mother, and his sister cried on the stand. Rather, the prosecutor was commenting on the demeanor of the defendant, which was before the jury at all times, and the trial court did not err by failing to intervene *ex mero motu*.

**Am Jur 2d, Trial §§ 577-587.**

**Violation of federal constitutional rule (*Griffin v. California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.**

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

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

**8. Jury § 132 (NCI4th)— voir dire—defendant's election not to testify—exclusion of question—no abuse of discretion**

The trial court did not unduly restrict defendant's *voir dire* of prospective jurors in a capital trial and thus did not abuse its discretion by sustaining an objection to one question to the jury panel regarding whether the prospective jurors would hold defendant's election not to testify against him where defendant did not exhaust his peremptory challenges; after the objection was sustained, defendant was allowed to ask other questions related to his election not to testify; and the trial court correctly

instructed the jury that defendant's decision not to testify could not be used against him.

**Am Jur 2d, Jury § 206.**

**Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.**

**9. Criminal Law § 463 (NCI4th)— capital sentencing—prosecutor's arguments—no gross impropriety**

The prosecutor's jury arguments in a capital sentencing proceeding that one of defendant's motives in killing the victim was to prevent the victim from testifying against him, that a picture of the victim showed that the victim had beautiful hands and "we had to cut them off to find out who he was," and that the jury could imagine the devastation suffered by the victim's mother when a law officer knocked on her door were not so grossly improper as to have required intervention *ex mero motu* by the trial court.

**Am Jur 2d, Trial § 554.**

**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.**

**10. Evidence and Witnesses § 1240 (NCI4th)— prearrest statements at police station—defendant not in custody—Miranda warnings not required**

Defendant was not in custody at the time he made three prearrest statements to law officers so that *Miranda* warnings were not required and those statements thus did not taint a subsequent statement made by defendant after he had been given the *Miranda* warnings where the trial court made findings supported by evidence that the defendant agreed to talk with law enforcement officers and agreed to go to the Sheriff's Department; defendant drove to the Sheriff's Department, accompanied by a friend; when defendant arrived, he spoke with three law enforcement officers; the officers thanked defendant for coming to the Sheriff's Department and told defendant that he was not under arrest and was free to leave at any time; the officers spoke to defendant for approximately forty minutes, during which time

defendant told three different stories about what happened on the night in question; thereafter, defendant went to the bathroom alone; after defendant returned from the bathroom, the officers asked defendant if he would tell the truth, and defendant said that he would; defendant was then advised of his *Miranda* rights, and defendant signed a written waiver of those rights; and defendant was given a drink and cigarettes throughout the interview.

**Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence § 749.**

**What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.**

**11. Jury § 142 (NCI4th)— voir dire—hypothetical question—improper attempt to stake our jurors**

The trial court did not err in refusing to permit defendant to ask prospective jurors in a capital trial whether, if they thought all the evidence and all the factors supported voting for life imprisonment, they would vote for life imprisonment even if eleven other jurors felt that death was appropriate since the question attempted to place jurors in a hypothetical situation of being deadlocked eleven to one and to stake out jurors to a certain position.

**Am Jur 2d, Jury §§ 208, 209.**

**Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.**

**12. Evidence and Witnesses § 1695 (NCI4th)— photographs of decomposed body—admissibility for illustrative purposes**

The trial court did not violate defendant's due process rights to a fair trial and a reliable sentencing proceeding by allowing the State to introduce a number of photographs of a murder victim's hog-tied body in a state of advanced decomposition, including photographs taken after the victim's body was retrieved from a river and at the autopsy, since the photographs were admissible to illustrate a pathologist's testimony with regard to the condition of the victim's body when found and the wounds it had sustained.

**Am Jur 2d, Homicide §§ 416 et seq.**

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

**13. Jury § 257 (NCI4th)— peremptory challenges of women—gender discrimination—prima facie case not shown**

The prosecutor's exercise of eight of twelve peremptory challenges against women, standing alone, was insufficient to establish a *prima facie* case of gender discrimination in this capital trial.

**Am Jur 2d, Jury § 245; Criminal Law § 683.**

**Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction. 9 ALR2d 661.**

**Sex discrimination in jury selection—Supreme Court cases. 128 L. Ed. 2d 919.**

**14. Jury § 153 (NCI4th)— capital trial—jury selection—prosecutor's question and argument—ability to return death penalty "without hesitation"—no gross impropriety**

Defendant's due process rights were not violated, and there was no gross impropriety requiring the trial court to intervene *ex mero motu*, when the prosecutor asked prospective jurors whether, if they determined the death penalty to be appropriate, they could recommend a sentence of death "without hesitation" and argued this pledge to the jury, since a reasonable interpretation of the prosecutor's question is whether each juror could recommend the death penalty if he or she found that the aggravating circumstances outweighed the mitigating circumstances, and the prosecutor's argument was intended only to remind jurors of their duty during the capital sentencing proceeding to recommend a sentence of death if the evidence supported this recommendation.

**Am Jur 2d, Jury § 199.**

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

**15. Criminal Law § 1309 (NCI4th)— capital sentencing—cross-examination of defendant's mother—bad act by defendant—no abuse of discretion**

The trial court did not abuse its discretion in allowing the prosecutor to ask defendant's mother on cross-examination in a capital sentencing proceeding if she was aware that defendant had broken his wife's arm where there was no contention that the question was asked in bad faith.

**Am Jur 2d, Trial § 500.**

**16. 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 where the jury found defendant guilty under the theory of malice, premeditation, and deliberation and also under the felony murder rule; the jury found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of a kidnapping and that it was especially heinous, atrocious, or cruel; defendant bound the victim's arms and legs behind his back, tied him to a tree, and tortured him for several hours before finally shooting him in the neck; defendant did not seek medical attention for the victim; and defendant threw the victim's bound body into a river after removing two cement blocks he had tied around the victim's neck because he could not lift the body with the cement blocks tied to it.

**Am Jur 2d, Criminal Law § 628.**

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., at the 31 October 1994 Criminal Session of Superior Court, Yadkin County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 11 April 1996.

*Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.*

*W. David Lloyd for defendant-appellant.*

FRYE, Justice.

Defendant, Joseph Earl Bates, was indicted on 29 October 1990 for the murder and the first-degree kidnapping of Charles Edwin Jenkins. He was tried capitally in February 1991, found guilty of one count of first-degree murder and one count of first-degree kidnapping, and sentenced to death for the first-degree murder conviction. On appeal, we awarded defendant a new trial. *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693, *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). During defendant's second capital trial, the jury returned verdicts of guilty of one count of first-degree kidnapping and guilty of one count of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. During a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the first-degree murder conviction. The jury found as aggravating circumstances that the murder was committed while defendant was engaged in the commission of a kidnapping, N.C.G.S. § 15A-2000(e)(5) (1988); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1988). The jury also found seven of the seventeen statutory and nonstatutory mitigating circumstances submitted to it. On 9 November 1994, Judge Rousseau sentenced defendant to forty years in prison for his first-degree kidnapping conviction, and upon the jury's recommendation, he imposed a sentence of death for defendant's first-degree murder conviction.

Defendant appeals to this Court as of right from the first-degree murder conviction; he does not appeal the kidnapping conviction. Defendant makes twenty-four arguments on appeal, supported by thirty-one assignments of error. We reject each of these arguments and conclude that defendant's trial and capital sentencing proceeding were free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's conviction of first-degree murder and his sentence of death.

The State's evidence presented at trial tended to show the following facts and circumstances: At approximately 9:30 p.m. on 10 August 1990, defendant spoke with Hal Eddleman, his employer, inside defendant's tent, which was located on Eddleman's land.

Eddleman allowed defendant to set up a campsite on his property after someone had broken into and fired gunshots into defendant's house. Defendant told Eddleman, "There's something going down at [the] Donnaha [bridge]. This guy got in touch with me, and told me to meet him over at Donnaha, we'd get it over with." As a result of this conversation, at approximately 11:30 p.m. on 10 August 1990, Eddleman and his wife went to the Donnaha bridge, which extends across the Yadkin River. They remained there for approximately two to two and one-half hours. After seeing no one, they returned home and went to bed.

At around 9:00 or 9:30 p.m. on 11 August 1990, defendant and Gary Shaver went to LaDan's Night Club. Janette Turner, a part-time waitress at LaDan's, and Billy Grimes, Turner's boyfriend and defendant's friend, were also at LaDan's that night. Grimes left LaDan's at around 12:30 or 1:00 a.m. on 12 August 1990. Grimes and Turner planned to meet at Bran's Game Room at the end of Turner's shift. At about 1:45 a.m., defendant asked Turner to ask Grimes to telephone Eddleman and said that Grimes and Eddleman would know what was going on. When Turner left LaDan's at around 2:00 or 2:30 a.m., she went to Bran's to meet Grimes. When she arrived at Bran's, Turner relayed defendant's message to Grimes.

Grimes testified at trial that when Turner relayed defendant's message to telephone Eddleman and tell him that something was "going down" and that they knew what it was all about, he did not know what it was all about. Nonetheless, Grimes and Turner left Bran's and went to the Pineview Restaurant, where Grimes telephoned Eddleman from an outside pay telephone. Grimes apologized for waking Eddleman and relayed defendant's message to him. Grimes said, "[Defendant] wanted me to call you and tell you there's something going down and he wants to know if you want anything to do with it." Eddleman said, "Well, I went to the river last night and spent about two and a half, maybe three hours. Nothing didn't happen then. Hell, no, I don't want nothing to do with it." Eddleman then went back to sleep. Grimes and Turner returned to Bran's and departed in their separate vehicles.

Meanwhile, at approximately 2:00 a.m., the victim, Charles Edwin Jenkins, asked defendant for a ride home. The victim left LaDan's with defendant and Shaver. During the ride, defendant asked the victim whether he knew defendant's ex-wife, Lisa Bates, or her boyfriend, Jeff Goins. The victim responded, "Yeah, isn't Lisa the one

that has big breasts" and "long blond hair." According to Shaver's testimony at trial, although defendant's ex-wife had long blond hair at that time, she did not have "big breasts."

During the ride, defendant stopped twice. The first time, he stopped for fifteen or twenty minutes along the side of the road in Iredell County so that defendant and Shaver could "use the bathroom." The victim did not exit the vehicle at this time. After driving for about fifteen or twenty minutes more, defendant stopped the vehicle a second time. This time, the victim and Shaver got out of defendant's vehicle to "use the bathroom." Shaver was standing on the passenger side of the vehicle, and the victim was standing at the rear of the vehicle. Defendant exited the vehicle, went around to the rear of the vehicle, and struck the victim at least three times on the back of the head with a shovel handle that had been in the vehicle. The victim fell to the ground. Defendant then gave the handle to Shaver, took some rope from the vehicle, and tied the victim's hands. The victim appeared to be unconscious at this point. However, the victim started moaning, and defendant told Shaver to hit the victim with the shovel handle. Shaver refused so defendant took the handle from Shaver and struck the victim on the back of the head again. The victim stopped moaning and again appeared to be unconscious. Defendant then bound the victim's arms and legs behind his back, or hog-tied him.

Defendant asked Shaver to help him place the victim into defendant's vehicle, and Shaver did so. Defendant then told Shaver that he believed that the victim was one of the persons who had been "messing around his house and stuff." Defendant said that he was "going to find out some answers." Defendant believed that the persons who had shot into his house were friends of his ex-wife and her boyfriend, and he thought the victim was setting him up and leading him into a trap.

Defendant and Shaver got into the truck and headed towards defendant's campsite. Defendant was driving, Shaver was in the passenger seat, and the victim was hog-tied and lying on the floor of the rear of the vehicle. At some point, the victim propped his head up, and defendant asked him for directions. The victim responded that he could not see because his glasses had been lost. The victim then asked defendant what he had done and what was going on. Defendant told the victim to shut up. About fifteen or twenty minutes later, defendant noticed a sign indicating that they were entering Yadkin County. Defendant proceeded towards his campsite.

On the way back to his campsite, defendant stopped at Eddleman's house. Defendant and Shaver exited the vehicle. Defendant knocked on the front door and entered Eddleman's house; Shaver waited outside in front of defendant's vehicle. Defendant remained inside the house for fifteen or twenty minutes. While inside Eddleman's house, defendant told Eddleman, "We got one of the MF's." Eddleman asked, "Who is he?" Defendant said, "His name is Chuck." Eddleman asked, "How do you know he's one of them?" Defendant said, "He's told us." Eddleman asked, "Where's he at?" Defendant responded, "He's hogtied in the jeep. You want to see him?" Eddleman said, "No, the best thing you can do is take him back where you got him, apologize to him and do anything he wants you to do, and hope that he don't prosecute you for kidnapping him." Defendant and Eddleman then stepped out onto the porch.

While defendant and Eddleman were outside on the porch talking, Billy Grimes drove up in his white Mitsubishi pickup truck and parked behind defendant's vehicle. Defendant walked up to Grimes' pickup truck and spoke with Grimes. According to Grimes, defendant said, "I've got one of the guys that's been messing with me. Do you want to watch or help?" Grimes declined, left, and went home.

Meanwhile, Eddleman had stepped off the porch to talk with Shaver. Eddleman said to Shaver, "Gary, you don't want nothing to do with this either." Eddleman also told Shaver, "Gary, you better talk to [defendant]." Eddleman then said to defendant, "Joe, you better listen." Defendant then walked over to Shaver and told him that he could get out of the situation if he wished. Shaver stated that he wanted out because he had sole custody of his daughter and did not want to jeopardize his custody. Defendant told Shaver that he would take Shaver back to his vehicle, which was parked at defendant's campsite. Defendant and Shaver then got back into defendant's vehicle and left. When they arrived at defendant's campsite, Shaver got into his vehicle and left. The victim was alive at this time. Shaver went home, set his alarm clock, and went to bed. It was approximately 4:00 a.m. at this time.

Defendant returned to Eddleman's house later that morning and again awoke Eddleman. It was still dark outside. Defendant returned Eddleman's gun, which he had borrowed at some time earlier. Eddleman took the gun and placed it in one of his bedrooms in his house. Defendant asked Eddleman, "What do you think I should do with the body?" Eddleman said, "What?" Defendant repeated the

question. Eddleman said, "Man, if you've got a body, you've only got about three choices. You either take him to the sheriff's office, bury him or throw him in the river." After some further conversation, defendant asked, "Do you reckon I should tie cement blocks to him?" Eddleman answered, "If you do, or not, he will come up in from nine to eleven days." Defendant then said, "I guess I can load him by myself," and he left.

Eddleman went back to bed and awoke at 9:30 or 9:45 a.m. that morning. Eddleman went to look at the gun to determine whether there was blood on it. He discovered what appeared to be flesh and blood on the gun. He then cleaned the gun.

Later that day, Eddleman spoke with defendant. During the conversation, defendant said, "I was just thinking about what happened last night." Eddleman said, "Man, you better quit thinking. You're going to have a hard enough day as it is." Defendant said, "Well, it don't bother me all that bad." Eddleman responded, "It will." When defendant left Eddleman's house, he packed up his tent and left the campsite.

Grimes saw defendant at about noon that day. Defendant was at defendant's home unloading his vehicle. Defendant was placing his tent and the other items from his campsite into his residence. Grimes noticed that there was blood all over the contents of defendant's vehicle. Defendant took some items inside his house and washed the blood off in the sink. Grimes remained at defendant's house for about thirty minutes.

Grimes again saw defendant later that day at Bran's Game Room. Defendant told Grimes that he shot the victim through the neck and threw his body into the river. Grimes asked defendant why he killed the victim, and defendant said that he could not let him live after what defendant had done to the victim and that he would get just as much time for murder as he would for kidnapping.

A couple of days later, Shaver saw defendant at Eddleman's house. Shaver asked defendant what happened, and defendant said that it was best if Shaver did not know. A few days before, defendant had told Shaver that he thought he could kill someone.

On 25 August 1990, two fishermen discovered the victim's body floating in the Yadkin River and contacted the police. The victim's ankles and wrists were bound by rope, his legs and arms were pulled backwards behind his back and tied together, and a rope

was tied around his neck. The victim's body was in an early stage of decomposition. His belt buckle was undone, and his pants were unzipped.

On 26 August 1990, an autopsy was performed on the victim's body. The medical examiner noted that the victim's wrists and ankles had been bound together with rope and that his arms and legs had been fastened behind his back in a "hogtie" configuration. There was also a loop of rope around the victim's neck and a separate rope around his knee area. The medical examiner further noted that there was considerable decomposition of the body. He discovered a gunshot wound to the back of the victim's neck. The medical examiner was unable to testify with any degree of medical certainty whether the victim experienced any pain as a result of the gunshot wound but testified that the victim could have died instantaneously.

Prior to the autopsy, police officers took fingerprints from the victim to establish his identity. Because the State Bureau of Investigation (SBI) was unable to determine his identity from these prints, the victim's hands were surgically removed and turned over to an agent of the SBI so that they could be processed and better fingerprints obtained. The SBI processed the fingerprints they obtained from the hands and determined that the victim was Charles Edwin Jenkins.

On 30 August 1990, while investigating the victim's murder, two law enforcement officers went to defendant's house and spoke with him. Before leaving the residence, they asked defendant's permission to search his vehicle. Defendant gave them permission and assisted them into the vehicle. One of the officers found a newspaper on the floor of defendant's vehicle. The newspaper had a front-page story about the officer's uncle, so he asked defendant if he could have the newspaper. Defendant agreed to let him have it. Inside the newspaper, the officer found a receipt that had what appeared to be bloodstains on it. The officers also asked defendant's permission to have a small piece of rope that was in a bucket on defendant's front porch. Defendant allowed the officers to take the rope. Also, a piece of molding containing what appeared to be blood was taken from defendant's vehicle. The receipt and the molding were examined by the SBI, and the substance on them was determined to be blood. However, no useable fingerprints were taken from the molding, and no determination could be made as to whether the blood matched the victim's blood since the victim's body contained no blood when it was found.

On 31 August 1990, defendant gave a thirteen-page confession to the police in which he admitted beating the victim, binding him with ropes, kidnapping him, tying him to a tree, and questioning him at gunpoint. Defendant also admitted shooting the victim in the neck after the victim would not tell him who had shot into his house and after the victim had spat on him. Defendant further admitted tying a cement block around the victim's neck, removing the cement block when he discovered it made the body too heavy to throw off the bridge, and throwing the victim's hog-tied body into the Yadkin River.

Defendant did not testify at trial. However, defendant presented the testimony of two witnesses, Eddleman's wife and Eddleman's daughter-in-law, which tended to show that Shaver's vehicle was parked at defendant's campsite until 6:00 or 7:00 a.m. on the morning of the victim's death.

Defendant's motions to dismiss, made at the close of the State's evidence and again at the close of all the evidence, were denied.

**[1]** In his first argument, defendant contends that the trial court committed reversible error in denying his request for an instruction on second-degree murder since this is a case of conflicting evidence. We disagree.

In *State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995), we said:

> The test for determining whether the jury must be instructed on second-degree murder is whether there is any evidence in the record which would support a verdict of second-degree murder. *State v. Strickland*, 307 N.C. 274, 285, 298 S.E.2d 645, 653 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). " 'It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense.' " *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835 (1994) (quoting *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 [(1993)]). However, if the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence other than defendant's denial that he committed the crime to negate these elements, the trial court should

not instruct the jury on second-degree murder. *Id.* at 634-35, 440 S.E.2d at 835 (citing *State v. Strickland*, 307 N.C. at 293, 298 S.E.2d at 658).

*Conaway*, 339 N.C. at 514, 453 S.E.2d at 841.

The evidence in this case supports all the elements of first-degree murder, including premeditation and deliberation. Premeditation requires the act to have been thought out beforehand for some period of time, no matter how brief. *Conner*, 335 N.C. at 635, 440 S.E.2d at 836; *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation requires that the defendant have the intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose, and not under the influence of a violent passion, suddenly aroused by a lawful or just cause or legal provocation. *Conner*, 335 N.C. at 635, 440 S.E.2d at 836; *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984).

In the instant case, defendant argues that there was conflicting evidence about premeditation and deliberation. In his confession, defendant said, "The exact reason I shot [the victim] was because he acted like he knew who shot into my house. He spit on me and told me to go to hell. *And this made me mad and I shot him.*" (Emphasis added). At trial, Billy Grimes testified that defendant told him that defendant shot the victim because defendant could not let the victim live after what defendant had done to the victim. Defendant argues that this evidence is conflicting as to the element of premeditation and deliberation in that defendant's confession permits an inference that defendant acted under a suddenly aroused violent passion.

We conclude, however, that there was no evidence presented at trial to support an instruction on second-degree murder. We note that the evidence presented at trial showed that defendant asked Janette Turner to tell Billy Grimes to call Hal Eddleman and to tell Eddleman that something was "going down" the night of the murder; that when Grimes was on his way home that night, he went by Eddleman's house and saw defendant's vehicle in Eddleman's front yard; that defendant told Grimes that defendant "had one of the guys that was watching [defendant] or doing something[] in the truck"; that defendant asked Grimes if he wanted to "help or watch"; that Grimes said, "No," and then left; that defendant beat the victim with a shovel handle, bound him with ropes, transported him to defendant's campsite, and tied him to a tree; that defendant questioned the victim at gunpoint; that the victim was asking defendant what he had done and what was

going on; and that the victim was purposely not allowed to escape the danger. We note further that after shooting the victim in the neck, defendant tied cement blocks to the victim's body and later threw the body over the bridge into the Yadkin River. Afterwards, defendant stated that what he had done did not bother him and that he could not let the victim go after what he had done to him. Additionally, defendant stated in his statement to the police: "I was not drunk or doing drugs at the time. I knew what was going on." We conclude that this evidence was sufficient to satisfy the State's burden of proof on the element of premeditation and deliberation. Since there was no evidence presented at trial to sustain a verdict of defendant's guilt of second-degree murder, we reject defendant's first argument.

In his second argument, defendant contends that the trial court erred in refusing to submit four nonstatutory mitigating circumstances to the jury. The four nonstatutory mitigating circumstances requested in writing by defendant but not submitted to the jury by the trial court were (1) that the defendant's criminal conduct was the result of circumstances unlikely to recur, (2) that the defendant was under the influence of alcohol, (3) that the defendant was functioning under the belief that his life was in danger at the time of the commission of the crime, and (4) that the influence of alcohol on defendant's life had been significant.

Defendant's expert witness, Dr. John Warren, a psychologist, testified that defendant believed he was being plotted against and that defendant booby-trapped his trailer and then moved out of the trailer into a campsite. Dr. Warren also testified that defendant had started drinking at an early age and that this had stunted defendant's personality growth. Defendant contends that the proposed mitigating circumstances would have focused the jury's attention on defendant's mental problems in a way that was more mitigating than the statutory mitigating circumstance that defendant was under the influence of a mental or emotional disturbance. Defendant's argument appears to be rooted in the notion that the jury would have been more impressed with the mitigating value of the proffered evidence if it had been categorized into four separate mitigating circumstances rather than consolidated into a statutory mitigating circumstance and the "catchall" circumstance. Defendant contends that the failure to submit the four nonstatutory mitigating circumstances separately on the Issues and Recommendation as to Punishment form given to the jury during the capital sentencing proceeding was prejudicial error. We disagree.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), we said:

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues.

*Id.* at 325, 372 S.E.2d at 521 (footnote omitted). Further, we said that where the proposed mitigating circumstance is subsumed in the other mitigating circumstances submitted to the jury, the refusal of the trial court to submit the proposed circumstance is not error. *Id.* at 327, 372 S.E.2d at 522.

**[2]** Bearing these principles in mind, we turn to consider the trial court's failure to submit to the jury the four nonstatutory mitigating circumstances at issue in this case. The record shows that defendant failed to produce sufficient evidence to support the proposed mitigating circumstances that defendant's criminal conduct was the result of circumstances unlikely to recur and that, at the time of the offense, defendant was suffering emotional fear because he believed his life was in danger. As to whether defendant's criminal conduct was the result of circumstances unlikely to recur, there is no evidence in the record that suggests defendant's depression, personality disorder, or alcohol abuse were unlikely to recur. As to whether defendant was suffering emotional fear, we find unpersuasive defendant's argument that this fear need not be grounded in fact. Since the victim was hog-tied and strapped to a tree at the time that defendant shot and killed him, we are not convinced that there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Therefore, we conclude that the trial court did not err in refusing to submit these proposed mitigating circumstances to the jury.

**[3]** With respect to the trial court's refusal to submit to the jury defendant's proposed mitigating circumstances that defendant was under the influence of alcohol at the time of the crimes and that the influence of alcohol on defendant's life was significant, we conclude that the trial court did not err. The trial judge submitted as mitigating circumstances that the murder was committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2); and that defendant's capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). We note that the trial judge instructed the jury that it could find the (f)(2) mitigating circumstance if "the defendant suffered from major depression or alcoholism abuse or personal disorder [a]nd, that as a result, the defendant was under the influence of a mental or emotional disturbance when he killed [the victim]." We further note that the trial court also submitted the (f)(9) catchall mitigating circumstance. Since the proposed mitigating circumstances were subsumed in these statutory mitigating circumstances which were submitted to the jury, we reject defendant's second argument.

In his third argument, defendant contends that the trial court erred by not peremptorily instructing the jury on the mitigating circumstances which he claims were uncontroverted. Defendant submitted a general request for a peremptory instruction as to all mitigating circumstances. There was no separate request as to each. The mitigating circumstances submitted to the jury were composed of four statutory circumstances, twelve nonstatutory circumstances, and the catchall circumstance. The trial court did not give peremptory instructions on five of the nonstatutory mitigating circumstances.

**[4]** Defendant argues that the trial court erred in not giving peremptory instructions on the mitigating circumstances that defendant has below average mental ability; that defendant was a loving and caring son; that defendant was a loving and caring brother; that defendant was one of seven children reared by poor, hardworking parents, and he worked to help out the family while at home; and that before his marital problems, defendant was kind, friendly, and compassionate.

As to the mitigating circumstances that defendant was a loving and caring son and brother, defendant acknowledged with commendable candor during oral arguments that, although Judge Rousseau denied his request to give a peremptory instruction, he did instruct the jury peremptorily during the jury charge. With respect to the other nonstatutory mitigating circumstances submitted to the jury, after reviewing the transcripts, record, and briefs, we conclude that it was not error for the trial court to refuse to peremptorily instruct the jury since the evidence relating to these circumstances was not uncontroverted. *See State v. Gay*, 334 N.C. 840, 434 S.E.2d 467 (1993) (trial court required to give peremptory instruction, if defendant so requests, when evidence showing that mitigating circumstance

exists is uncontroverted). Accordingly, we reject defendant's third argument.

**[5]** In his fourth argument, defendant contends that the trial court erred in submitting to the jury two aggravating circumstances which he claims constituted impermissible and unconstitutional duplication in the evidence of aggravation. Defendant was convicted of first-degree murder based on premeditation and deliberation and under the felony murder rule. During the capital sentencing proceeding, the trial court submitted to the jury the following aggravating circumstances:

(1) Was this murder committed by the defendant while the defendant was engaged in the commission of kidnapping?

ANSWER: _____

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

ANSWER: _____

The jury answered both of these questions "Yes."

The crux of defendant's argument is that all the evidence supporting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a felony (kidnapping) was subsumed by the evidence supporting the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Defendant notes that the trial court instructed the jurors that in order to find the (e)(5) aggravating circumstance, they must find defendant guilty of kidnapping the victim for the purpose of terrorizing him. Thus, defendant argues that, by necessity, the jury must have used the same evidence to determine the (e)(5) and (e)(9) aggravating circumstances. We disagree.

In a capital case, it is error to submit multiple aggravating circumstances supported by precisely the same evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987). Where, however, there is separate evidence supporting each aggravating circumstance, the trial court may submit both "even though the evidence supporting each may overlap." *Gay*, 334 N.C. at 495, 434 S.E.2d at 856.

As to the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, we have stated that it 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; *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).

In the instant case, evidence establishing the circumstance that the crime was especially heinous, atrocious, or cruel concerned the brutality of the murder: Defendant hit the victim over the head several times with a shovel handle. The victim suffered for hours before being killed. Defendant hog-tied the victim, laid the victim out on the ground, tied the victim to a tree, and placed a gun to his throat while interrogating him. After beating and interrogating the victim at gunpoint for several hours, defendant shot the victim in the neck. This is clearly enough evidence to establish that the murder was especially heinous, atrocious, or cruel.

None of this evidence, however, was necessary to establish the kidnapping used for the aggravating circumstance that the murder was committed during the course of a felony, and there was substantial other evidence supporting that circumstance. We first note that the crime of kidnapping requires that the defendant "unlawfully confine, restrain, *or* remove from one place to another" the victim. N.C.G.S. § 14-39(a) (1993) (emphasis added). Thus, in the instant case, the evidence supporting the kidnapping was that defendant loaded the victim onto his truck and took him to Eddleman's house. The purpose of the kidnapping—to terrorize the victim—is shown by the evidence that defendant invited Eddleman and Grimes to participate or watch him as he got answers from the victim. Additionally, defendant had earlier expressed to Shaver his intent to get answers, and he carried out this intent by interrogating the victim at gunpoint. Thus, we conclude that there was independent evidence supporting each of these aggravating circumstances. Accordingly, we reject defendant's fourth argument.

**[6]** In his fifth argument, defendant contends that the trial court erred in not instructing the jury that it could not consider the same

evidence in support of the (e)(5) and (e)(9) aggravating circumstances. Defendant concedes, however, that he did not request such an instruction and that our review is therefore limited to review for plain error, which requires defendant to show that the error was so fundamental that another result would probably have obtained absent the error. *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983). In light of the strong evidence in this case, including evidence of psychological torture, and the fact that there was independent evidence supporting each aggravating circumstance, defendant has not shown that any error likely affected the outcome of his capital sentencing proceeding. Accordingly, we reject defendant's fifth argument.

**[7]** In his sixth argument, defendant contends that the trial court erred during the prosecutor's closing argument by its failure to intervene *ex mero motu* and rectify improprieties to which defendant failed to object. Defendant argues that the prosecutor's closing argument to the jury violated his rights to silence and to due process by drawing attention to his decision not to testify.

During the sentencing phase arguments, the prosecutor argued:

> Have you heard any evidence at all the defendant is sorry for what he did? Think about that for a moment. Any evidence at all that he's sorry?
>
> . . . .
>
> You saw three women get on the stand and cry. You saw [the victim's mother], and briefly, she, she lost her composure, and she cried. Did the Defendant shed any tears as she cried? Anybody look? Did you see any show of emotion of him as she cried for the loss of her son.
>
> [Defendant's] mother, his own mother got on the stand and cried. Any tears over there? Did you see any? [Defendant's] sister, who's done so well. She cried for her brother. Did he? Did he cry for what he'd done to her? For what he'd done to [the victim]?

Defendant contends that he was placed in a position of having no way to rebut his absence of emotion except by taking the stand and testifying and, thus, that the judge should have intervened *ex mero motu* in order to stop the improper argument.

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), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Although the appellate court may review an alleged error or impropriety in the State's argument notwithstanding the defendant's failure to flag the error for the trial court, " 'the impropriety . . . must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Artis*, 325 N.C. 278, 323, 384 S.E.2d 470, 496 (1989) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)).

In the instant case, the prosecutor never commented directly or indirectly on defendant's failure to testify, nor did she 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. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975). Clearly, the trial court did not abuse its discretion by failing to intervene *ex mero motu* to stop the prosecutor's argument.

**[8]** In his seventh argument, defendant contends that the trial court erred by unduly restricting his *voir dire* of prospective jurors by sustaining an objection to one question regarding whether the prospective jurors would hold defendant's election not to testify against him. Relying upon this Court's decisions in *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), and *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), defendant contends that he is entitled to a new trial because the trial court erred by sustaining the State's objection to the question propounded by the defense attorney.

In both *Hightower* and *Cunningham*, each defendant contended that the trial court erred in denying a challenge for cause to a juror. This Court agreed with the defendants' contentions that the prospective jurors were unable to render verdicts in accordance with North Carolina law. These prospective jurors gave ambiguous responses to questions concerning their understanding of the State's burden of

proof and the defendants' presumption of innocence as well as concerning their ability to follow the law and not to hold the defendants' election not to testify against them. In both cases, each defendant exhausted his peremptory challenges, the trial court denied his renewed challenge for cause, and the defendant informed the trial court that, if his challenge for cause was allowed, he would have an additional peremptory challenge to exercise against a particular prospective juror who did in fact serve on the jury which convicted each defendant. Under these circumstances, we granted the defendants new trials.

*Hightower* and *Cunningham* make it clear that a criminal defendant is entitled to be tried by an impartial and unbiased jury. In order to insure a fair trial before an impartial and unbiased jury, it is entirely proper in a criminal case for the defendant to make appropriate inquiry concerning a prospective juror's ability to follow the law. It is well established that a criminal defendant cannot be compelled to testify. N.C. Const. art. 1, § 23; N.C.G.S. § 8-54 (1986); *see State v. Randolph*, 312 N.C. 198, 205, 321 S.E.2d 864, 869 (1984). It is also settled that failure of the defendant to testify creates no presumption against him. *Id.* at 206, 321 S.E.2d at 869. Therefore, the defendant may question prospective jurors as to their views concerning the defendant's election not to testify and whether the jurors could be impartial in light of the defendant's election. However, while counsel may inquire into the potential jurors' fitness to serve, this is not an unbridled inquiry. The manner and extent of the inquiry is left in the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent a showing of abuse of discretion. *State v. Weeks*, 322 N.C. 152, 162, 367 S.E.2d 895, 901 (1988).

During *voir dire* in the instant case, the exchange occurred as follows:

> [DEFENSE COUNSEL]: Now, the Judge previously stated that as [defendant] sits here, he's presumed innocent. Does anybody disagree with the proposition of law that [defendant is] presumed innocent at this time?
>
> (Some shake heads negatively; others do not respond)
>
> [DEFENSE COUNSEL]: Do you also agree that it's the State's burden to prove guilt beyond a reasonable doubt? Does anybody have any problems with [that], whatsoever?
>
> (Some shake heads negatively; others do not respond)

[DEFENSE COUNSEL]: Also, it's not our job to prove anything. It's the State's burden. The burden of proof is upon the State. If [defendant] elects not to testify, and we're not saying he will not, but if he did not testify, would any of you all hold that against him in any way?

[PROSECUTOR]: Well, **OBJECTION.**

THE COURT: **SUSTAINED.**

[DEFENSE COUNSEL]: Do you all disagree with the proposition that [defendant] has the right not to testify?

(Some shake heads negatively; others do not respond)

[DEFENSE COUNSEL]: Do you all disagree with that in any way?

(Some shake heads negatively; others do not respond)

Following this exchange, defense counsel did not pursue this line of questions, but proceeded to other issues.

The instant case is not controlled by *Hightower* and *Cunningham*, two cases involving the trial court's denial of the defendants' challenges for cause. Here, defendant made no challenge for cause based on the question involved. Instead, defendant sought to inquire as to whether the prospective jurors would hold his election not to testify against him. This same question arose in *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826. There, we said:

> As to defendant's argument concerning questions relating to defendant's right not to testify, defense counsel repeatedly attempted to ask a potential juror whether or not she would "hold it against" defendant if defendant elected not to testify. The person being examined was peremptorily challenged by defendant; therefore, defendant, not having exhausted his peremptory challenges, the error, if any, could not have been prejudicial to defendant. This assignment of error is without merit and is overruled.

*Conner*, 335 N.C. at 633, 440 S.E.2d at 834.

Like the defendant in *Conner*, defendant here did not exhaust his peremptory challenges. Therefore, prejudice does not appear. We note that in *Conner*, this question was asked of one prospective juror,

and there is no indication as to whether this or a similar question was asked of other prospective jurors. In the instant case, however, the judge sustained the objection when the question was asked to an entire panel. However, after the judge sustained the objection to the question, defendant was allowed to ask other questions related to his election not to testify. Additionally, we note that the trial court correctly instructed the jury that defendant's decision not to testify could not be used against him. For the foregoing reasons, we conclude that the trial court did not unduly restrict defendant's *voir dire* and hence did not abuse its discretion. Accordingly, we reject defendant's seventh argument.

**[9]** In his eighth argument, defendant contends that the trial court violated his due process right to a full and fair hearing in mitigation by allowing the prosecutor to argue several lines of improper argument in the penalty phase. We disagree.

It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases. *Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123. Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 844. Conversely, counsel is prohibited from arguing facts which are not supported by the evidence. *State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980). These principles apply not only to ordinary jury arguments, but also to arguments made at the close of the sentencing phase in capital cases. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761.

In the instant case, during the sentencing phase closing arguments, the prosecutor argued that one of defendant's motives in killing the victim was to prevent the victim from testifying against him. Defendant contends that this argument placed before the jury an additional aggravating circumstance. Next, the prosecutor, after showing the jury a picture of the victim dressed in a tuxedo, argued, "And, another thing about this picture, look at his hands. He had the most beautiful hands. And, we had to cut them off to find out who he was." Next, the prosecutor argued to the jury that defendant had been given the benefit of two lawyers to ask the jury not to return the death penalty, while the victim did not have the benefit of a trial or of anyone begging defendant to spare the victim's life. Finally, the prosecu-

tor asked the jury, "Can you imagine the devastation of that knock on the door that [the victim's mother] told you about with a law enforcement officer standing there? Can you imagine that?"

Defendant failed to object to any of the comments made by the prosecutor which are now assigned as error, and the trial court did not intervene *ex mero motu*. However, as we have said before: "[O]ur appellate courts may, in the absence of an objection by the defendant, review a prosecutor's argument to determine whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). After carefully reviewing the prosecutor's argument in its entirety, we conclude that it was not so grossly improper as to have necessitated intervention *ex mero motu* by the trial court. Accordingly, we reject defendant's eighth argument.

**[10]** In his ninth argument, defendant contends that the trial court erred in denying his motion to suppress his statement to police, which defendant alleges was made in violation of his state and federal constitutional rights.

Before defendant was Mirandized, he gave police officers three conflicting statements concerning the night in question. Thereafter, officers told defendant that they wanted to hear the complete truth. At that point, defendant signed a written waiver of his *Miranda* rights and dictated a thirteen-page statement which was introduced against him at trial. Defendant contends that, after having given his three statements to the police confessing to murder, any reasonable man would be aware that he had confessed to murder and would know that the logical and inevitable consequence of his confession is that he would be immediately arrested. Defendant contends that officers obtained the final Mirandized statement by building on the earlier tainted ones.

*Miranda* warnings are required prior to questioning only if one is in custody or has been deprived of one's freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); *State v. Perry*, 298 N.C. 502, 506, 259 S.E.2d 496, 499 (1979). The test for whether a person is in custody for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992).

In the instant case, defendant filed a motion during his first trial to suppress his statement made to police on 31 August 1990. Defendant's motion was heard by Judge Rousseau, who conducted an extensive suppression hearing. Judge Rousseau made detailed findings of fact concerning the several interviews defendant had with various law enforcement and investigative officers. Based on these findings, Judge Rousseau concluded that, with regard to "any statement the Defendant made prior to [his Mirandized statement], he was not in custody; that he was free to leave, and [that the statement] is admissible into evidence if the State so desires." The court also concluded that defendant's statement of 31 August 1990 "was freely, voluntarily, and knowingly given without any promise of reward, and that . . . after being advised of his rights, and stating that he did not want an attorney, that that statement is admissible in the trial of this case." Accordingly, Judge Rousseau denied defendant's motion to suppress defendant's statement.

After this Court granted defendant a new trial, defendant again filed a motion to suppress the same statement. On 14 June 1994, Judge W. Douglas Albright denied the motion, relying on Judge Rousseau's denial of defendant's motion to suppress entered at defendant's first trial. However, on 15 June 1994, Judge Albright entered an order denying defendant's motion to suppress on the ground that defendant

> made an insufficient showing to satisfy the Court that such additional pertinent facts ha[d] been discovered by the Defendant which he could not have discovered with reasonable diligence before the determination of the motion by Judge Rousseau, which would warrant the Court permitting the Defendant to renew the Motion to Suppress, which was the subject of an extensive *voir dire* . . . and full inquiry by Judge Rousseau, who made findings of fact and conclusions of law.

"A trial court's findings of fact are binding on appeal when supported by competent evidence." *State v. Rose*, 335 N.C. 301, 333, 439 S.E.2d 518, 536, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994). In the instant case, Judge Rousseau found as fact that the defendant agreed to talk with law enforcement officers and agreed to go to the Sheriff's Department; that defendant drove to the Sheriff's Department, accompanied by his friend, Eddie Atkins; that when defendant arrived, he spoke with three law enforcement officers; that

the officers thanked defendant for coming to the Sheriff's Department and told defendant that he was not under arrest and was free to leave at any time; that the officers spoke to defendant for approximately forty minutes, during which time defendant told three different stories about what happened on the night in question; that, thereafter, defendant went to the bathroom alone; that, after defendant returned from the bathroom, the officers asked defendant if he would tell the truth, and defendant said that he would; that defendant was then advised of his *Miranda* rights, and defendant signed a written waiver of those rights; and that defendant was given a drink and cigarettes throughout the interview. Because these findings of fact are supported by the evidence and the findings support the trial court's conclusion of law, we cannot disturb the trial court's ruling. Therefore, we conclude that defendant was not in custody at the time of his prearrest statements to law enforcement officers and that *Miranda* warnings were not required. *See State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992) (defendant not in custody when he went to police station on his own, was permitted to return home, and later agreed to take a polygraph test); *State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978) (defendant not in custody when he voluntarily went to the police station and made a statement, and police officers returned him to his home afterwards); *see also State v. Bromfield*, 332 N.C. 24, 37, 418 S.E.2d 491, 498 (1992) (no seizure where defendant agreed to accompany officers to the police station, was not handcuffed, was told there were no charges against him and that he was free to go, went unescorted to the snack bar and rest rooms, and acknowledged that based upon prior experiences, he could not be coerced into talking with officers); *State v. Johnson*, 317 N.C. 343, 369, 346 S.E.2d 596, 609-10 (1986) (no seizure where defendant agreed to accompany officers to the police station, was not frisked, was given cigarettes and coffee, and was allowed to go unescorted to the bathroom and to make telephone calls). Accordingly, we hold that defendant was not seized for Fourth Amendment purposes and that the trial court did not err in denying defendant's motion to suppress.

**[11]** In his tenth argument, defendant contends that the trial court erred by unduly restricting his *voir dire* of prospective jurors, thereby preventing him from making effective use of his peremptory challenges and violating his constitutional rights. Defendant argues that he should have been allowed to inquire of potential jurors whether they would vote their conscience even if the vote was eleven to one against them.

During *voir dire*, defendant attempted to ask jurors whether, if they thought all the evidence and all the factors supported voting for life imprisonment, they would vote for life imprisonment even if eleven other jurors felt that death was appropriate. The trial court sustained the State's objection. Defendant contends that his question mirrors the law of North Carolina that "[n]o 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." N.C.G.S. § 15A-1235(b)(4) (1988).

In *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), we addressed a similar question. The trial court did not allow the defendant to ask jurors how they would react if, during deliberations, they were the only juror on a particular side of an issue. In concluding that the trial court's ruling was proper, we said that the question was "intended to elicit from the jurors how they would vote under a particular set of given facts. Such questions tend to cause jurors to pledge themselves to a decision in advance of the evidence to be presented and are therefore improper." *Id.* at 135, 451 S.E.2d at 835-36.

In the instant case, the question was improper because it attempted to place the jurors in a hypothetical situation of being deadlocked eleven to one. The trial court did not abuse its discretion by sustaining the State's objection to defendant's hypothetical question which tended to stake out jurors to a certain position. Accordingly, we reject defendant's tenth argument.

**[12]** In his eleventh argument, defendant contends that the trial court violated his due process rights to a fair trial and a reliable sentencing proceeding by allowing the State to introduce a number of gruesome photographs of the victim's body in a state of advanced decomposition. The photographs included those taken at the scene after the victim's body was retrieved from the river as well as photographs taken at the victim's autopsy. Defendant contends these photographs were inflammatory due to the advanced state of decomposition brought on by the ravages of decomposition in water with attendant damages by fish and other river scavengers. We disagree that the showing of the photographs violated defendant's right to a fair trial and reliable capital sentencing proceeding.

The photographs in question depicted the location of the body when it was discovered and the condition of the body when found, including the ropes still tied to the body. The State argues that the photographs were admissible as illustrative of the pathologist's testi-

mony with regard to the condition of the victim's body when found and the wounds it had sustained. We agree with the State.

> This Court has stated that "[p]hotographs of homicide victims are admissible at trial even if they are 'gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury.' " *State v. Thompson*, 328 N.C. 477, 491, 402 S.E.2d 386, 394 (1991) (quoting *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988)).

*State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 528.

In *State v. Lee*, 335 N.C. 244, 278-79, 439 S.E.2d 547, 565, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994), we said, "Where the victim's identity and the cause of his or her death are uncontroverted, a trial court may nevertheless allow in evidence photographs showing the condition of the body and its location when found."

The photographs at issue depicted the victim's hog-tied body in an advanced state of decomposition. The photographs also purported to depict the location where the body was found. Although the victim's identity and the cause of his death were not in dispute, these photographs showed the circumstances of his death which were relevant to the issues to be determined in defendant's trial and capital sentencing proceeding. We find no error in admitting these photographs into evidence. Accordingly, we reject defendant's eleventh argument.

**[13]** In his twelfth argument, defendant contends that his constitutional rights were violated by the prosecutor's gender-biased exercise of peremptory challenges. Defendant argues, essentially, that the prosecution's exercise of eight of twelve peremptory challenges against women makes a *prima facie* case of gender discrimination. In this instance, we conclude that defendant has not made a *prima facie* case demonstrating that the State exercised its peremptory challenges on the basis of gender.

The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 82 (1986). The Supreme Court has stated that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpet-

uate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, —-, 128 L. Ed. 2d 89, 98 (1994). Thus, the Supreme Court said, "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in the particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *Id.* at —-, 128 L. Ed. 2d at 107.

As with race-based *Batson* claims, a party alleging gender discrimination must make a *prima facie* showing of intentional or purposeful discrimination before the party exercising the peremptory challenge is required to explain the basis for the strike. *Id.* at —-, 128 L. Ed. 2d at 106-07. Once the defendant makes his *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for having peremptorily challenged those jurors. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. This Court has applied these principles and has permitted a third step in the analysis, specifically, that of allowing a defendant to introduce evidence that the State's explanations are merely a pretext. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

A party objecting on constitutional grounds to the challenge to a venireperson on the basis of gender establishes a *prima facie* case of purposeful discrimination first by showing that the peremptory challenge was exercised against a member of a constitutionally cognizable group. *See Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87. Second, the party must demonstrate that this fact "and any other relevant circumstances raise an inference" that the offending party challenged the venireperson because of his or her group membership. *Id.* The burden then shifts to the offending party to articulate a nondiscriminatory reason related to the particular case to be tried for challenging the juror. *Id.* at 98, 90 L. Ed. 2d at 88. The trial court's findings regarding purposeful discrimination in the jury selection process are findings which we will not set aside unless clearly erroneous. *Id.* at 98 n.21, 90 L. Ed. 2d at 89 n.21; *United States v. Power*, 881 F.2d 733, 739 (9th Cir. 1989).

In the instant case, this issue arose at the point in the jury selection process when ten women and no men had been seated on the jury, and defendant had peremptorily challenged four women. The State had peremptorily challenged eight women. Defendant does not argue, and we cannot find, any factor other than the proportion of

women challenged by the prosecutor to support his contention that the peremptory challenges were exercised solely on the basis of gender. The proportion of women challenged by the prosecutor in this case, standing alone, is insufficient to establish a *prima facie* case of gender discrimination. Under these circumstances, we conclude that defendant failed to carry his burden of establishing a *prima facie* case of gender discrimination in the prosecutor's exercise of her peremptory challenges. Accordingly, we reject defendant's twelfth argument.

**[14]** In his thirteenth argument, defendant contends that his due process rights were violated when the court allowed the district attorney to secure a pledge from jurors that they could return the death penalty in this case "without hesitation."

During the jury selection process, the prosecutor asked virtually every prospective juror whether she or he could, if she or he determined the death penalty to be appropriate, return a recommendation of a sentence of death "without hesitation." Defendant did not object to these questions by the prosecutor. Nevertheless, defendant now contends that the prosecutor staked out virtually every juror as to the ultimate issue in this case by asking for no less than a pledge from each juror that he or she could and would deliver the death penalty without hesitation. Any doubt about the prosecutor's intention, defendant contends, was dispelled in her closing argument in the penalty phase:

> And, I think without exception, during our jury selection process, I asked each and every one of you, if you go back there and you deliberate, and determine together with the rest of the jury whether that [sic] the death penalty is appropriate, can you come back into this courtroom and announce that without hesitation. Each of you assured me you could.

Defendant argues that to allow the State to secure and play off such a pledge is a fundamental denial of his right to secure a fair trial and impartial jury.

Because defendant did not object to the questions or the prosecutor's argument to which he now assigns error, we shall consider defendant's argument under the plain error rule. *See State v. Reeves*, 337 N.C. 700, 729-30, 448 S.E.2d 802, 815 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 860 (1995). We believe that a reasonable interpre-

tation of the prosecutor's question is whether the juror could recommend the death penalty if she or he found that the aggravating circumstances outweighed the mitigating circumstances and that the prosecutor's argument was intended only to remind jurors of their duty during the capital sentencing proceeding to recommend a sentence of death if the evidence supported this recommendation. Clearly, the jurors' understanding of their responsibilities was not diminished by the prosecutor's questions and argument, and no fundamental right to a fair trial was denied. We conclude that neither the prosecutor's questions nor jury argument were so grossly improper or egregious as to require the trial court to intervene in the absence of an objection by defense counsel. Accordingly, we reject defendant's thirteenth argument.

**[15]** In his fourteenth argument, defendant contends that the trial court erred in allowing the prosecutor to ask defendant's witnesses questions designed to imply that defendant was a person of bad and violent character when no issue existed as to his character for violence prior to the time the question was asked.

During cross-examination of defendant's mother in the penalty phase of defendant's trial, the prosecutor asked defendant's mother if she was aware that defendant had broken his wife's arm. Defendant's objection was overruled.

Cross-examination as to defendant's specific violent acts of conduct is not admissible unless it is introduced to rebut a pertinent trait of character when offered first by defendant. *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). In the instant case, defendant contends that he never offered any evidence that he loved his wife or that he was a nonviolent person toward his wife or anyone else. Therefore, defendant argues that the prosecutor was not entitled to cross-examine defendant's mother on this issue since there was no evidence to rebut.

In *State v. Warren*, we said:

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981).

*Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990). In the instant case, defendant does not argue that the question asked of his mother was asked in bad faith. We conclude that the trial court did not abuse its discretion in permitting defendant's mother to answer the question, over defendant's objection, on cross-examination. Accordingly, we reject defendant's fourteenth argument.

## PRESERVATION ISSUES

Defendant raises ten additional arguments which he concedes have been decided against him by this Court: (1) the trial court violated defendant's due process rights by denying his motion to inform jurors of parole eligibility; (2) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's rights because they used the inherently ambiguous and vague terms "satisfaction" and "satisfy" to define the burden of proof, thus permitting jurors to establish for themselves the legal standard to be applied to the evidence; (3) the trial court's instructions that permitted jurors to reject submitted mitigation on the basis that it had no mitigating value violated defendant's constitutional rights; (4) the trial court violated defendant's constitutional rights by denying him the right to further question potential jurors after they indicated they were opposed to the death penalty; (5) the trial court committed reversible constitutional error by submitting to the jury the "especially heinous, atrocious, or cruel" aggravating circumstance based upon instructions that failed adequately to limit the application of this inherently vague and overbroad circumstance; (6) the trial court's use of the term "may" in instructing on sentencing issues three and four violated defendant's rights in that it made consideration of proven mitigation discretionary with jurors; (7) the trial court's instruction to the jury that it must find both instances of conduct, that defendant shot an animal *and* fought in school, in order to find the statutory mitigating circumstance of no significant criminal activity violated defendant's rights; (8) the trial court erred in instructing the jury that the first four submitted mitigating circumstances were statutory and the rest nonstatutory, implying that the statutory circumstances were more important or carried more weight; (9) the trial court violated defendant's due process rights by denying his motion to inform jurors of parole eligibility; and (10) defendant's due process rights and right to a reliable capital sentencing proceeding were violated because the State's death penalty scheme is unconstitutional.

Defendant raises these issues for the purpose of permitting this Court to reexamine its prior holdings and also for the purpose of pre-

serving 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. Accordingly, we reject these assignments of error.

## PROPORTIONALITY REVIEW

**[16]** Having concluded that defendant's trial and separate capital sentencing proceeding were free of 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).

In the instant case, the jury found defendant guilty of first-degree murder under the theory of malice, premeditation, and deliberation, as well as under the felony murder rule. It also convicted defendant of first-degree kidnapping. The trial court submitted two aggravating circumstances to the jury: that the murder was committed while defendant was engaged in the commission of a 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 both aggravating circumstances to exist.[1] 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 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

1. Of the four statutory mitigating circumstances, two were found to exist by one or more members of the jury. Of the twelve nonstatutory mitigating circumstances, five were found to exist by one or more members of the jury. The catchall mitigating circumstance was not found to exist by any member of the jury.

L. Ed. 2d 895 (1994). We have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170, the trial court submitted and the jury found two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), and that the murder was part of a course of conduct in which the defendant was engaged which included the commission by the defendant of other crimes of violence against another person or other persons, N.C.G.S. § 15A-2000(e)(11). The defendant had pointed a gun at the victim and taunted him for some two to three minutes before finally shooting him. Of importance to the Court in finding the death sentence disproportionate was that defendant immediately secured medical attention for the victim, directing the driver of the car to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83. By contrast, in the present case, the defendant tortured the victim for several hours before finally shooting him in the neck. Furthermore, defendant here did not seek medical attention for the victim. Instead, defendant threw the victim's hog-tied body into the Yadkin River after removing the two cinder blocks he had tied around the victim's neck since he could not lift the body with the cinder blocks tied to it.

In only one case where we have found the death penalty disproportionate, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181, were multiple aggravating circumstances found to exist. *State v. Gibbs*, 335 N.C. 1, 73, 436 S.E.2d 321, 362-63 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). In *Young*, this Court focused on the jury's failure to find either the especially heinous, atrocious, or cruel aggravating circumstance, N.C.G.S. § 15A-2000(e)(9), or the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11). *Id.* In the instant case, however, the especially heinous, atrocious, or cruel circumstance was one of the two aggravating circumstances found by the jury.

It is also proper to compare this case to those where the death sentence was found 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 our 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 our duty." *Id.* It suffices to say here that we conclude the present case is similar to certain cases in which we have found the death sentence proportionate.

The aggravating circumstances found in this case have been present in other cases where this Court has found the sentence of death proportionate. *See State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995) (the trial court submitted and the jury found two 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)), *cert. denied*, — U.S. —, — L. Ed. 2d —, 64 U.S.L.W. 3763 (1996); *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995) (the trial court submitted and the jury found two aggravating circumstances: that the murder was committed while defendant was engaged in a robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9)), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996); *State v. Simpson*, 341 N.C. 316, 462 S.E.2d 191 (1995) (the trial court submitted and the jury found two aggravating circumstances: that the murder was committed while defendant was engaged in the commission of a robbery, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9)), *cert. denied*, — U.S. —, 134 L. Ed. 2d 194 (1996). In fact, in *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1996), this Court noted that it has affirmed death sentences based on four of the eleven aggravating circumstances when only one aggravating circumstance was submitted to and found by the jury. The (e)(5) and (e)(9) aggravating circumstances found by the jury in the instant case are among these four aggravating circumstances. *Id.* at 110 n.8, 446 S.E.2d at 566 n.8.

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. Accordingly, we cannot conclude

that defendant's death sentence is excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

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STATE OF NORTH CAROLINA v. RAYMOND DAYLE ROWSEY

No. 490A93

(Filed 31 July 1996)

**1. Jury § 227 (NCI4th)— capital murder—jury selection—death qualification—equivocal answers**

There was no error in a capital murder prosecution in granting the State's motion to excuse for cause a prospective juror where the record shows that the prospective juror gave equivocal and conflicting answers about whether he would be able to set aside his own beliefs with respect to the death penalty and left the impression that he would be unable to fairly and impartially follow the law.

**Am Jur 2d, Jury §§ 191, 192, 228.**

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

**2. Evidence and Witnesses § 3218 (NCI4th)— capital murder—testimony by accomplice—inconsistent with plea bargain—issue of credibility**

The trial court in a capital murder prosecution properly denied defendant's motion to prohibit an accomplice from testifying that he did not plan or participate in the killing or the robbery. Although defendant contended that this was inconsistent with the accomplice's guilty plea and that this amounted to presenting false testimony to the jury, defendant failed to show that any of the accomplice's testimony was false or that the State knowingly and intentionally used false testimony to obtain defendant's conviction. Any inconsistency in the testimony with guilt or with the plea agreement is relevant to credibil-

ity and defendant had ample opportunity to cross-examine the accomplice.

**Am Jur 2d, Evidence § 1485; Homicide §§ 345, 429; Trial §§ 504, 821, 822, 1362, 1363, 1401.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial. 17 ALR Fed. 249.**

**3. Criminal Law § 468 (NCI4th)— capital murder—prosecutor's argument—State's witness as accomplice**

There was no plain error in a capital murder prosecution where the prosecutor stated in his closing argument that a State's witness, Steele, was defendant's accomplice. When viewed in context, the prosecutor's argument was not that Steele's mere presence at the scene of the crime showed that he was guilty of the crimes, but explained that the prosecutor entered into a plea bargain with Steele because defendant was more culpable and Steele's testimony was necessary to prove beyond a reasonable doubt that defendant shot the victim.

**Am Jur 2d, Evidence § 1485; Trial §§ 504, 821, 822, 1362, 1363, 1401.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial. 17 ALR Fed. 249.**

**4. Criminal Law § 830 (NCI4th)— capital murder—instructions—accomplice testimony**

There was no plain error in a capital murder prosecution where defendant argued that the court's instruction on accomplice testimony was not supported by the evidence, validated the prosecutor's notion that the accomplice, Steele, was guilty based either on actions after the fact or on a failure to act theory, and constituted an expression of opinion by the trial judge. The issue was not whether Steele was guilty, but whether his version of what occurred was credible and the trial court correctly instructed the jury to carefully scrutinize his testimony.

**Am Jur 2d, Trial §§ 1225.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial. 17 ALR Fed. 249.**

**5. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstances—no significant history of prior criminal activity—submitted over defendant's objection**

The trial court did not err in a capital murder prosecution by submitting over defendant's objection the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where defendant was convicted of two counts of larceny seven months before the shooting, fifteen counts of injury to property less than two years before the shooting, an alcoholic beverage violation less than two years before the shooting, illegally possessed marijuana on the day of the shooting, illegally concealed the murder weapon on his person on a number of occasions prior to the shooting, and participated in a breaking and entering of a church. Defendant's convictions consisted primarily of property crimes, he did not have any felony convictions, and there was no evidence of any prior violent criminal activity. A rational juror could conclude that defendant did not have a significant history of prior criminal activity at the time of the murder. N.C.G.S. § 15A-2000(f)(1).

**Am Jur 2d, Trial §§ 841, 1760.**

**6. Criminal Law § 1321 (NCI4th)— capital sentencing—Issue Four—unanimity**

There was no plain error in a capital sentencing proceeding in instructing the jury that it must be unanimous in its answer to Issue Four on the Issues and Recommendation as to Punishment form. The jury sent a written inquiry to the trial court asking whether Issue Four had to be unanimous either way and the trial court informed the jury that the verdict had to be unanimous for yes and unanimous for no. This Court has recently considered and rejected defendant's argument in *State v. McLaughlin*, 341 N.C. 426.

**Am Jur 2d, Trial §§ 1077 et seq.**

**Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed. 75 ALR4th 91.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.**

**7. Criminal Law § 1300 (NCI4th)— capital sentencing—alleged errors in guilt-innocence phase—not prejudicial in sentencing phase**

There was no prejudice in a capital sentencing proceeding where the court had denied defendant's pretrial motion *in limine* asking the court to prevent an accomplice, Steele, from testifying; had failed to intervene *ex mero motu* during the prosecutor's guilt-innocence phase closing arguments; and had instructed the jury that there was evidence that Steele was an accomplice and that the testimony of an accomplice should be examined with care and caution.

**Am Jur 2d, Evidence § 1485; Homicide §§ 345, 429; Trial §§ 504, 821, 822, 1362, 1363, 1401.**

**Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial. 17 ALR Fed. 249.**

**8. Criminal Law § 912 (NCI4th)— capital murder—jury poll—emotional juror**

A defendant in a capital murder trial was not entitled to a new trial where the trial court polled each juror after the sentencing recommendation was read, one juror first did not respond, then became emotional, then responded "Yes" to questions as to whether she had an answer and whether that answer was yes. Although defendant contends that the juror's response was ambiguous in that the second yes may have meant that she had an answer to the court's previous question, the trial court properly conducted the individual jury poll mandated by N.C.G.S. § 15A-2000(b), properly presented this juror with the question of whether she concurred with the verdict, there is no evidence that her response was coerced by any of the parties present, and the parties at the time did not indicate that the juror's answer was ambiguous despite being asked by the court whether they had anything else regarding the juror poll. The juror's emotional response and initial hesitation to answer is not sufficient to show that she did not assent to the verdict. This was the sixth juror to

be polled; a reasonable juror in this situation would have understood that the trial court's final question was referring to the critical question of whether she assented to the verdict.

**Am Jur 2d, Trial §§ 1766, 1770.**

**Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case. 25 ALR3d 1149.**

**9. Criminal Law § 1363 (NCI4th)— capital sentencing—definition of evidence—defendant's demeanor**

There was no plain error in a capital sentencing hearing in the instruction that evidence "is what came from that witness stand there subject to oath and cross-examination." Although defendant contends that this instruction precluded the jury from considering defendant's demeanor in the courtroom, defendant did not request a nonstatutory mitigating circumstance that his demeanor in the courtroom demonstrated remorse; the trial court submitted the catchall mitigating circumstance, which allows the jury to find that a defendant's demeanor at trial showed regret or remorse or otherwise had mitigating value; viewed in context, the complained-of instruction did not improperly instruct the jury not to consider defendant's demeanor; the only indication in the record that defendant showed any remorse at trial is the prosecutor's statement in his sentencing proceeding closing argument that defendant shed tears while his mother was on the stand; and defendant's counsel did not argue that the jury should consider defendant's demeanor to be mitigating.

**Am Jur 2d, Trial §§ 1081, 1124, 1125.**

**10. Evidence and Witnesses § 748 (NCI4th)— capital sentencing—evidence withdrawn after admission over objection—no prejudice**

There was no prejudicial error in a capital sentencing proceeding where the trial court overruled defendant's objection to lay opinion testimony elicited by the prosecutor on cross-examination on whether evidence concerning defendant's childhood had anything to do with the murder, but reversed that the ruling the next day and instructed the jury to disregard the evidence. Given the nature of the testimony and the fact that at least one juror found each of the nonstatutory mitigating circumstances related to defendant's childhood home life, the trial court's

instruction was sufficient to cure any prejudice suffered by defendant.

**Am Jur 2d, Expert and Opinion Evidence §§ 53, 54, 166, 167, 170.**

**Comment Note.—Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness. 10 ALR3d 258.**

**Construction and application of Rule 701 of Federal Rules of Evidence providing for opinion testimony by lay witnesses under certain circumstances. 44 ALR Fed. 919.**

**11. Evidence and Witnesses § 2783 (NCI4th)— capital sentencing—prosecutor's comment—curative instruction—no prejudice**

There was no prejudicial error in a capital sentencing proceeding where defendant's brother testified that defendant had "a big heart," the prosecutor said that he was sure the victim's mother appreciated that, and the trial court sustained defendant's objection. Sustaining an objection and issuing curative instructions cures any prejudice due to the jury's exposure to incompetent evidence, and the same rule applies when defendant contends that a question by a prosecutor was prejudicial. Here the court promptly sustained defendant's objection and defendant did not request any curative instructions.

**Am Jur 2d, Trial §§ 428, 466, 470.**

**12. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate**

A sentence of death in a first-degree murder prosecution was not disproportionate where the jury's finding of each of the aggravating circumstances was 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; this case is not sufficiently similar to any of those cases in which the North Carolina Supreme Court has previously found disproportionality to warrant a finding of disproportionality in this case; and this case is most analogous to cases in which the Court has held the death penalty not to be disproportionate. The most significant distinguishing features of this case are the killing

of a lone employee in the early morning hours and the especially heinous, atrocious, or cruel nature of the killing. This case rises to the level of cases in which the Court has approved the death penalty.

**Am Jur 2d, Criminal Law § 628; Trial §§ 841, 1760.**

**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.**

**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.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.**

Justice FRYE concurring in part, dissenting in part.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Brannon, J., on 1 October 1993 in Superior Court, Alamance County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed on 27 March 1995. Heard in the Supreme Court 13 October 1995.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.*

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Howard Rue Sikorski ("victim"). The jury returned a verdict finding defendant guilty as charged on the bases of both premeditation and deliberation and felony murder. The jury also found defendant guilty of robbery with a firearm. Following a capital sentencing proceeding, the jury recommended that defendant be sen-

tenced to death for the murder; and the trial court entered judgment accordingly. The trial court sentenced defendant to a consecutive term of forty years in prison for robbery with a dangerous weapon. For the reasons discussed herein, we conclude that the jury selection, guilt-innocence phase, and capital sentencing proceeding of defendant's trial were free from prejudicial error and that the death sentence is not disproportionate.

The State's evidence tended to show that on the evening of 23 March 1992, defendant and his half brother, Raymond Lee Steele, wrestled, played cards, and listened to the radio at Steele's house. The two men got bored, and they decided to walk to the Circle K convenience store on the corner of Chapel Hill Road and Mebane Street in Burlington, North Carolina, where the victim worked as a clerk.

Defendant and Steele left Steele's house at 12:30 a.m. on 24 March and arrived at the Circle K approximately thirty to forty minutes later. At the store defendant and Steele obtained change and played several dollars worth of video games. Defendant and Steele then went to the back of the store to examine the store's rental movie display.

Defendant asked Steele to give him some money so that he could buy a snack, and Steele gave defendant two dollars. Defendant selected one bag of M & M's and went to the checkout counter. Upon learning the price, defendant returned to the candy aisle and obtained a second bag of M & M's. Defendant then went back to the checkout counter and paid for the candy.

At this point defendant pulled a gun out of his coat pocket and pointed it at the victim. The gun clicked, but it did not fire. When the gun clicked defendant turned towards Steele and smiled. Defendant told Steele that he had scared the victim with a water gun.

Defendant then turned back towards the victim, jerked the gun up, and shot the victim in the face. As the victim fell to the floor and turned his back to defendant, defendant leaned over the counter and shot the victim again. Defendant then ran around the counter and fired at least two more shots. As the victim lay facedown on the floor, defendant stood over him and kicked him three or four times in the back of the head.

After seeing defendant kick the victim in the back of the head, Steele ran out one of the store's two doors, around the building, and into the parking lot. Moments later, defendant ran out the other door

with something underneath his arm and the gun in his hand. Together, defendant and Steele ran and walked back to Steele's house. As they walked home, Steele asked defendant why he shot the victim. Defendant told Steele that he was just playing around, that he saw the victim reaching underneath the counter as if reaching for a gun, and that he thought the victim was going to shoot him so he shot the victim instead.

At Steele's house defendant counted $54.00 in cash and told Steele that he had taken the money from the Circle K cash register. Upon Steele's inquiry, defendant told Steele that he took the money in order to make it look like a robbery and in order to make it worth the while. Steele also saw four or five adult entertainment magazines, including *Penthouse*, *Playboy*, and *Oui*, in defendant's possession. Defendant offered Steele half the money, but Steele declined. Defendant then offered and Steele accepted a two-dollar bill which had been taken from the Circle K cash register.

Steele asked defendant if the victim was alive, and defendant told Steele that he did not know whether the victim remained alive or not. Defendant told Steele that he kicked the victim in an effort to ensure the victim's death and that the victim was alive and gasping for breath when he left the scene.

Defendant examined the murder weapon, a .25-caliber automatic handgun which defendant had taken from a locked trunk in the home of his girlfriend's mother, and indicated that it was dirty. Defendant told Steele that he did not want to return the gun in this condition, and Steele cleaned the gun for defendant. Defendant explained that the gun was loaded when he took the gun, so Steele provided defendant with .25-caliber bullets so that defendant could return the gun loaded.

The victim's body was discovered, lying behind the checkout counter, at approximately 2:00 a.m. on 24 March. There was a large quantity of blood on the floor running from the victim's head to his right foot. Dr. Karen Elizabeth Chancellor performed the autopsy on the victim's body; and her examination revealed six gunshot wounds: one to the face, one to the back of the neck, one to the right side of the head, and three to the back. Additionally, the victim suffered a number of blunt-force injuries to the head and neck area. One of the gunshot wounds pierced the victim's left lung and resulted in massive bleeding; this wound alone would have caused the victim's death.

Mildred Holder, who helped manage the Chapel Hill Road and Mebane Street Circle K, arrived at the store early that morning and identified the victim's body. Ms. Holder subsequently closed out the cash register and determined that $57.54 was missing. The Circle K's manager, Brenda Bowes, noticed that several magazines were missing from the adult entertainment magazine rack. Ms. Holder informed the police that the Circle K store had a two-dollar bill "bait money" policy pursuant to which the store kept a two-dollar bill in the cash register and a record of the bill's serial number. Ms. Holder told the police that the two-dollar bill was missing and provided the police with the bill's serial number.

At approximately 2:30 p.m. on 24 March, Steele and his girlfriend made a purchase at a Burlington store with the missing two-dollar bill. Steele was arrested shortly thereafter. Steele initially made several false statements in which he denied any involvement in the Circle K murder, but he subsequently admitted that he had been present at the Circle K when defendant shot and killed the victim. Defendant was arrested later that evening.

Steele was permitted to plead guilty to second-degree murder and robbery with a dangerous weapon in exchange for his truthful testimony at trial. At trial Steele acknowledged that he was testifying pursuant to a plea bargain and that he was in fact guilty of the crimes to which he pled based upon a theory of acting in concert. Steele also indicated that he did not plan or participate in the robbery or the murder and that he was shocked when the shooting began.

During defendant's cross-examination of Steele, defendant questioned Steele with respect to a four-page letter which Steele wrote to defendant while they were in prison and which concluded with the phrase, "even though you didn't do it." Steele acknowledged writing the letter, but denied writing "even though you didn't do it."

Two of defendant's witnesses claimed that they overheard Steele admit that he killed the victim. Robert Eastwood, an inmate at the Alamance County jail, testified that he overheard a conversation between Steele and defendant and that during that conversation Steele acknowledged that he killed the victim. Another inmate, Gerald Wayne Flynn, II, testified that he overheard a jailhouse conversation between Steele and defendant in which Steele stated that he would take the blame for the victim's murder because he did not want defendant to take the blame for something defendant did not do.

At sentencing the State initially declined to present evidence. Defendant presented evidence that he came from a broken home, that he was neglected by his mother, that he was exposed to the promiscuous sexual activity of his mother and sister, that he was illegitimate and had little contact with his biological father, and that his mother had a drug- and alcohol- abuse problem.

The State's rebuttal evidence at sentencing showed that defendant was responsible for breaking into a church and stealing a number of items valued at approximately $900.00 just weeks prior to the Circle K murder. The State's evidence further showed that defendant had been convicted of fifteen counts of injury to personal property in 1990, one count of possession of a malt beverage by a minor in 1990, and two counts of misdemeanor larceny in 1991.

JURY SELECTION

**[1]** Defendant contends that the trial court erred in granting the State's motion to excuse for cause prospective juror Gene Kizziah. We disagree.

In the instant case the record shows that prospective juror Kizziah was excused after extensive questioning by the State, defendant, and the trial court. In response to the State's questions, Mr. Kizziah stated that he opposed the death penalty in most cases and that his views would "impair" his ability to impose a death sentence in a real case. After Mr. Kizziah indicated that his views would impair him "a great deal," the State moved to excuse him for cause.

The trial court then permitted defendant to question Mr. Kizziah in order to clarify his answers, and Mr. Kizziah gave equivocal and conflicting responses. Mr. Kizziah stated that he did not know if he could follow the trial court's instructions in evaluating the evidence, that he did not know if he could follow the trial court's instructions in determining whether the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, and that there was a strong possibility that his personal beliefs about the death penalty would so substantially impair his ability to follow the trial court's instructions that he would not be able to do so. Mr. Kizziah also gave responses indicating that he could fairly, honestly, and impartially consider whether the aggravating circumstances outweighed the mitigating circumstances; that there were some cases in which he would not be opposed to the death penalty; and that he could render a fair and impartial verdict based on the evidence.

In response to additional questions posed by the State, Mr. Kizziah continued to give equivocal and conflicting responses. He stated that he did not believe that his views would make him automatically vote against capital punishment and that he really did not know if his views would substantially impair his ability to follow the trial court's instructions with respect to the death penalty. In response to the trial court's questions, Mr. Kizziah indicated that he would try to find ways to vote for life imprisonment over death and that he would try to be honest about the way he voted. The trial court then granted the State's motion to excuse prospective juror Kizziah for cause.

> The standard for determining when a potential juror may be excluded for cause because of his views on capital punishment is "whether those views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)); *accord State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Prospective jurors with reservations about capital punishment must be able to "state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986); *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). However, a prospective juror's bias or inability to follow the law does not have to be proven with unmistakable clarity. *State v. Locklear*, 331 N.C. [239,] 248, 415 S.E.2d [726,] 731-32 [1992]; *State v. Davis*, 325 N.C. at 624, 386 S.E.2d at 426. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852-53.

*State v. Conaway*, 339 N.C. 487, 511-12, 453 S.E.2d 824, 839-40, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995).

In this instance the record shows that prospective juror Kizziah gave equivocal and conflicting answers about whether he would be able to set aside his own beliefs with respect to the death penalty and follow the law. The equivocal and conflicting answers given by

prospective juror Kizziah left the impression that he would be unable to fairly and impartially follow the law. *Wainwright v. Witt*, 469 U.S. at 426, 83 L. Ed. 2d at 852. Accordingly, the trial court did not err in granting the prosecutor's challenge of prospective juror Kizziah for cause. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

**[2]** Defendant made a pretrial motion *in limine* asking that the State be prohibited from offering the testimony of Raymond Lee Steele. Defendant's motion stated that there was no factual basis for Steele's guilty plea to second-degree murder and robbery with a dangerous weapon and that the prosecution was prohibited from using perjured testimony. The trial court denied defendant's motion and permitted Steele to testify.

In this assignment of error, defendant contends that the State knowingly permitted Steele to give false testimony with respect to Steele's plea bargain to second-degree murder and robbery with a dangerous weapon. Defendant contends that permitting Steele to testify that he did not plan or participate in the killing or the robbery was inconsistent with his guilty plea and that this amounted to presenting false testimony to the jury. We disagree.

On direct examination Steele testified that he had been charged with first-degree murder and robbery with a dangerous weapon with respect to the robbery-murder at issue in this case. Steele testified that he had entered a guilty plea to second-degree murder and robbery with a dangerous weapon and that he was, in fact, guilty of both those charges.

Steele, in the plea transcript, which was introduced into evidence and read to the jury by Steele, stated:

> It is understood that I, by pleading guilty, am not admitting that I actually killed the victim or took money from the Circle K cash register. I acknowledge that there is evidence from which the jury could find me guilty of murder and robbery on the theory of acting in concert.

A letter from Steele and his counsel to the district attorney was attached to the plea bargain and was also introduced into evidence and read to the jury. In the letter Steele and his counsel stated that Steele would plead guilty to second-degree murder, that the district

attorney had indicated that he would not accept an *Alford* plea[1], and that the plea transcript would affirmatively state that Steele denied that he shot the clerk or that he took any money from the register but that Steele understood that there was evidence from which a jury could find him guilty of murder and robbery with a dangerous weapon on the theory of acting in concert.

Steele testified that he did not rob the Circle K, that he did not know that any money had been taken until he and defendant returned to his house, and that he did not plan or participate in the murder. Defendant contends that this testimony was completely inconsistent with guilt of second-degree murder and robbery with a dangerous weapon, even under a theory of acting in concert. Defendant argues that the State's use of Steele's clearly exculpatory testimony amounted to the use of false testimony. We disagree.

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

*State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995).

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1. In *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), the Court held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt. *Id.* at 37-39, 27 L. Ed. 2d at 171-72.

Defendant has failed to show that any of Steele's testimony was false or that the State knowingly and intentionally used false testimony to obtain defendant's conviction. Steele's testimony at trial was consistent with his plea transcript and with the letter to the district attorney. After initially denying any involvement in the crime, Steele consistently stated that defendant shot the victim and that he did not plan or participate in the murder and robbery.

Defendant argues that Steele's testimony was inconsistent with guilt and inconsistent with the fact that Steele acknowledged that the district attorney would not accept an *Alford* plea. Steele, in his plea transcript, stated that he was in fact guilty. Thus, he did not enter an *Alford* plea.

Any inconsistency in Steele's testimony with guilt or with his plea agreement is relevant to Steele's credibility as a witness. This Court has stated that the "credibility of witnesses is a matter for the jury rather than the court." *State v. Keller*, 297 N.C. 674, 679, 256 S.E.2d 710, 714 (1979); *accord State v. Peterson*, 337 N.C. 384, 396, 446 S.E.2d 43, 51 (1994). Defendant had ample opportunity to cross-examine Steele with respect to any inconsistencies between his pretrial statements, his guilty plea, and his testimony at trial. We conclude that the trial court properly denied defendant's motion to prohibit Steele from testifying. Defendant's assignment of error is overruled.

**[3]** In a related assignment of error, defendant contends that the trial court erred by failing to prevent the prosecutor from arguing a legally spurious theory of Steele's guilt during the guilt-innocence phase closing arguments. Defendant did not make an objection during closing arguments, so "he must demonstrate that the prosecutor's closing arguments amounted to gross impropriety." *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995).

During his closing argument the prosecutor stated that Steele was defendant's accomplice. The prosecutor noted that Steele saw defendant shoot the victim, that Steele did nothing to stop defendant, that Steele did not call 911 even though there was a phone booth near the Circle K, and that Steele cleaned the murder weapon and lied to help cover up the crime. Defendant contends that this argument had no support in North Carolina law.

Defendant correctly states that the mere presence of a person at the scene of a crime at the time of its commission does not make him

an accomplice. *State v. Birchfield*, 235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952). However, when viewed in context, the prosecutor's argument was not that Steele's mere presence at the scene of the crime showed that he was guilty of the crimes to which he pled. Rather, this portion of the prosecutor's argument explained that the prosecutor entered into a plea bargain with Steele because defendant was more culpable than Steele and Steele's testimony was necessary to prove beyond a reasonable doubt that defendant shot the victim. The prosecutor's argument was supported by the record; and, after careful review, we conclude that it was not improper. This assignment of error is without merit.

**[4]** In another related assignment of error, defendant contends that the trial court compounded the alleged error in permitting Steele to testify by giving the following instruction, without objection, on accomplice testimony:

> There is evidence which tends to show that the witness, Raymond Lee Steele, was an accomplice in the commission of the crime or crimes charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he may knowingly help or encourage another in the crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of this witness with the greatest care and caution.

Defendant argues that the instruction was not supported by the evidence; that the instruction validated the prosecutor's notion that Steele was guilty based either on actions after the fact or on a failure to act theory, neither of which is sufficient; and that the instruction constituted an expression of opinion by the trial judge. We disagree.

The evidence was in conflict as to which brother took the .25 caliber weapon to the Circle K and whether Steele provided ammunition for the weapon prior to the killing. Further, the evidence tended to show that Steele assisted in hiding the crime by cleaning and reloading the weapon and by cleaning defendant's shoes. Steele pled guilty to second-degree murder and robbery with a dangerous weapon; and Steele testified that he was, in fact, guilty of the crimes to which he pled guilty under the principle of acting in concert. "An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an

instruction that the testimony of an accomplice should be carefully scrutinized." *State v. Harris*, 290 N.C. 681, 699, 228 S.E.2d 437, 447 (1976). Here the issue was not whether Steele was guilty, but whether his version of what occurred was credible. For this reason we conclude that the trial court correctly instructed the jury to carefully scrutinize his testimony. This assignment of error is overruled.

SENTENCING PROCEEDING

**[5]** Defendant contends that the trial court erred by submitting, over defendant's objection, the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). We disagree.

"[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).

Before submitting the (f)(1) circumstance, the trial court must initially "determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). "A significant history for purposes of this circumstance is one likely to influence the jury's sentence recommendation." *State v. Frye*, 341 N.C. 470, 503, 461 S.E.2d 664, 681 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996); *accord State v. Sexton*, 336 N.C. 321, 375, 444 S.E.2d 879, 910, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994). "[I]t is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists." *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

A review of the record reveals that defendant was convicted of two counts of larceny seven months before the shooting, that defendant was convicted of fifteen counts of injury to property less than two years before the shooting, and that defendant was convicted of an alcoholic beverage violation less than two years before the shooting. Additionally, the evidence showed that defendant illegally possessed

marijuana on the day of the shooting, that defendant illegally concealed the murder weapon on his person on a number of occasions prior to the shooting, and that defendant participated in a breaking and entering of a church. Other evidence, which the State did not present to the jury, showed that defendant had been charged with five counts of felony breaking and entering and felony larceny offenses at the time of trial.

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 (1988), this Court held that 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 *State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995), this Court determined that the trial court did not err by submitting the (f)(1) mitigating circumstance over the defendant's objection where the defendant's criminal record consisted of seven breaking and entering convictions, a common-law robbery conviction, and a drug-trafficking conviction. *Id.* at 234, 464 S.E.2d at 434-35.

In this case defendant's convictions consisted primarily of property crimes, and defendant did not have any felony convictions. Unlike in *Buckner*, where the defendant had been convicted of common-law robbery, there was no evidence of any prior violent criminal activity on the part of defendant. 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. *See also State v. Walker*, 343 N.C. 216, 469 S.E.2d 919 (1996) (holding that absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless). Defendant's assignment of error is overruled.

**[6]** In his next assignment of error, defendant contends that the trial court committed plain error by instructing the jury that it must be unanimous in its answer to Issue Four on the "Issues and Recommendation as to Punishment" form. Defendant contends that the trial court's instruction that the jury must be unanimous to answer Issue Four "no" was contrary to North Carolina law and violated his federal constitutional rights. We disagree.

Issue Four on the Issues and Recommendation as to Punishment form given to the jury in this case reads 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?

On the second day of deliberations following the sentencing proceeding jury charge, the jury sent a written inquiry to the trial court with respect to Issue Four. The note read: "We are asking about issue four, does this have to be unanimous either way, yes, no." The trial court informed the jury that the jury verdict had to be unanimous for "yes" and that it had to be unanimous for "no." Defendant's trial counsel did not object to this instruction.

Defendant contends that the trial court's response to the jury's question constituted plain error. We disagree and hold that the trial court's response correctly stated the law.

This Court has recently considered and rejected defendant's argument. *State v. McLaughlin*, 341 N.C. 426, 455, 462 S.E.2d 1, 17 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996); *see also State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996). In *McCarver* the defendant contended that the trial court erred by refusing to instruct the jury that it did not need to be unanimous in order to answer "no" to Issue Three on the Issues and Recommendation as to Punishment form. 341 N.C. at 388, 462 S.E.2d at 38-39. We rejected the defendant's argument and concluded

> that any issue which is *outcome determinative* as to the sentence a defendant in a capital trial will receive—whether death or life imprisonment—must be answered unanimously by the jury. That is, the jury should answer Issues One, Three, and Four on the standard form used in capital cases either unanimously "yes" or unanimously "no."

*Id.* at 390, 462 S.E.2d at 39.

In *McLaughlin* this Court addressed the question of whether the trial court correctly instructed the jury that it must be unanimous before it could answer Issue Four "yes" or "no." 341 N.C. at 455, 462 S.E.2d at 17. We stated that "[a] jury must be unanimous in deciding any sentence determinative issue, and Issue Four is a sentence determinative issue." *Id.* This Court concluded that the trial court properly

instructed the jury that it must be unanimous before it could answer Issue Four "yes" or "no." *Id.*

Similarly, in the present case the trial court properly instructed the jury that it must be unanimous to answer Issue Four "yes" or "no." This assignment of error is overruled.

**[7]** Defendant next contends that the trial court erred in denying defendant's pretrial motion *in limine* to prevent codefendant Raymond Lee Steele from testifying, that the prosecutor improperly argued a "spurious theory of Steele's guilt" to the jury during the guilt-innocence phase closing arguments, and that the trial court's instruction on accomplice testimony was plain error. Defendant argues that even if this Court finds these errors harmless with respect to the guilt-innocence phase, the error prejudiced defendant in the sentencing proceeding. For the reasons we stated in addressing these issues earlier in this opinion, the trial court did not err in denying defendant's motion *in limine* asking the court to prevent Steele from testifying; the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's guilt-innocence phase closing arguments; and the trial court did not err by instructing the jury that there was evidence that Steele was an accomplice and that the testimony of an accomplice should be examined with care and caution.

**[8]** In his next assignment of error, defendant contends that a juror's ambiguous response with respect to whether she assented to the verdict entitles him to a new trial. We disagree.

After the jury foreman read the jury's sentencing recommendation, the trial court polled each juror individually with respect to his or her assent to the death verdict. The following occurred when the trial court addressed juror Leath:

> THE COURT: Ms. Leath, Ms. Leath, your foreman has announced that the verdict of the jury is is [sic] that the defendant, Mr. Rowsey, be sentenced to death, was that your verdict and do you still agree to that as being your verdict in this case?
>
> MS. LEATH: (No response).
>
> THE COURT: Ms. Leath, I'll repeat the question. Ms. Leath, your foreman has announced that the verdict of the jury is is [sic] that the defendant, Mr. Rowsey, be sentenced to death, was that your verdict and do you still agree to that as being your verdict in this case?

MS. LEATH: (No response, becomes emotional).

THE COURT: Ms. Leath, do you have an answer to the question.

MS. LEATH: Yes (nods affirmatively).

THE COURT: And was your answer yes, ma'am?

MS. LEATH: Yes.

Defendant contends that juror Leath's response was ambiguous in that the second "yes" answer may have meant that she had an answer to the trial court's previous question rather than indicating that she agreed with the death verdict. Defendant argues that the record does not reveal what juror Leath meant by the second "yes" and that this uncertainty renders the jury poll fatally defective.

N.C.G.S. § 15A-2000(b) states that "[u]pon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned." N.C.G.S. § 15A-2000(b). The purpose of polling the jury is

> to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

*Davis v. State*, 273 N.C. 533, 541, 160 S.E.2d 697, 703 (1968). "A jury verdict is not defective if it appears that the juror eventually freely assented to the verdict." *State v. Asbury*, 291 N.C. 164, 171, 229 S.E.2d 175, 178 (1976).

In this instance the trial court properly conducted the individual jury poll mandated by N.C.G.S. § 15A-2000(b). The trial court asked each juror whether the verdict read by the jury foreman was the juror's verdict and whether the juror still agreed with that verdict, and each juror responded "yes" to this question. While juror Leath twice failed to respond to the court's inquiry, she eventually indicated that she had an answer and that the answer was "yes." The trial court properly presented juror Leath with the question of whether she concurred with the verdict, and there is no evidence that her response was coerced by any of the parties present.

Before dismissing the jury, the trial court asked counsel for both the State and defendant whether they had anything else with respect to the jury poll, and defendant did not indicate that juror Leath's answer was ambiguous at that time. After the jury was dismissed, defendant's counsel argued that juror Leath's body language and her crying indicated that she was not in agreement with the verdict. Juror Leath's emotional response and initial hesitation to answer is not sufficient to show that she did not assent to the verdict. *See State v. Spruill*, 320 N.C. 688, 697-98, 360 S.E.2d 667, 672 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).

Juror Leath was the sixth juror polled by the trial court, and a reasonable juror in this situation would have understood that the trial court's final question was referring to the critical question of whether she assented to the jury verdict. We are confident that juror Leath did not understand the question otherwise. Defendant's assignment of error is overruled.

**[9]** Defendant next contends that the trial court committed plain error by instructing the jury in a manner which precluded its considering defendant's demeanor in the courtroom as mitigating evidence. Toward the end of the sentencing proceeding jury charge, the trial court instructed the jury as follows: "Now, members of the jury, you've heard the evidence, the evidence, of course, is what came forth from that witness stand there subject to oath and cross-examination." Defendant contends that this instruction violated the Eighth Amendment to the United States Constitution by precluding the capital sentencing jury from considering defendant's demeanor in the courtroom. We disagree.

Defendant did not request a nonstatutory mitigating circumstance that defendant's demeanor in the courtroom demonstrated remorse for his killing. However, the trial court submitted the N.C.G.S. § 15A-2000(f)(9) mitigating circumstance, permitting the jury to consider "[a]ny other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value." " '[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom.' " *State v. McNeil*, 327 N.C. 388, 396, 395 S.E.2d 106, 111 (1990) (quoting *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)) (alteration in original), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). When the (f)(9) circumstance is submitted, the capital sentencing jury may find that a defendant's demeanor at trial

showed regret or remorse or otherwise had mitigating value. *See id.* at 396, 395 S.E.2d at 111.

Defendant contends that the trial court's instruction that the "evidence . . . is what came forth from that witness stand" precluded the jury from considering evidence that defendant was crying while his mother was on the stand. " '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " *Id.* at 392, 395 S.E.2d at 109 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)). Viewed in context, it is apparent that the trial court's instruction did not preclude the jury from considering defendant's demeanor at trial. Rather, this portion of the instruction charged the jurors to rely upon their own recollection of the evidence if their recollection differed from that of counsel for either party. The trial court instructed as follows:

> Now, members of the jury, you've heard the evidence, the evidence, of course, is what came forth from that witness stand there subject to oath and cross-examination. And you have heard the arguments of the advocates for the State and for the defendant. The Court has not summarized all of the evidence, but it is your duty to remember all of the evidence whether it had been called to your attention or not, and if your recollection of the evidence differs from that of the Court or the District Attorneys or the defense lawyers, or the defendant, you are to rely solely upon your own recollection of the evidence in your deliberations.

Viewed in context, the complained-of instruction did not improperly instruct the jury not to consider defendant's demeanor.

Even if we assume *arguendo* that the trial court's instruction erroneously precluded the jury from considering defendant's demeanor in the courtroom, defendant did not object to the instruction. Therefore, defendant is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure from assigning the trial court's instruction as error, *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993); and we review defendant's assignment of error under the "plain error" rule. "[T]he term 'plain error' does not simply mean obvious or apparent error." *Id.* at 62, 431 S.E.2d at 193; *accord State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury would have

reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 862, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995); *accord Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

Under the facts of this case, the instruction did not rise to the level of "plain error." The only indication in the record that defendant showed any remorse at trial is the prosecutor's statement, in his sentencing proceeding closing argument, that defendant shed tears while his mother was on the stand. Defendant's counsel did not submit defendant's demeanor at trial as a nonstatutory mitigating circumstance, and defendant's counsel did not argue that the jury should consider defendant's demeanor to be mitigating. In fact, in response to the prosecutor's argument that defendant had shown no remorse during the trial, defendant's counsel argued that

> the way that [defendant] reacts to certain things is not evidence in this case, it's not something that you should read in and let the prosecution say to you that he doesn't have remorse because he has tried to sit there and not show his emotions only to the extent that he's been able to. He hasn't always been able to do that during this trial. I ask you to remember that.

The trial court instructed the jury to consider all of the arguments, contentions, and positions of counsel in addition to the evidence. We cannot say that, had the trial court not given the instruction that evidence is what comes forth from the witness stand, the jury probably would have reached a different verdict in the sentencing proceeding. This assignment of error is overruled.

**[10]** In his next assignment of error, defendant contends that the trial court erred in overruling defendant's objection to lay opinion testimony elicited by the prosecutor on cross-examination. Defendant also contends that the trial court erred by failing to prevent similar lay opinion testimony *ex mero motu*.

During the sentencing proceeding defense witness Rhonda Flack, defendant's sister, testified that her stepfather hit defendant when defendant was three or four years old, causing defendant to bleed from the mouth. On cross-examination the prosecutor asked Ms. Flack the following question: "Well, does Junior hitting [defendant] seventeen years before [the victim] was murdered have anything to do with this?" The trial court overruled defendant's objection; and Ms. Flack responded, "I don't think so, no." Shortly thereafter the

prosecutor questioned Ms. Flack with respect to her testimony that defendant was exposed to sexual activity in his mother's home when he was a child. The prosecutor asked Ms. Flack what this had to do with defendant murdering the victim; and Ms. Flack responded, "I have no idea." Defendant did not object to this second question and answer, and defendant's assignment of error with respect to this question and answer is not properly preserved for review.

On the day following Ms. Flack's testimony, the trial court reminded the jury that, on the previous day, a witness had been "asked something along the lines of what did some thing have to do with this case." The trial court then charged the jury that the objection then made by defendant was sustained and instructed the jury that "it is the jury and not a witness who is to determine" the significance, importance, and value of the evidence. Defendant contends that Ms. Flack's opinion on the relevance of the evidence was neither relevant nor admissible and that the trial court's instruction came too late to undo any prejudice. The State contends that the trial court cured any error by withdrawing the evidence and instructing the jury to disregard it.

"When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). " 'In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict.' " *State v. Hunt*, 287 N.C. 360, 374, 215 S.E.2d 40, 49 (1975) (quoting *State v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473 (1948)). "Whether instructions can cure the prejudicial effect of such statements must depend in large measure upon the nature of the evidence and the particular circumstances of the individual case." *Id.* at 375, 215 S.E.2d at 49.

In this instance Ms. Flack was permitted to testify that she did not think certain mitigating evidence had anything to do with this case. The next day the trial court properly reversed its ruling and told the jurors that it is for the jury, and not a witness, to determine the significance of evidence. Given the nature of Ms. Flack's testimony and the fact that at least one juror found each of the nonstatutory mitigating circumstances related to defendant's childhood home life, the trial court's instruction was sufficient to cure any prejudice suffered by defendant. This assignment of error is overruled.

**[11]** In a related assignment of error, defendant contends that the prosecutor engaged in unfair and inflammatory cross-examination of defendant's brother, Pete Flack. In response to a question, Mr. Flack stated that defendant had "a big heart." The prosecutor then stated: "I'm sure [the victim's] mother appreciates that." Defendant objected to this comment, and the trial court promptly sustained this objection. Defendant contends that, by alluding to the pain of the victim's mother, the prosecutor was able to blunt the impact of the mitigating evidence; that the prosecutor's tactics interfered with a proper balancing of the aggravating and mitigating circumstances; and that the prosecutor's tactics were fundamentally unfair.

We conclude that the trial court's prompt action of sustaining defendant's objection was sufficient to cure any prejudice. *See State v. Locke*, 333 N.C. 118, 124, 423 S.E.2d 467, 470 (1992). This Court has held that when a trial court sustains an objection and issues curative instructions, these "actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness." *Id.* The same rule applies when the defendant contends that a question posed by the prosecutor was prejudicial. *Id.* In this instance the trial court promptly sustained defendant's objection to the prosecutor's comment, and defendant did not request any curative instructions. Under these circumstances defendant has failed to show any prejudice. This assignment of error is overruled.

## ADDITIONAL ISSUES

Defendant has designated fourteen additional issues in order to preserve them in the event of later review. Ten of these issues are properly designated as preservation issues: (i) the trial court violated defendant's due process rights by failing to give an instruction on parole eligibility after the issue was broached by a juror during jury selection and by refusing defendant's motion for sentencing proceeding jury instructions on the issue; (ii) the trial court's instruction that the jury could consider all evidence in both phases of the trial during the sentencing proceeding violated defendant's constitutional rights; (iii) the trial court committed reversible constitutional error by failing to prevent the prosecutor from commenting on defendant's demeanor and appearance in his closing argument; (iv) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights in that the instructions used the terms "satisfaction" and "satisfy" to define the burden of proof; (v) the trial court's instructions violated defend-

ant's constitutional rights in that the instructions permitted jurors to reject a mitigating circumstance on the basis that it had no mitigating value; (vi) the trial court erred by denying defendant's motion to quash the murder indictment based on the form; (vii) the trial court committed reversible constitutional error by submitting the especially heinous, atrocious, or cruel aggravating circumstance based upon instructions that failed to adequately limit the application of this circumstance; (viii) the trial court's use of the term "may" in sentencing Issues Three and Four violated defendant's constitutional rights; (ix) the trial court erred by not submitting the nonstatutory mitigating circumstances that defendant was convicted on the testimony of an accomplice and that the codefendant received a more lenient sentence; and (x) the trial court violated defendant's right to a reliable capital sentencing proceeding and to due process of law by broaching the matter of appellate review during jury selection. We have considered defendant's arguments with regard to these issues and have found no compelling reasons to depart from our prior holdings which are dispositive. *See State v. Ward*, 338 N.C. 64, 122, 449 S.E.2d 709, 742 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995).

Defendant presents four other additional issues in order to preserve them for later review: (i) the trial court committed reversible error by denying defendant's motions for change of venue or individual *voir dire*; (ii) the trial court violated defendant's constitutional rights by denying defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal and by excusing jurors defendant was not permitted to question; (iii) the trial court's failure to impose a life sentence following a reasonable period of deliberations by the jury coerced the death verdict in violation of defendant's constitutional rights; and (iv) the trial court's failure to prevent the prosecutor's inflammatory sentencing proceeding argument denied defendant due process, the right to be free of cruel and unusual punishment, and assistance of counsel.

These issues are not proper preservation issues, as they are not determined solely by principles of law upon which this Court has previously ruled, but require a review of the transcript and record to determine whether, based on the specific facts, questions, or answers, the assignment of error has merit. Where counsel determines that an issue of this nature has no merit, counsel should "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994). Nevertheless, we have con-

sidered defendant's arguments on these issues, have reviewed the transcript and record as to these assignments, and have found no error. These assignments of error are without merit.

PROPORTIONALITY

**[12]** 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 (1994).

The trial court submitted and the jury found two aggravating circumstances: (i) this murder was committed while defendant was engaged in the commission of robbery with a firearm, N.C.G.S. § 15A-2000(e)(5); and (ii) this murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). 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 (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 (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*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). 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).

Defendant was convicted of first-degree murder based on both felony murder and premeditation and deliberation. He was also convicted of robbery with a firearm. The jury found both of the submitted aggravating circumstances: (i) that this murder was committed while defendant was engaged in the commission of robbery with a firearm; and (ii) that this murder was especially heinous, atrocious, or cruel.

The jury found six of the nine mitigating circumstances submitted for its consideration. While four statutory circumstances were submitted to the jury, only one was found: that defendant aided in the apprehension of a capital felon, N.C.G.S. § 15A-2000(f)(8). The jury declined to find the following statutory mitigating circumstances: (i) defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); (ii) the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7); and (iii) the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). The nonstatutory mitigating circumstances found by the jury related to defendant's illegitimacy, his lack of a relationship with his natural father, his lack of a suitable male role model, his coming from a broken home where he was neglected by his mother, and defendant's actions in offering no resistance upon arrest and cooperating with law enforcement.

This Court has found the death sentence disproportionate on seven occasions. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Of these seven cases, in only two, *Stokes* and *Bondurant*, did the jury find the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." Four of the seven cases found disproportionate by this Court involved murders committed during armed robbery: *State v. Benson*, *State v. Stokes*, *State v. Young*, and *State v. Jackson*. In three of these cases—*State v. Benson*, *State v. Stokes*, and *State v. Jackson*—the defendant was found guilty of felony murder only.

After comparing the present case with the above cases, we conclude that this case is not sufficiently similar to any of those cases in which the Court has previously found disproportionality to warrant a finding of disproportionality in this case.

We recognize that juries have returned life sentences for several robbery murders. 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. 1, 36, 292 S.E.2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by Rouse*, 339 N.C. 59, 451 S.E.2d 543, *by Robinson*, 336 N.C. 78, 443 S.E.2d 306, and *by Benson*, 323 N.C. 318, 372 S.E.2d 517).

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 distinguishing features of this case are the killing of a lone employee in the early morning hours and the especially heinous, atrocious, or cruel nature of the killing. In *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by Vandiver*, 321 N.C. 570, 364 S.E.2d 373, the defendant robbed a convenience store, kidnapped the clerk, drove her to an isolated location, and shot her six times. *Id.* at 71, 337 S.E.2d at 830. In finding the death penalty proportionate, the Court emphasized that the robbery-murder occurred in the early morning hours when the lone employee was most vulnerable. *Id.* This Court also found the death penalty proportionate in *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), where the defendant robbed and killed the lone employees of a gas station and a convenience store in the early morning hours. *Id.* at 661-62, 690, 292 S.E.2d at 248, 263.

Defendant in the instant case robbed and murdered the sole employee of a convenience store in the early morning hours when the victim was the most vulnerable. The jury found that the killing was especially heinous, atrocious, or cruel; and this finding was amply supported by the evidence. Defendant shot the victim six times at close range; the medical examiner testified that two of the shots may have been fired while the victim was lying prone on the floor. After shooting the victim, defendant kicked the victim in the back of the head in an effort to ensure the victim's death. Further, the evidence revealed that the victim bled to death from a gunshot wound that pierced his lung, that none of the victim's injuries would have caused instantaneous death, and that the victim was alive and gasping for breath when defendant left the scene of the crime.

In light of the above, 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 defendant's case to similar cases in which the death penalty was imposed and in consideration of both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

Justice FRYE concurring in part, dissenting in part.

I concur in the Court's decision finding no prejudicial error in defendant's trial and conviction of first-degree murder. I dissent only as to the capital sentencing proceeding.

I disagree with the majority's treatment of the issue relating to the submission of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). In this case, defendant objected to the submission of this mitigating circumstance, arguing that the evidence available to the State was such that no reasonable juror could find defendant's criminal history insignificant. The trial court denied defendant's request for a *voir dire* on the evidence available to the State, concluding that the matter presented a jury question. Defendant argues,

correctly I think, that no reasonable juror could have found it insignificant that he, a twenty-year-old youth, illegally possessed marijuana the day of the shooting, concealed the murder weapon on his person on a number of occasions in the days prior to the shooting, stole money from his girlfriend's mother days before the shooting, broke into a church and stole at least $900 worth of items weeks before the shooting, was convicted of two counts of larceny seven months prior to the shooting, and was convicted of fifteen counts of injury to property and an alcoholic beverage violation less than two years prior to the shooting.

Furthermore, I disagree with the majority's reliance on *State v. Walker*, where the majority of this Court held that absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless. *State v. Rowsey*, 343 N.C. 603, 620, 472 S.E.2d 903, 912 (1996). *See State v. Walker*, 343 N.C. 216, 228, 469 S.E.2d 919, 926 (1996) (Frye, J. concurring). Here, it appears that the decision of the trial court to submit the (f)(1) mitigating circumstance led to the State's introduction of "rebuttal" evidence at the capital sentencing proceeding that would not otherwise have been presented to the jury. The State was then free to argue to the jury that defendant did have a significant history of criminal activity despite the alleged contention to the contrary, thus belittling defendant's argument as to any mitigating circumstances. Since I am not convinced that without the rebuttal evidence the jury would nevertheless have recommended a sentence of death, I find the submission of the (f)(1) mitigating circumstance prejudicial error entitling defendant to a new capital sentencing proceeding.

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STATE OF NORTH CAROLINA v. REX DEAN PENLAND

No. 139A94

(Filed 31 July 1996)

**1. Rape and Allied Offenses §§ 90, 110 (NCI4th)— rape and sexual offense—sufficiency of evidence—offenses committed by force and against victim's will**

The trial court did not err by denying defendant's motion to dismiss charges of first-degree rape and first-degree sexual

offense where defendant contended that there was insufficient evidence that the offenses were committed by force and against the victim's will. There was substantial evidence from which the jury reasonably could find that defendant used actual or constructive physical force sufficient to overcome any resistance the victim might have offered and evidence of physical resistance is not necessary to prove lack of consent. Here, the victim's fear of defendant was specific to the events leading to defendant's sexual assaults on and murder of her.

**Am Jur 2d, Rape §§ 88 et seq.; Sodomy § 45.**

**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.**

**2. Rape and Allied Sexual Offenses §§ 97, 113 (NCI4th)—rape and sexual offense—defendant was aided and abetted—sufficiency of evidence**

There was sufficient evidence of first-degree sexual offense and first-degree rape on the basis that defendant was aided and abetted where defendant alleged that the State presented no evidence that the Sapp brothers, who cooperated with the State, did anything to encourage, instigate, advise, or counsel defendant to engage in any sexual acts with the victim and merely proved that the Sapps were present. Although mere presence at the crime scene is insufficient to support a finding that a person is an aider and abettor, presence alone may be regarded as encouragement when the bystander is a friend of the perpetrator who knows his presence will be regarded as an encouragement. Here, viewed in the light most favorable to the State, the evidence showed that defendant was the Sapp brothers' uncle and that the Sapps were present when defendant picked up the victim, swore at her, hit her in the face, and demanded that she put on handcuffs; not only were the Sapps in close proximity when defendant forced the victim to perform fellatio upon him and to have sexual intercourse with him, but Larry participated in the sexual acts, and both brothers complied with defendant's request to tie the victim to a tree; and their presence inside and outside the truck while defendant engaged in sexual acts with the victim could reasonably have been regarded as encouragement to defendant and constitutes sufficient evidence that they and defendant shared

the community of unlawful purpose necessary for aiding and abetting.

**Am Jur 2d, Rape § 28; Sodomy §§ 89, 90.**

**Prosecution of female as principal for rape. 67 ALR4th 1127.**

**3. Rape and Allied Sexual Offenses §§ 189, 203 (NCI4th)— first-degree rape and first-degree sexual offense—failure to charge on lesser offenses—no error**

There was no plain error in a prosecution for first-degree rape, first-degree sexual offense, first-degree murder, and first-degree kidnapping where the court did not instruct the jury on second-degree rape and second-degree sexual offense as lesser included offenses based on insufficient evidence that defendant was aided and abetted. Defendant did not object to the instructions given, did not request instructions on the lesser offenses, and there was no evidence to support instructions on second-degree rape and second-degree sexual offense in that defendant's evidence did not tend to negate the evidence that his nephews aided and abetted him. Rather, defendant stated that he did not remember the evening's events and his testimony suggested that the nephews were the perpetrators. Based on the evidence, the jury could have found defendant guilty of first-degree rape and first-degree sexual offense or not guilty.

**Am Jur 2d, Rape § 110; Sodomy § 95.**

**Propriety of lesser-included-offense charge to jury in federal sex-crime prosecution. 100 ALR Fed. 535.**

**4. Kidnapping and Felonious Restraint § 31 (NCI4th); Rape and Allied Sexual Offenses § 90 (NCI4th)— first-degree kidnapping to commit rape—prostitute—withdrawal of consent**

There was sufficient evidence to permit the jury to find beyond a reasonable doubt that defendant committed first-degree kidnapping where defendant argued that the evidence was insufficient to prove that he formed an intent to rape the victim prior to or during the removal because all of the evidence tended to show that the victim got into the truck for the purpose of engaging in prostitution. The evidence indicates that defendant never intended to pay her for sexual services and, given the circum-

stances, the jury could reasonably infer (1) that defendant would have known the victim's prior consent to sexual activity had been withdrawn, and (2) that his threats and actions compelled her submission and overcame her will, thereby negating her earlier consent.

**Am Jur 2d, Abduction and Kidnapping § 12; Rape §§ 7, 10, 11.**

**Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.**

**5. Evidence and Witnesses § 376 (NCI4th)— kidnapping, rape, murder—testimony of similar acts with prior girlfriend**

The trial court did not err in a prosecution arising from an abduction, rape and murder by admitting testimony from an ex-girlfriend concerning prior bad acts defendant allegedly committed. Even if defendant had preserved this argument for appeal, the incidents with the ex-girlfriend and the victim involved assaults on a female in remote wooded areas in which defendant used a knife to threaten or intimidate the female, tied her to a tree, slapped or beat her, used handcuffs and verbally abused his victim. Given the commonality of the distinct and bizarre behaviors, the ten-year gap between the incidents did not negate the plausibility of the existence of an ongoing and continuous plan to engage in such activities. In light of the limiting instruction, the probative value of the evidence was not substantially outweighed by its prejudicial impact.

**Am Jur 2d, Evidence §§ 448, 450.**

**Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.**

**Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed. 564.**

**Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed. 781.**

**6. Evidence and Witnesses § 761 (NCI4th)— abduction, rape, capital murder—defendant's comment regarding handcuffs—similar testimony without objection**

The trial court did not err in a prosecution for first-degree murder, first-degree rape, first-degree sexual offense, first-degree kidnapping, conspiracy to commit rape and conspiracy to commit kidnapping in which there was evidence that the victim had been handcuffed and assaulted by admitting testimony that defendant had always said that he was going to handcuff Sherry Fultz (not the victim) and "beat the hell out of her." The State had previously introduced without objection similar testimony of three sisters that defendant possessed handcuffs or had threatened to use handcuffs on them.

**Am Jur 2d, Evidence § 1435.**

**7. Evidence and Witnesses § 3224 (NCI4th)— capital murder—accomplices testifying against defendant—character for truthfulness—sixth grade teacher**

The trial court did not err in a prosecution arising from an abduction, rape and murder by admitting testimony from the sixth-grade teacher of defendant's accomplices, who testified against him, of the good character of the accomplices for truthfulness. The fact that the witness's knowledge of their reputation for truthfulness related to a time six years earlier affected only weight, not admissibility.

**Am Jur 2d, Evidence § 374.**

**8. Criminal Law § 754 (NCI4th)— capital murder, kidnapping, rape—instructions—proof of identity**

There was no prejudicial error in a prosecution arising from an abduction, rape and murder in not giving the instruction requested by defendant that the State had the burden of proving beyond a reasonable doubt defendant's identity as the perpetrator. Defendant's identity as the perpetrator was not seriously in question and, even if it was an issue, the court indicated in instructing on each of the offenses that the State was required to prove beyond a reasonable doubt that defendant committed their various elements.

**Am Jur 2d, Trial §§ 1370-1372.**

**9. Criminal Law § 468 (NCI4th)— capital murder—prosecutor's argument—explanation of reasonable doubt**

The trial court did not err in a prosecution arising from an abduction, rape and murder by not intervening *ex mero motu* in the prosecutor's explanation of reasonable doubt where the prosecutor stated that reasonable doubt is more than a possibility of innocence, that it is not a vain or imaginary doubt, and that the jury should not have any reasonable, substantial or significant doubt. The trial court properly instructed the jury on reasonable doubt and this instruction cured any error in the prosecutor's closing argument.

**Am Jur 2d, Trial § 645.**

**Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury. 67 ALR2d 245.**

**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.**

**10. Criminal Law § 433 (NCI4th)— capital murder—prosecutor's argument—defendant's character**

The trial court did not err in a prosecution arising from an abduction, rape, and murder by not intervening *ex mero motu* in the prosecutor's argument where defendant contended that the prosecutor improperly invited the jury to infer defendant's guilt from evidence of defendant's bad character. Counsel are generally allowed wide latitude in the argument of hotly contested cases and may argue facts in evidence and each of these comments was supported by the evidence or set forth an inference the jury could draw therefrom.

**Am Jur 2d, Trial §§ 681, 682.**

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

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

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

**11. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstances—no significant history or prior criminal activity**

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity where evidence was adduced at trial that defendant had been convicted of breaking and entering and larceny, larceny of a vehicle, three counts of forgery and uttering, assault on a female, and driving while impaired; he had served at least six months in prison in 1991-92 and had been imprisoned at least three times; and he acknowledged that at that time he was charged with backhanding his wife in response to her choking him and that his license was revoked. Although defendant asserts that a rational juror could have concluded that he had no significant history of prior criminal activity because of the age of some of his convictions, the allegedly nonviolent nature of all of them, and the fact that they were a product of his alcoholism, the cases on which defendant relies involved the mitigator being submitted over defendant's objection and the N.C. Supreme Court has held that similar histories barred submission of the mitigator. Given the nature and extent of defendant's prior criminal history and the nature of the outstanding charges against him, the trial court properly could have found that no reasonable juror would deem defendant's criminal history insignificant.

**Am Jur 2d, Criminal Law § 628.**

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

**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.**

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

**12. Criminal Law § 1357 (NCI4th)— capital sentencing—mitigating circumstances—mental or emotional disturbance**

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance that he was under the influence of a mental or emotional disturbance where, in context, the court in effect submitted the circumstances of mental or emotional disturbance and impaired capacity. Even assuming that the court did not, the jurors must have considered this evidence since they in fact found the four nonstatutory mitigating circumstances which the court related to those two circumstances.

**Am Jur 2d, Criminal Law § 628.**

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

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

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

**13. Criminal Law § 455 (NCI4th)— capital sentencing—prosecutor's argument—need to justify life sentence—deterrence**

There was no error in a capital sentencing proceeding where defendant asserted that the State's argument suggested that the jurors would have to justify a verdict of life imprisonment to the prosecutor and the citizens of the county and that a life sentence could be justified only if the jury could guarantee beyond a reasonable doubt that defendant would never kill again. Taken in context, the arguments suggested that the only way to prevent defendant from killing again was for the jury to return a death sentence; this type of specific deterrence argument has been consistently upheld. Moreover, the trial court subsequently instructed that the burden was on the State to prove the existence of an aggravating circumstance which outweighed any existing mitigating circumstances and which was sufficiently substantial

to warrant a recommendation of death. Any error in the prosecutor's argument could not have denied defendant due process and did not require a new trial.

**Am Jur 2d, Trial § 572.**

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

**14. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's argument—mitigating circumstances**

There was no error requiring intervention *ex mero motu* in a first-degree murder sentencing hearing where defendant contended that the State improperly argued that the mitigating circumstances were in fact aggravating circumstances. When read in context, the comments were attacks on the weight of the mitigating circumstances. Even assuming that they were improper, the trial court properly instructed the jury that only those circumstances identified by statute may be considered as aggravating circumstances and only the five aggravating circumstances submitted were listed on the Issues and Recommendation as to Punishment form. Accordingly, the jury could not have considered mitigating circumstances as aggravating circumstances. Furthermore, a psychologist testified that defendant had a history of antisocial acts and, under those circumstances, the prosecutor's comment that defendant had an antisocial personality disorder did not require the trial court to intervene.

**Am Jur 2d, Trial § 572.**

**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.**

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

**15. Jury § 229 (NCI4th)— capital murder—jury selection—juror initially uncertain, then opposed to death—excusal for cause**

A prospective juror was not erroneously excused for cause from a first-degree murder prosecution because of his personal

beliefs concerning the death penalty where, despite his speculation that there might be some cases in which he would agree to the death penalty, the juror subsequently asserted that he did not think he could follow the court's instructions that required imposing the death sentence.

**Am Jur 2d, Jury § 279.**

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

**16. Criminal Law § 1373 (NCI4th)— death penalty—not disproportionate**

A sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factors and was not excessive and disproportionate where the evidence supported the jury's finding of each aggravating circumstance and the jury did not sentence defendant to death under the influence of passion, prejudice, or any other arbitrary factor, this case is distinguishable from each of the seven cases where a death sentence was found disproportionate, cases cited by defendant in which juries have imposed life sentences are distinguishable in that here the jury convicted defendant of first-degree murder on the theories of premeditation and deliberation, felony murder, and murder by torture; none of the cases defendant cited involved the same aggravating circumstances as here and none involved a defendant who stabbed his victim fourteen times after having kidnapped, raped, and sexually assaulted her; and this case is similar to cases where the death penalty was found 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.**

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Wood, J., at the 24 January 1994 Criminal Session of Superior Court, Stokes 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 first-degree rape, first-degree sexual offense, and first-degree kidnapping was allowed 9 February 1996. Heard in the Supreme Court 12 February 1996.

*Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.*

*James R. Glover for defendant-appellant.*

WHICHARD, Justice.

Defendant was tried capitally for the first-degree murder, first-degree rape, first-degree sexual offense, and first-degree kidnapping of Vernice Alford. He was also charged with conspiracy to commit rape and conspiracy to commit kidnapping. The jury found defendant guilty on all but the conspiracy charges and recommended a sentence of death for the first-degree murder. The trial court sentenced defendant accordingly on the murder charge and sentenced defendant to two consecutive terms of life imprisonment for the rape and sexual offense and to a forty-year term for the kidnapping. Defendant appeals from his convictions and sentences. We hold that defendant received a fair trial, free of prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that on 30 November 1992, defendant and his two nineteen-year-old twin nephews, Gary Sapp and Larry Sapp, Jr., left defendant's trailer to go deer hunting. They stopped at a convenience store, at a pool hall, at a Waffle House, and at the Darrell and Sherry Fultz residence. Defendant then drove to Winston-Salem and picked up the victim, Vernice Alford, a waitress and prostitute. He drove to a logging road in Stokes County where he engaged in sexual acts with her. After ordering the Sapp brothers to tie the victim to a tree, defendant assaulted her with a knife and left her there.

The victim died of internal and external bleeding caused by multiple stab wounds. Although vaginal swabs and smears showed the presence of sperm cells, State Bureau of Investigation crime laboratory serologist P.D. Deaver testified that there was not a sufficient quantity of sperm to perform DNA testing.

In the area surrounding the site where the body was found, investigators recovered a Magna brand cigarette butt and a no-name ciga-

rette with a gold ring around the filter, a length of yellow and black cord wrapped loosely around a clump of small trees, an empty forty-ounce King Cobra beer bottle, an empty package of Monarch 100 cigarettes, and footprints from two different pairs of shoes. One print was made by a tennis shoe bearing the brand "Pony" on the sole, like the shoes the victim had worn. The other print was made either by a woman's shoe with a heel or by a cowboy boot. Chips of green paint and tire tracks were also found.

Based on statements made by the Sapp brothers, investigators arrested defendant and searched his residence area. They recovered a green pickup truck whose paint and tires were consistent with the paint chips and tire tracks found in the area of the logging road. They also recovered a pair of handcuffs hanging on a gun rack in the rear of the truck's cab. Fibers found on the handcuffs were consistent with fibers taken from the victim's blue jean jacket. Officers also seized a pair of cowboy boots that defendant put on as he was escorted from the residence.

Like defendant, the Sapp brothers were charged with first-degree kidnapping, first-degree murder, first-degree rape, first-degree sexual assault, conspiracy to commit rape, and conspiracy to commit kidnapping. Larry Sapp, Jr., testified that on the night of the murder, defendant was wearing cowboy boots, Larry was wearing black shoes, and Gary was wearing tennis shoes. Larry and Gary both smoked Magna cigarettes, whereas defendant smoked Monarch 100s, which have a gold band.

Gary Sapp testified that on 30 November 1992, he and defendant traded their aluminum cans for money at the recycling center in Kernersville. On the way back to the Sapps' trailer, defendant's wife bought five forty-ounce bottles of Magnum beer. Defendant and Gary each drank two bottles, and Larry drank the remaining bottle at the Sapps' trailer. That evening, defendant and the Sapp brothers decided to spotlight for deer in some cornfields. Finding no deer, they drove to Rural Hall, where they stopped at a Pantry store and purchased four or five more forty-ounce bottles of Magnum beer. They drove on to King and stopped at the Rack Room. Upon leaving there, they drove to the Waffle House, where defendant went inside and tried to convince Anita Brown to "party" with them. Defendant returned to the truck alone, telling the Sapps that Brown had refused to come. Larry testified that defendant was "really mad" and stated "that bitch ain't nothing but a whore anyway." Defendant then drove to the

Fultzes' residence, where defendant and the Sapps drank beer, and according to Larry, defendant told Sherry she should handcuff Darrell and beat him.

After leaving the Fultzes' residence and buying three forty-ounce bottles of King Cobra beer, defendant drove to Winston-Salem, saying he wanted to pick up a prostitute. Arriving in Winston-Salem at approximately 9:00 p.m., defendant stopped on Patterson Avenue when a black female flagged him down. She opened the passenger side door and sat in the front seat. As the woman repeatedly asked for money, defendant sped off. Tossing her the handcuffs he had removed from the gun rack, defendant then said, "[S]hut the f--- up and put the handcuffs on, bitch." When the victim looked at defendant and hesitated, defendant hit her in the face, saying, "[P]ut the f------ handcuffs on, bitch, like I told you." The victim said, "Okay, Mister. Okay, Mister," and cuffed her hands in front of her body.

Defendant sped and ran through several stoplights and stop signs on the way to rural Stokes County. Larry testified that the victim was scared and stated, "Please, Mister, don't," and that defendant replied, "Well, all them black girls that got killed out there, I'm the one that did it." Defendant drove down a logging road, rode over a felled tree, and stopped the vehicle. He and the victim exited the truck. Defendant walked to the passenger side and forced the victim's head toward his penis. After the victim performed fellatio upon defendant, he took her to the rear of the truck, where he engaged in sexual intercourse with her as she leaned over and held the bumper. Larry walked to the rear of the truck, and the victim performed fellatio upon him while she was engaged in intercourse with defendant. When defendant stated, "You f------ bitch," Larry stopped the victim from performing oral sex. Defendant and the victim then walked to the driver's side of the truck; defendant pushed the victim onto some logs and again had intercourse with her. Gary testified that defendant stated several times, "I am going to ice this bitch." Larry testified that the victim engaged in all of the sexual acts willingly and voluntarily.

Defendant then led the victim to a tree. Although Gary said to defendant, "Let's go, let's get out of here," defendant insisted, "I'm going to ice this bitch." Defendant asked the Sapp brothers to tie the victim to a tree with a length of yellow and black rope. According to Gary, defendant said he was not going to pay the victim for having sex and was going to leave her there. Gary and Larry wrapped the rope around the victim and the tree four or five times but left the rope

loose so the victim could later extricate herself. Larry testified that while he and Gary were wrapping the rope, the victim asked them several times not to hurt her and stated that she had a child. Larry responded that they would not hurt her. As the Sapp brothers walked back to the truck, defendant angrily yelled, "Why didn't you tie the G----- rope like I told you to?" While Gary and Larry sat in the truck drinking beer, Larry observed defendant standing in front of the victim and saw defendant's arms moving. Defendant returned to the truck within a few minutes, and as he turned on the engine and the headlights, Gary observed the victim walking "kind of bent over."

After leaving the logging road, defendant discovered that the truck had a flat tire. While the Sapps changed it, defendant contacted his wife on the citizens band radio to tell her about the flat tire. Defendant then drove to his residence. Before going inside, defendant and the Sapps walked to the rear of defendant's residence, where defendant tried to burn a length of black and yellow rope. Gary testified that defendant, while burning the rope, said that he "iced that bitch." Defendant also told the Sapps he had stabbed himself in the leg while stabbing the victim. He showed them the knife he usually carried in a sheath on his belt, and it was covered with blood. Three days after the incident, defendant called the Sapp brothers, laughing, and told them the black female had been found. He instructed them not to tell anyone about the incident. Both Sapp brothers testified that on the night of the incident, defendant was "feeling good" but was not drunk.

Defendant testified that he did not remember any of the events after he and the Sapps left the Rack Room because he passed out as a result of consuming more than a case of beer over the course of the day. He claimed that he knew nothing about the killing of the victim, asserting that the Sapp brothers had awakened him to tell him the pickup had a flat tire. He had no memory of stopping at the Waffle House or at the Fultzes'. Defendant denied ever possessing any black and yellow rope and denied burning any such rope after returning to his residence. Although when arrested he had a small wound on his leg, defendant and his fifteen-year-old nephew, Donnie Penland, testified that defendant had injured his leg when he caught his pants on a barbed wire fence they were crossing while deer hunting several days after the murder. Defendant acknowledged that he previously had been to Patterson Avenue with Larry Sapp, Jr., and Donnie Penland and that he had told the Fultzes that Patterson Avenue was a place for picking up prostitutes.

At sentencing defendant presented evidence that his father was an alcoholic and was abusive toward his children. Dr. John Warren, a psychologist, testified that defendant suffered from alcohol dependency and mixed personality disorder and that defendant had intellectual functioning in the bottom six or seven percent of persons his age. Dr. Warren found nothing in his evaluation to suggest that defendant was insane or so intoxicated that he was unable to distinguish right from wrong at the time of the crimes.

**[1]** Defendant first assigns as error the trial court's denial of his motion to dismiss the charges of first-degree rape and first-degree sexual offense. He contends that the evidence was insufficient to permit the jury to find beyond a reasonable doubt that the sexual intercourse and fellatio were committed by force and against the victim's will.

In ruling on a 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 therefrom. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). Contradictions and discrepancies are for the jury to resolve. *Id.* In deciding whether the trial court's denial of defendant's motion to dismiss violated defendant's due process rights, this Court must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979).

One common element of first-degree rape and first-degree sexual offense, N.C.G.S. §§ 14-27.2(a)(2), 14-27.4(a)(2) (1986), is that the vaginal intercourse or sexual act must be "by force and against the will" of the victim. This Court has held that such force may be established by either actual physical force or constructive force. Constructive force may be demonstrated by evidence of threats or other actions by the defendant which compel the victim's submission to sexual acts, and such threats "need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987).

In arguing that the State's evidence was insufficient to establish either that the sexual acts were against the victim's will or that he used the kind of force required for a conviction of rape or sexual offense, defendant relies upon *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984). *Alston*, however, is distinguishable. In *Alston*,

Cottie Brown had engaged in a consensual sexual relationship with the defendant for six months prior to the alleged rape. Brown testified that when she and the defendant engaged in sex, she frequently would remain motionless while the defendant undressed her and had intercourse with her. On the day of the alleged rape, approximately a month after Brown moved out of the defendant's apartment, the defendant approached Brown outside the school she was attending and threatened to "fix" Brown's face. Brown testified that she did not run away from the defendant because she was afraid of him. Instead, after they walked around the neighborhood discussing their relationship, Brown followed the defendant to a friend's apartment and remained motionless while he undressed her and had intercourse with her. This Court held that "absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*," the victim's "general fear" was not sufficient to show that the defendant used the force required to support a conviction of rape. *Id.* at 409, 312 S.E.2d at 476.

Here, there was substantial evidence from which the jury reasonably could find that defendant used actual or constructive physical force sufficient to overcome any resistance the victim might have offered. Unlike in *Alston*, defendant and the victim were strangers. When the victim entered the truck and asked for money, defendant began driving "real fast," swore at her and admonished her twice to "shut up," slapped her, and commanded her to put on handcuffs. Gary Sapp testified that the victim was scared. When she pleaded, "Please, Mister, don't," defendant replied that he was responsible for the deaths of "all them black girls that got killed out there." At the logging road, defendant pushed the victim's head down onto his penis. While the victim was performing fellatio on Larry Sapp, defendant exclaimed, "You f----- bitch," causing Larry to stop the victim from performing oral sex. After repeatedly telling Gary Sapp he was going to "ice this bitch," defendant pushed the victim onto a pile of logs and had intercourse with her again. When the Sapps were wrapping the rope around the victim and the tree, she pleaded with them not to hurt her and told them, falsely, that she had a child. When defendant observed that the Sapps had not tied the victim tighter, he became furious and yelled, "Why didn't you tie the G------ rope like I told you to?" Although the victim was a prostitute and initially sought a sexual encounter for payment, consent to sexual intercourse can be withdrawn at any time prior to penetration. *State v. Way*, 297 N.C. 293, 296, 254 S.E.2d 760, 761 (1979). Moreover, while the victim here did

not offer any physical resistance to the acts of sexual intercourse and fellatio, evidence of physical resistance is not necessary to prove lack of consent in a rape case. *Alston*, 310 N.C. at 408, 312 S.E.2d at 475 (citing *State v. Hall*, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977)). Unlike in *Alston*, the victim's fear of defendant was specific to the events leading to defendant's sexual assaults on and murder of her. Under these circumstances, a jury could reasonably find that there was substantial evidence that the victim withdrew any prior consent to the sexual acts.

**[2]** In addition to requiring proof that a sexual act or intercourse was by force and against the victim's will, convictions for first-degree sexual offense and first-degree rape require proof that defendant used or displayed a deadly weapon, inflicted serious injury on the victim, or was aided and abetted in the commission of the sexual offense or rape by one or more other persons. N.C.G.S. §§ 14-27.2(a)(2), 14-27.4(a)(2). The trial court submitted the charges of first-degree rape and first-degree sexual offense on the basis that defendant was so aided and abetted. Defendant argues that the evidence was insufficient to prove that the Sapp brothers aided and abetted him because the State presented no evidence that they did anything to encourage, instigate, advise, or counsel defendant to engage in any sexual acts with the victim. Rather, the State's evidence merely proved that the Sapps were present.

Mere presence at the crime scene is insufficient to support a finding that a person is an aider and abettor; there must be some evidence tending to show that the alleged aider and abettor " 'by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary.' " *Bell*, 311 N.C. at 139, 316 S.E.2d at 615 (quoting *State v. Aycoth*, 272 N.C. 48, 51, 157 S.E.2d 655, 657 (1967)). In addition, to be an aider and abettor, a person must share in the criminal intent of the perpetrator to commit the charged offense. *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). That a person intends to aid the perpetrator may be inferred from his actions and from his relation to the actual perpetrator. *State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 185 (1973). In fact, when the bystander is a friend of the perpetrator who knows his presence will be regarded as an encouragement, presence alone may be so regarded. *Id.* (quoting with approval Vol. 1, Francis Wharton, *Wharton's Criminal Law* § 246 (12th ed. 1932)).

When viewed in the light most favorable to the State, the evidence here showed that defendant was the Sapp brothers' uncle and that the Sapps were present when defendant picked up the victim, swore at her, hit her in the face, and demanded that she put on handcuffs. Not only were the Sapps in close proximity when defendant forced the victim to perform fellatio upon him and to have sexual intercourse with him, but Larry participated in the sexual acts, and both brothers complied with defendant's request to tie the victim to a tree. Their presence inside and outside the truck while defendant engaged in sexual acts with the victim could reasonably have been regarded as encouragement to defendant and constitutes sufficient evidence that they and defendant shared the "community of unlawful purpose" necessary for aiding and abetting. *State v. McKinnon,* 306 N.C. 288, 299, 293 S.E.2d 118, 125 (1982).

**[3]** Defendant further argues that even if their presence was sufficient to raise an inference that they aided and abetted him, the evidence that they shared a criminal intent to commit the offenses was at best equivocal. Defendant contends that he was entitled to an instruction on the lesser offenses of second-degree rape and second-degree sexual offense. He further argues that the failure to so instruct deprived him of his state and federal constitutional rights to due process and freedom from cruel and unusual punishment. Because defendant did not object to the instructions given and did not request instructions on the lesser offenses, however, he is now barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure from assigning this as error. *State v. Collins,* 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (citing *State v. Odom,* 307 N.C. 655, 300 S.E.2d 375 (1983)). Even under the plain error standard of *Odom,* defendant is entitled to no relief because he cannot demonstrate that any error in the trial court's instructions "caused the jury to reach a different verdict than it would have reached otherwise." *State v. Walker,* 316 N.C. 33, 40, 340 S.E.2d 80, 84 (1986). There was no evidence to support instructions on second-degree rape and second-degree sexual offense. Defendant's evidence did not tend to negate the evidence that the Sapps aided and abetted him. Rather, he stated that he did not remember the evening's events, and his testimony suggested that the Sapps were the perpetrators. Based on this evidence, the jury could have found defendant guilty of first-degree rape and first-degree sexual offense or not guilty. Because there was no evidence suggesting a lack of aiding and abetting, the trial court was not required to instruct the jury on the lesser offenses. *See State v.*

*Amerson*, 316 N.C. 161, 168, 340 S.E.2d 98, 102 (1986). This assignment of error is overruled.

**[4]** Defendant next contends the evidence was insufficient to permit the jury to find beyond a reasonable doubt that he committed first-degree kidnapping. The indictment charged that defendant kidnapped the victim by "unlawfully confining her and restraining her and removing her from one place to another" without her consent and for the purpose of committing a felony, and that the victim was sexually assaulted, seriously injured, and not released in a safe place. Although defendant concedes that the evidence established that he restrained or removed the victim without her consent, he argues that the evidence was insufficient to prove that he formed an intent to rape the victim prior to or during the removal. Defendant contends that because all of the evidence tended to show that the victim got into the truck for the purpose of engaging in prostitution, defendant had no reason to believe she would not engage in consensual sexual acts, and therefore there was no substantial evidence that he formed an intent to rape the victim prior to or during the removal. We disagree.

Although the victim was a prostitute, the evidence indicates that defendant never intended to pay her for sexual services. When she entered the truck and asked for money, defendant began driving very fast. As she repeated her request for money, defendant swore at her, slapped her, and demanded that she wear handcuffs. When the victim stated, "Please, Mister, don't," defendant enhanced her fear by telling her he was responsible for the murders of "all them black girls." Defendant's repeated statements that he was going to "ice" the victim further indicated that he had no intention of paying her. Given these circumstances the jury could reasonably infer (1) that defendant would have known the victim's prior consent to sexual activity had been withdrawn, and (2) that his threats and actions compelled her submission and overcame her will, thereby negating her earlier consent. This assignment of error is overruled.

**[5]** Defendant next assigns as error the trial court's admission pursuant to N.C.G.S. § 8C-1, Rule 404(b), over his objection, of the testimony of Judy Hopkins and Gary Sapp concerning prior bad acts defendant allegedly committed. He argues that this evidence was not relevant to prove any issue of fact other than his bad character and predisposition to commit such acts and that it was admitted in violation of N.C.G.S. § 8C-1, Rule 403, because its prejudicial impact substantially outweighed its probative value.

Following the State's assertion that it intended to offer Hopkins' testimony to prove defendant's *modus operandi* and common plan or scheme, the trial court held a *voir dire* to determine whether the acts against Hopkins and the victim were sufficiently similar under Rule 404(b) to allow admission of the testimony. Hopkins testified on *voir dire* that she dated defendant for a six-month period approximately ten years prior to trial. On their second or third date, Hopkins saw defendant with handcuffs, and he used these handcuffs to secure her "to a bed or to anything that he could get." Defendant often used a rope to bind Hopkins to a tree in the woods; and he sometimes used the handcuffs, rope, and his knife together on Hopkins. After tying her to a tree, defendant would verbally abuse her, slap her around, and throw knives at her. He also held several knives to her throat. On at least one occasion, Hopkins suffered black eyes and a torn lip. The trial court determined that defendant's actions against Hopkins and those against the victim were sufficiently similar that the ten-year span between the crimes charged and the prior bad acts did not render the evidence too remote to be probative on the issue of common plan or scheme. However, it ruled that the State could not elicit "remote" evidence from Hopkins about defendant "tying her to beds and things of that nature."

Hopkins testified before the jury that defendant controlled her by using handcuffs on her, that he had used handcuffs on more than five occasions, that he had tied her to a tree and thrown knives at her, that he had held knives at her throat, that he had called her "bitches [sic] and stuff like that," that he had slapped her and used his fist on her, and that these incidents always occurred in wooded areas. The trial court gave a limiting instruction in which it told the jury that the evidence of defendant's assaults against Hopkins "was received solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime or crimes charged in this case."

Defendant contends that Hopkins' evidence was inadmissible to prove the existence of a common plan or scheme because of the ten-year gap between those acts and the crimes charged here and because of the dissimilarities between the two. He relies on *State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982), a case decided before codification of the rules of evidence, in which the defendant and a fellow police officer were charged with first-degree sexual offense for raiding a massage parlor and threatening to arrest the female employees for prostitution but then offering to drop the charges in exchange for

sexual favors. This Court held that the trial court erroneously admitted evidence that seven months prior to this incident, a prostitute allegedly committed fellatio upon the defendant in exchange for his agreement not to arrest her. Despite the "striking similarity" between the two events, the Court determined that the seven-month time gap between the events "substantially negated the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities." *Id.* at 656, 285 S.E.2d at 821.

Initially, we note that at trial defendant argued that the prior bad acts were too dissimilar to be admissible under Rule 404(b), not that they were too remote in time. In his brief he primarily contends that the prior bad acts against Hopkins were too remote in time to be admissible as evidence of a common plan or scheme. Because this argument is made for the first time on appeal, it is not properly before this Court. *See State v. Robbins*, 319 N.C. 465, 495-96, 356 S.E.2d 279, 297-98, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); N.C. R. App. P. 10(b)(1).

Even if defendant had preserved this argument, he would not prevail. As the trial court noted, both incidents involved assaults on a female in remote wooded areas in which defendant used a knife to threaten or intimidate the female, tied her to a tree, and slapped or beat her. Moreover, defendant used handcuffs and verbally abused his victim in both instances. Given the commonality of the distinct and bizarre behaviors, the ten-year gap between the incidents did not "negate[] the plausibility of the existence of an ongoing and continuous plan to engage . . . in such . . . activities." *Shane*, 304 N.C. at 656, 285 S.E.2d at 821.

Nor did the admission of Hopkins' testimony violate Rule 403. The trial court specifically precluded the prosecutor from eliciting "remote" evidence from Hopkins, and the evidence actually adduced did not simply imply that defendant had a bad character, but tended to prove the existence of a common plan or scheme on his part. In light of the limiting instruction, the probative value of Hopkins' evidence was not substantially outweighed by its prejudicial impact.

**[6]** Under this same assignment, defendant argues that the trial court erred in allowing Gary Sapp to testify, over objection, that whenever he previously accompanied defendant to the Fultz residence, defendant always told Darrell Fultz that he was going to handcuff Sherry Fultz and "beat the hell out of her." Defendant again contends this evidence should not have been admitted because it was not

relevant to prove anything other than his bad character. However, the State had previously introduced testimony of three sisters that defendant possessed handcuffs or had threatened to use handcuffs on them. One, Mary Wilson, testified that approximately two years before 30 November 1992, defendant and Debbie Wilson argued, and defendant handcuffed and slapped Debbie. Darrell and Sherry Fultz later testified that on 30 November 1992, defendant told Darrell he had handcuffs in his truck if Darrell wanted to "take care of" Sherry. Defendant did not object to any of this evidence. As this similar evidence was admitted without objection, defendant cannot now complain about the admission of Gary Sapp's testimony regarding defendant's proposed handcuffing of Sherry Fultz. *See State v. Alford*, 339 N.C. 562, 569-70, 453 S.E.2d 512, 515-16 (1995). This assignment of error is therefore overruled.

**[7]** Defendant next argues that the trial court erred in allowing State's witness Jason Duncan to testify to his opinion regarding the good character of the Sapp brothers for truthfulness. At trial defendant offered evidence of his good character for truth and veracity and the Sapp brothers' bad character for such. As Duncan had been the Sapp brothers' teacher in the sixth grade approximately six years prior to trial, defendant argued that Duncan's knowledge was so remote that his testimony should not be admitted. The trial court permitted Duncan to testify over objection that in the sixth grade, the Sapp brothers admitted exactly what they had done when they were caught. On cross-examination Duncan admitted that he did not know the brothers' current reputation for truthfulness. The fact that Duncan's knowledge of the Sapp brothers' reputation for truthfulness related to a time six years earlier affected only weight, not admissibility. *See State v. Syriani*, 333 N.C. 350, 377, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Further, given the inconsequential nature of this testimony, defendant has failed to demonstrate that the error, if any, in admitting it was prejudicial.

**[8]** Defendant next assigns as error the trial court's refusal to instruct the jury that the State had the burden of proving beyond a reasonable doubt defendant's identity as the perpetrator. Asserting that there was no direct evidence that he killed the victim, defendant requested that the trial court instruct in accordance with N.C.P.I.—Crim. 104.90, which provides:

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond

> a reasonable doubt. That means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

N.C.P.I.—Crim. 104.90 (1989). The trial court refused to give the instruction. Defendant argues that the main issue was whether he or one of the Sapp brothers killed the victim. He thus contends that he was entitled to have the substance of this instruction given.

So long as the requested instruction is given in substance, the trial court is not required to give it verbatim even when it is a correct statement of the law. *State v. Dodd*, 330 N.C. 747, 753, 412 S.E.2d 46, 49 (1992). The trial court did not err in refusing to give this instruction because defendant's identity as the perpetrator was not seriously in question. There was substantial evidence that defendant killed the victim: the Sapp brothers testified that defendant was the last person with the victim before they left the scene of the crimes; Larry testified that he observed defendant moving his arms in front of the victim; defendant admitted to the Sapp brothers that he had "iced the bitch" and that he had stabbed himself in the leg while he was stabbing the victim; defendant displayed his bloody knife to the Sapps; and both cigarette butts matching defendant's brand and a cowboy boot print were found at the crime scene. As Larry testified that defendant was the only one wearing cowboy boots, the discovery of the cowboy boot print at the crime scene refuted defendant's assertion that he was passed out in the truck at the time of the killing.

Even if identity of the perpetrator was an issue, the trial court instructed that the State "must prove . . . that the defendant is guilty beyond a reasonable doubt." In instructing on each of the offenses, the court indicated that the State was required to prove beyond a reasonable doubt that defendant committed their various elements. These instructions adequately informed the jury that the State had to prove that defendant was the perpetrator. *See State v. Williams*, 98 N.C. App. 68, 71-72, 389 S.E.2d 830, 832 (1990). Any error in the failure to give the requested instruction thus was harmless beyond a reasonable doubt. This assignment of error is overruled.

Defendant next argues that the prosecutors' guilt-innocence phase arguments contained misstatements of the law and the evidence, included statements of personal opinion and personal testimony, and were grossly improper. Although defendant did not object, he now contends that the remarks violated his state and federal rights

to a fair trial such that the trial court erred by failing to intervene *ex mero motu*. We conclude that the arguments were not so grossly improper as to deny such rights and that the trial court therefore did not err by failing to intervene *ex mero motu*.

**[9]** Defendant first argues that one prosecutor's explanation of the reasonable doubt standard allowed the jury to apply an unconstitutionally lenient standard of proof in determining defendant's guilt. The prosecutor noted that it was neither possible nor necessary for the State to prove defendant's guilt beyond all conceivable doubt. Quoting from *State v. Bryant*, 282 N.C. 92, 99, 191 S.E.2d 745, 750 (1972), the prosecutor stated that reasonable doubt "is more than a possibility of innocence." He continued:

> Reasonable doubt is doubt based on reason. It is a reasonable doubt as distinguished from a flimsy doubt. It is a significant and important doubt. Let me read that to you again. It is a reasonable doubt as distinguished from a flimsy one. It is an important, significant doubt. That is what reasonable doubt is. It's not a vain or imaginary doubt.

The prosecutor added that the jury should not have any reasonable, substantial, or significant doubt that defendant was the person who kidnapped, raped, and murdered the victim.

Citing *Cage v. Louisiana*, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342 (1990) (per curiam), defendant contends that the use of the terms "substantial," "important," and "significant" "suggest a higher degree of doubt than is required under the reasonable doubt standard." This Court recently rejected a similar argument in *State v. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, — U.S. —, 132 L. Ed. 2d 818 (1995), affirming that "[t]he jury does not have to be absolutely certain or totally free from doubt to find a defendant guilty." *Id.* at 196, 451 S.E.2d at 225. The Court determined that the prosecutor's language there that it was sufficient if the jurors "believed basically" that the defendant was guilty did not lower the State's burden of proof in violation of the defendant's due process rights. *Id.* at 196-97, 451 S.E.2d at 225. In addition, *Cage* concerned instructions the trial court gave to the jury and is "not controlling here, where the statements complained of were made by the prosecutor during jury arguments." *State v. Jones*, 336 N.C. 490, 495, 445 S.E.2d 23, 25 (1994). The trial court properly instructed the jury on reasonable doubt as follows:

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

This instruction cured any error in the prosecutor's closing argument and insured that defendant was not denied due process. *See Rose*, 339 N.C. at 197, 451 S.E.2d at 225.

**[10]** Defendant further argues that a prosecutor improperly invited the jury to infer defendant's guilt from various items of evidence indicating that defendant was a person of bad character. Defendant complains of (1) the prosecutor's arguing that defendant had two different sides and asking the jury to determine "which side was out there" on 30 November 1992; (2) the prosecutor's arguing that only police have a legitimate reason for owning handcuffs and that defendant had presented no evidence that he needed to carry a knife every day; (3) the prosecutor's arguing that defendant was the kind of person who liked to go to Patterson Avenue in Winston-Salem and that, even though he was married, defendant tried to get other women to go out with him; and (4) the prosecutor's brief comment on defendant's criminal record and time served in prison.

Counsel are generally allowed "wide latitude in the argument of hotly contested cases." *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). Counsel may argue facts in evidence and all reasonable inferences to be drawn therefrom, and the propriety determination is largely in the sound discretion of the trial court. *Id.*

Each of the above comments was supported by the evidence or set forth an inference the jury could draw therefrom. Although there was evidence that defendant committed these crimes and had assaulted females in the past, defendant presented evidence that he was a good husband and had never handcuffed or threatened his wife with violence. As there was evidence that defendant was not a police officer, the prosecutor could properly comment on and question his longtime possession of handcuffs as well as his need to carry a knife on his belt at all times. There was evidence that defendant had previously been to Patterson Avenue at least once with Larry Sapp, Jr., and Donnie Penland and once with the Fultzes. There was also evidence that on the night of the crimes, defendant attempted to convince

Anita Brown to accompany him and the Sapp brothers. Finally, defendant acknowledged that he had prior convictions for breaking and entering and larceny, larceny of a vehicle, three counts of forgery and uttering, and driving while impaired. The prosecutor's remarks concerned the credibility of defendant and his testimony that he knew nothing about the crimes, rather than defendant's predisposition to commit the crimes. They were not so grossly improper as to require the trial court to intervene *ex mero motu*. This assignment of error is therefore overruled.

**[11]** Defendant next argues that the trial court failed to submit statutory mitigating circumstances supported by the evidence and that this failure deprived him of his due process rights. He first contends the court erred in failing to submit the circumstance that defendant had "no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1) (Supp. 1995), because the evidence would have permitted a reasonable juror to find this proven by a preponderance of the evidence. Evidence was adduced at trial that defendant had been convicted of breaking and entering and larceny, larceny of a vehicle, three counts of forgery and uttering, assault on a female, and driving while impaired. He had served at least six months in prison in 1991-92 and had been imprisoned at least three times. Defendant acknowledged that at that time he was charged with backhanding his wife in response to her choking him. He also admitted to outstanding charges of driving while impaired and driving while his license was revoked. Dr. Warren, defendant's expert in forensic psychology, opined that defendant's prior convictions were associated with his long-standing addiction to alcohol.

Defendant asserts that because of the age of some of his convictions, the allegedly nonviolent nature of all of them, and the fact that they were a product of his alcoholism, a rational juror could have concluded that he had no significant history of prior criminal activity. As support for this assertion, defendant cites *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), and *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (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). In *Lloyd* this Court determined that this mitigator was properly submitted over defendant's objection notwithstanding evidence of two felony convictions and seven alcohol-related misdemeanors. *Lloyd*, 321 N.C. at 312-13, 364 S.E.2d at 323-24. In *Brown* the (f)(1) mitigator was held properly submitted over objection

despite defendant's record of eighteen felony convictions. *Brown*, 315 N.C. at 62, 337 S.E.2d at 825.

Defendant's reliance on *Lloyd* and *Brown* is misplaced. In those cases the mitigator was submitted over the defendants' objections; here, it was not submitted. Further, defendant bears the burden of producing "substantial evidence" tending to show the existence of a mitigating circumstance before that circumstance will be submitted. *State v. Rouse*, 339 N.C. 59, 100, 451 S.E.2d 543, 566 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995). Before submitting this mitigating circumstance, the trial court must "determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). This Court has held that similar criminal histories barred submission of the mitigator. *See, e.g., State v. McCarver*, 341 N.C. 364, 399, 462 S.E.2d 25, 44-45 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996); *State v. Daughtry*, 340 N.C. 488, 522, 459 S.E.2d 747, 764-65 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996); *State v. Jones*, 339 N.C. 114, 157-58, 451 S.E.2d 826, 849-50 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995); *Rouse*, 339 N.C. at 99-100, 451 S.E.2d at 565-66. Given the nature and extent of defendant's prior criminal history and the nature of the outstanding charges against him, the trial court properly could have found that no reasonable juror would deem defendant's criminal history insignificant. Thus, the trial court did not err in failing to submit the circumstance *ex mero motu*.

**[12]** By this same assignment, defendant asserts that the evidence in the light most favorable to him would have permitted a reasonable juror to find the statutory mitigating circumstance that the "murder was committed while the defendant was under the influence of a mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). He notes that there was sentencing phase evidence that he suffered from a mixed personality disorder, that his intellectual capacity was impaired, that he was addicted to alcohol, and that each of these conditions existed prior to and at the time of the murder. Even if his alcoholism was not a mental or emotional disturbance within the meaning and intent of (f)(2), defendant argues that the other diagnoses were sufficient to require that this circumstance be submitted.

In its instructions the trial court in effect submitted this circumstance. It submitted the following nonstatutory mitigating circumstances: (1) whether the defendant suffers from low mentality or a

low intelligence quotient, (2) whether the defendant suffers from substance abuse and alcohol dependency, (3) whether the defendant suffered from an impaired capacity at the time of the crime, and (4) whether the defendant suffers from a personality disorder. The court then instructed that if one or more jurors found that defendant's low mentality or low intelligence quotient, and/or substance abuse and alcohol dependency, and/or impaired capacity, and/or personality disorder existed "so that as a result the Defendant was under the influence of a mental disturbance or emotional disturbance when he killed the victim, . . . you would so indicate by having your foreperson write 'Yes' in the space after this mitigating circumstance on the Issues and Recommendation form." The trial court similarly related these four mitigators to the mitigating circumstance in N.C.G.S. § 15A-2000(f)(6), instructing that if any of the jurors found that any of these same four mitigating circumstances existed and "impaired [defendant's] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law," they would so indicate by having their foreperson write "Yes" in the space provided after this mitigating circumstance on the Issues and Recommendation as to Punishment form. Thus, in context, the trial court in effect submitted both the (f)(2) and (f)(6) mitigators.

Even assuming *arguendo* that the court did not, through its instructions, in effect submit the (f)(2) mitigator, the error was harmless. The jurors must have considered this evidence since they in fact found the four nonstatutory mitigating circumstances which the trial court related to (f)(2) and (f)(6): that defendant suffers from low mentality or low intelligence quotient, that defendant suffers from substance abuse and alcohol dependency, that defendant suffered from an impaired capacity at the time of the crime, and that defendant suffers from a personality disorder. Thus, the error, if any, in failing to submit the (f)(2) circumstance did not prevent any juror from considering and giving weight to the mitigating evidence and was harmless beyond a reasonable doubt. *See State v. Ward*, 338 N.C. 64, 113, 449 S.E.2d 709, 736-37 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). This assignment of error is overruled.

**[13]** Defendant next asserts that the State's penalty phase arguments contained misstatements of the evidence and were grossly improper. The first remark to which defendant objects was:

> Now, ladies and gentlemen of the jury, if you could tell me, if you could tell me, if you could show to the people in this county

> beyond a reasonable doubt that letting Rex Dean Penland live guarantees he'll never kill again, can you do that? Can you really do that?

Defense counsel objected, and the trial court sustained the objection. Defendant contends that this comment suggested that the jurors would have to justify a verdict of life imprisonment to the prosecutor and the citizens of the county and that a life sentence could be justified to the public only if the jury could guarantee beyond a reasonable doubt that defendant would never kill again. Defendant further argues that the trial court should have instructed the jury to disregard the remarks.

A prosecutor's challenged remarks must be reviewed in the overall context in which they were made and in view of the overall factual circumstances to which they referred. *State v. Daniels*, 337 N.C. 243, 277, 446 S.E.2d 298, 319 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). Prior to the challenged remark, the prosecutor noted that defendant sought to protect his own life but that "no one tried to protect Vernice Alford." Taken in context, the comments suggested that the only way to prevent defendant from killing again was for the jury to return a death sentence. This type of specific deterrence argument has been consistently upheld. *See State v. Lee*, 335 N.C. 244, 281-82, 439 S.E.2d 547, 566-67, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994); *State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993); *State v. Johnson*, 298 N.C. 355, 366-67, 259 S.E.2d 752, 760 (1979). Moreover, the trial court subsequently instructed that the burden was on the State to prove the existence of an aggravating circumstance which outweighed any existing mitigating circumstances and which was sufficiently substantial to warrant a recommendation of death; thus, any error in the prosecutor's argument could not have denied defendant due process and did not require a new trial. *See State v. Frye*, 341 N.C. 470, 492, 461 S.E.2d 664, 674 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996); *Jones*, 336 N.C. at 493-96, 445 S.E.2d at 24-26.

**[14]** Defendant further argues that the State improperly argued that the mitigating circumstances to be submitted to the jury were in fact aggravating circumstances. Referring to the fact that defendant suffered from a personality disorder, the prosecutor argued, "And I submit to you that you've already found by your verdict in the first phase of this trial that that is not a mitigating factor." Subsequently, after

reviewing the list of mitigating circumstances, the prosecutor argued, "Are those mitigating factors? Do they mitigate this? Or are they aggravating factors?" Defendant also contends that the prosecutor misstated the evidence by claiming that defendant had been diagnosed as suffering from an antisocial personality disorder and arguing, "I contend to you that it is an aggravating factor."

Defendant failed to object to any of these comments. Review, therefore, is limited to whether they were so grossly improper as to require the trial court to intervene *ex mero motu*. When read in context, the comments were attacks on the weight of the mitigating circumstances. Even assuming that they were improper, the trial court properly instructed that "[o]nly those circumstances identified by statute may be considered . . . as aggravating circumstances." The trial court then instructed on the five aggravating circumstances submitted, and only these were listed on the Issues and Recommendation as to Punishment form. Accordingly, the jury could not have considered the mitigating circumstances as aggravating circumstances, and the prosecutors' remarks could not have prejudiced defendant. Further, although Dr. Warren did not testify that defendant suffered from antisocial personality disorder, he did state that defendant had a history of antisocial acts. Under these circumstances, the prosecutor's comment referring to "antisocial personality disorder" did not require the trial court's *ex mero motu* intervention. This assignment of error is overruled.

**[15]** By his next assignment, defendant contends, pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), that prospective juror Russell Farmer was erroneously excused for cause because of his personal beliefs concerning the death penalty. Farmer stated that he was irrevocably opposed to the death penalty and could not set aside his personal conviction and vote to impose it. He admitted that there "could be some" cases in which the facts were such that he would so vote, but he later asserted that he could not follow the trial court's instructions if they required imposing the death penalty.

A prospective juror may be removed for cause because of his or her views on the death penalty if those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The granting of a challenge for cause

where a juror's fitness is arguable is a matter within the trial court's discretion and will not be overturned absent an abuse of that discretion. *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). The record fully supports the trial court's determination that Farmer's beliefs about the death penalty would substantially impair his capacity to perform as a juror. Despite his speculation that there might be some cases in which he would agree to the death penalty, Farmer subsequently asserted that he did not think he could follow the court's instructions that required imposing a death sentence. Defendant has failed to demonstrate that the trial court abused its discretion by excusing Farmer for cause. This assignment of error is therefore overruled.

Defendant next raises several issues which he concedes this Court has decided against his position, including: (1) that he was entitled to pretrial notice of the theory on which the State intended to rely on the first-degree murder charge and of the aggravating circumstances that the State intended to prove; (2) that the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9), is vague and overbroad; (3) that North Carolina's capital sentencing scheme is unconstitutional; (4) that he should have been allowed to examine potential jurors about their understanding of the definition of a life sentence; (5) that instructing the jury that defendant had the burden of proving automatism to the satisfaction of the jury was plain error; (6) that the trial court erred in instructing the jury that it had the duty to impose the death penalty if it found that the mitigators failed to outweigh the aggravators; (7) that the trial court's definition of mitigators was error; (8) that the trial court erred in instructing that nonstatutory mitigators are not mitigating as a matter of law; and (9) that the manner in which this Court conducts proportionality review is "arbitrary or undefined." We have reviewed defendant's arguments, and we find no compelling reason to reconsider our prior holdings. These assignments are overruled.

**[16]** In his final assignment, defendant contends that the death sentence was imposed under the influence of passion, prejudice, and other arbitrary factors and that it is excessive and disproportionate to the penalty imposed in other similar cases. The jury found four aggravating circumstances: that the murder was committed while defendant was engaged in the commission of first-degree rape, that the murder was committed while defendant was engaged in the commission of first-degree sex offense, and that the murder was committed while

defendant was engaged in the commission of first-degree kidnapping, all pursuant to N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, pursuant to N.C.G.S. § 15A-2000(e)(9). The jury did not find as an aggravating circumstance, pursuant to N.C.G.S. § 15A-2000(e)(4), that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The jury found six of eleven mitigating circumstances submitted, including that defendant suffers from low mentality or low intelligence quotient; that defendant suffers from substance abuse and alcohol dependency; that defendant suffered from impaired capacity at the time of the crime; that as the second youngest of eight children, defendant had a difficult time growing up; that defendant suffers from a personality disorder; and that defendant grew up in an abusive situation with an alcoholic father who beat his children, including defendant. 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.

This Court's final statutory duty is to determine whether the sentence of death is excessive or disproportionate. As we recently noted:

> 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).

*State v. Chapman*, 342 N.C. 330, 346, 464 S.E.2d 661, 670 (1995), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1077 (1996).

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); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We find the instant case distinguishable from each of those cases. Significantly, this Court has never found a death sentence disproportionate in a case involving a victim of first-degree murder who was also sexually assaulted. *State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87 (1996) (citing *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 contends that his case is comparable to *Stokes* and *Young*. Those cases are distinguishable. In *Stokes* the defendant was convicted of felony murder, and the jury found only one aggravating circumstance; here, defendant was convicted of murder based on three distinct theories, and the jury found four aggravating circumstances. In *Young*, an armed robbery-murder case, this Court noted that the jury failed to find (1) that defendant was engaged in a course of conduct that included the commission of violence against another person, or (2) that the crime was especially heinous, atrocious, or cruel, one of which is usually found in armed robbery-murder cases in which the jury recommends death. *Young*, 312 N.C. at 690-91, 325 S.E. 2d at 194. By contrast, the jury here found, based on substantial evidence, that the murder was especially heinous, atrocious, or cruel.

Defendant alleges that juries have imposed life sentences in several cases which are similar to this case. Those cases, however, are distinguishable from this one, for here the jury convicted defendant of first-degree murder on the theories of premeditation and deliberation, felony murder, *and* murder by torture. "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). Moreover, none of the cases defendant cited involved the

same four aggravating circumstances found by the jury here, and none involved a defendant who stabbed his victim fourteen times after having kidnapped, raped, and sexually assaulted her.

This case is similar to cases in which this Court has found the death penalty proportionate. In *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994), we affirmed a death sentence where the defendant strangled the victim after raping and sexually assaulting her. Although the jury found nineteen of the twenty-seven submitted mitigators, it also found three aggravators, including those in N.C.G.S. § 15A-2000(e)(5) and (e)(9). In *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995), we affirmed a death sentence where the defendant took a "trusting" woman to a secluded place and assaulted, raped, brutally beat, stabbed, and strangled her. As in *Sexton* and *Moseley*, the murder here was vicious, and the victim remained conscious for some time following the attack.

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.

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STATE OF NORTH CAROLINA v. CURTIS RAY WOMBLE

No. 126A94

(Filed 31 July 1996)

**1. Jury § 99 (NCI4th)— death penalty views—reopening examination of passed juror**

The trial court had "good reason" to permit the State to reopen the examination of a prospective juror it had previously passed where the juror's answer to defense counsel's question regarding his feelings about the death penalty was inconsistent with earlier answers he had given to both the prosecutor and the trial court. N.C.G.S. § 15A-1214(g).

**Am Jur 2d, Jury §§ 189 et seq.**

**2. Jury § 219 (NCI4th)— jury selection—death penalty views—dismissal for cause**

It was not error for the trial court to dismiss a prospective juror for cause based on her death penalty views, notwithstanding her statement that she believed in the death penalty, where her responses to questions by the trial court, prosecutor and defense counsel strongly indicated that she personally could not return a recommendation of death, and she was never able to state clearly her willingness to set aside her own beliefs in deference to the rule of law.

**Am Jur 2d, Jury § 279.**

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

**3. Jury § 260 (NCI4th)— peremptory challenge—racially neutral reasons**

The State met its burden of coming forward with neutral, nonracial explanations for its peremptory challenge of a minority prospective juror where the prosecutor stated that the juror was peremptorily excused because he had indicated that he had been rudely treated by an assistant district attorney and because he misunderstood the burden of proof.

**Am Jur 2d, Jury § 244.**

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

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

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

**4. Jury § 123 (NCI4th)— capital trial—jury selection—age of defendant as mitigating circumstance—attempt to stake out juror**

The trial court did not err by refusing to permit defense counsel to ask a prospective juror in a capital trial whether he would

consider the age of the defendant to be of any importance in determining the appropriateness of the death penalty since this question was a clear attempt to stake out whether the juror would consider a specific mitigating circumstance.

**Am Jur 2d, Jury §§ 208-210.**

**Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.**

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

**5. Jury § 123 (NCI4th)— capital trial—jury selection—age of defendant—impermissible hypothetical question**

The trial court did not err in refusing to permit defense counsel to ask a prospective juror in a capital trial whether he understood that the fact defendant was seventeen years old at the time of the commission of the crime was a statutory mitigating circumstance that the jury could consider to make this crime less deserving of the death penalty since the question was hypothetical because no evidence relating to defendant's age had been presented to the jury and the fact that defendant was seventeen years old, standing alone, did not establish the mitigating circumstance of age; and defense counsel may not attempt to indoctrinate prospective jurors as to the existence of a mitigating circumstance, not then known to exist, through the use of hypothetical questions.

**Am Jur 2d, Jury §§ 208-210.**

**Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.**

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

**6. Criminal Law § 680 (NCI4th)— mitigating circumstance—age of defendant—peremptory instruction not warranted**

Evidence as to the statutory mitigating circumstance of defendant's age at the time of a murder was controverted and did

not warrant a peremptory instruction where there was evidence that the defendant was seventeen years old at the time he committed the crime, was mentally and emotionally young in years, had an unstable home environment, had a learning disability, read at a fourth-grade level, left school after the seventh grade and had judgment and insight skills that were below average, but there was also evidence that the defendant's intellectual functioning, judgment and insight were within the normal range, that defendant formed the intent to assault the victim earlier in the day, that defendant was not coerced by anyone, that defendant was not under duress at the time he murdered the victim, and that defendant instructed his accomplice to return to the crime scene and remove items that might contain defendant's fingerprints. Furthermore, defendant requested and received a peremptory instruction that all of the evidence showed that the defendant was seventeen years old and did not specifically request a different peremptory instruction.

**Am Jur 2d, Criminal Law §§ 603, 628.**

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

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

**7. Criminal Law § 1362 (NCI4th)— mitigating circumstance of age—weight—propriety of instruction**

The trial court's instruction to the jury regarding the statutory mitigating circumstance of age did not allow the jury to give the circumstance no weight in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

**Am Jur 2d, Criminal Law §§ 603, 628.**

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

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

**8. Criminal Law § 680 (NCI4th)— mitigating circumstance—peremptory instruction—specific request**

The trial court did not err by failing to give a peremptory instruction on the nonstatutory mitigating circumstance that

nothing was taken from the murder victim's residence where defendant made a general request that peremptory instructions be given as to any uncontroverted mitigating circumstances but made no specific request for a peremptory instruction as to this mitigating circumstance.

**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.**

**9. Criminal Law § 881 (NCI4th)— capital sentencing proceeding—jury sequestration if verdict not reached—no coercion of verdict**

The trial court did not coerce a verdict in a capital sentencing proceeding by informing the jury at 5:05 p.m., after the jury had deliberated for about seven hours, that if a unanimous decision was not reached by 9:00 p.m., the jury would retire, be sequestered overnight, and continue deliberations the next day where the foreman reported that the jury was making progress and there was no indication of an impasse at the time the trial court addressed the jury; at no time did the trial court inform the jurors that they would not go home until they "reached a unanimous verdict" or intimate that the jury had to reach a verdict by 9:00 p.m.; the court specifically instructed that it was not trying to put jurors under any time constraints or pressure them in any way; after the jurors returned from their dinner break, the trial court, at defendant's request, instructed the jurors to reconcile their differences but only if such could be done without surrender of honest and conscientious convictions and not for the mere purpose of returning a sentence recommendation; and the jury resumed deliberations at 8:00 p.m. and returned at 8:35 p.m. with a sentencing recommendation.

**Am Jur 2d, Trial § 1602.**

**Effect on verdict in criminal case of haste or shortness of time in which jury reached it. 91 ALR2d 1238.**

**Time jury may be kept together on disagreement in criminal case. 93 ALR2d 627.**

**Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (*Allen* charge)—modern cases. 97 ALR3d 96.**

**10. Constitutional Law § 370 (NCI4th)— death penalty—juvenile defendant—not cruel and unusual punishment**

The imposition of the death penalty for first-degree murder on a seventeen-year-old defendant does not constitute cruel and unusual punishment in violation of the state and federal constitutions.

**Am Jur 2d, Criminal Law § 628.**

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

**11. Criminal Law § 1314 (NCI4th)— capital sentencing—plea discussions with accomplice—inadmissibility**

The trial court did not err by refusing to admit in a capital sentencing proceeding evidence of discussions between the State and defendant's accomplice since the treatment of an accomplice by the criminal justice system is not a proper subject for consideration by a capital jury.

**Am Jur 2d, Criminal Law § 628.**

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

**12. Evidence and Witnesses § 1618 (NCI4th)— tape recording—portions inaudible—audible portions relevant—admissibility**

Although portions of a tape recording of a conversation between defendant and an accomplice were inaudible and unintelligible, the trial court did not err by admitting the tape recording into evidence where other parts of the recording were clearly audible, and the audible portions were relevant under Rule 401 to rebut testimony by defendant's expert in psychology. Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice so as to

require its exclusion under Rule 403 where portions of the recording which defendant claims are unduly prejudicial relate to the instant crime. N.C.G.S. § 8C-1, Rules 401, 403.

**Am Jur 2d, Evidence § 1238.**

**Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR3d 746.**

**Admissibility in evidence of sound recording as affected by hearsay and best evidence rules. 58 ALR3d 598.**

**Admissibility of sound recordings as evidence in federal criminal trial. 10 L. Ed. 2d 1169.**

**13. Criminal Law § 1357 (NCI4th)— mental or emotional disturbance mitigating circumstance—instruction—victim's racial bigotry not precluded as source**

The trial court's instruction that the jurors could find the mental or emotional disturbance mitigating circumstance if they found that defendant suffered from "depersonalization or dissociation" did not preclude the jurors from considering evidence of the victim's acts of racial bigotry as a source of defendant's mental or emotional disturbance where the court also instructed the jury that the mitigating circumstance would exist if "the defendant's mind or emotions were disturbed, from any cause, and . . . he was under the influence of the disturbance when he killed the victim." Even if a juror might have understood the trial court's instruction as precluding consideration of any evidence regarding the victim's acts of racial bigotry in determining the existence of this circumstance, such juror could have considered this evidence in his or her determination of the "catchall" mitigating circumstance.

**Am Jur 2d, Criminal Law § 628.**

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

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

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

**14. Criminal Law § 441 (NCI4th)— capital sentencing—jury argument—differences between psychiatrists and psychologists**

The prosecutor did not ridicule the psychologist who testified for defendant or inject his own personal beliefs into the case by statements in his jury argument in a capital sentencing proceeding in which he pointed out differences between practicing psychiatrists and psychologists. Rather, the prosecutor's argument was a fair and accurate interpretation of the evidence, including testimony by defendant's psychologist and by a psychiatrist who testified for the State, and the reasonable inferences that could be drawn therefrom.

**Am Jur 2d, Trial § 695.**

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

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

**15. Criminal Law § 463 (NCI4th)— capital sentencing—jury argument—testimony not misconstrued**

The prosecutor did not misconstrue testimony by defendant's psychologist when he argued to the jury in a capital sentencing proceeding, in effect, that the psychologist had testified on cross-examination that two or more psychologists could interpret a test differently and, as a result, reach differing conclusions as to an individual's personality trait.

**Am Jur 2d, Trial § 632.**

**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.**

**16. Criminal Law § 541 (NCI4th)— juror misconduct—excusal of two jurors—failure to declare mistrial**

The trial court did not abuse its discretion by failing to declare a mistrial following allegations that jurors had engaged in

inappropriate conversations in the jury room where the trial court conducted an inquiry into the alleged misconduct and excused two jurors.

**Am Jur 2d, Trial §§ 1722-1727.**

**Use of intoxicating liquor by jurors: criminal cases. 7 ALR3d 1040.**

**Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.**

**Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 ALR4th 626.**

**17. Criminal Law § 1373 (NCI4th)— murder of elderly man —seventeen-year-old defendant—death penalty not disproportionate**

A sentence of death imposed upon the seventeen-year-old defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases where defendant pled guilty to first-degree murder; the jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that it was committed for pecuniary gain; the victim was killed in his own home; defendant was the ringleader of a plan with two accomplices to take the victim's money, and he alone entered the victim's home and took the victim's life; the jury failed to find that defendant's age was a mitigating circumstance; defendant rendered the sixty-year-old victim helpless by beating him with his fist, then with a glass object, then with the base of a telephone, and finally with a frying pan; defendant continued the assault even though the victim yelled repeatedly that defendant was going to kill him; the victim suffered great physical and psychological pain before death and was aware of his impending death as he was beaten; and defendant failed to show any remorse for what he had done but instead bragged to his friends and talked about the need to return to the victim's residence to remove any objects containing his fingerprints and to burn the residence to destroy any possible evidence.

**Am Jur 2d, Criminal Law § 628.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that mur-**

**der was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**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.**

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Gore, J., at the 14 February 1994 Special Criminal Session of Superior Court, Columbus County. Heard in the Supreme Court 13 September 1995.

*Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.*

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

LAKE, Justice.

The defendant was indicted on 22 March 1993 for first-degree burglary and for the first-degree murder of Palmer Ray Brown. On 13 September 1993, the defendant pled guilty to the first-degree murder charge. Pursuant to the plea agreement, the first-degree burglary charge was dismissed. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. For the reasons discussed herein, we conclude that the jury selection and the defendant's capital sentencing proceeding were free from prejudicial error, and that the sentence of death is not disproportionate.

At the capital sentencing proceeding, the State presented evidence tending to show that Palmer Ray Brown, the sixty-year-old victim, was murdered on the night of 16 March 1993, and that the defendant confessed to the murder. The defendant, in his confession, stated that he, Jamieka Oliver and Tony Oliver had discussed "messing with" the victim and taking the victim's money. On the night of the murder, the defendant and Jamieka went to the victim's residence. The

defendant entered the residence while Jamieka waited outside. Brown was asleep when the defendant found him. Defendant jumped on top of Brown and began beating him, first with his fist and then with a glass object that was sitting on a shelf behind the bed. The glass object shattered into pieces, so the defendant grabbed the base of a telephone and used it to hit Brown several more times in the head. After the phone slipped out of his hand, the defendant grabbed a frying pan from the shelf and began hitting the victim in the head with the pan. Grease flew out of the pan as the defendant beat the victim.

The defendant stated that throughout the assault, the victim was yelling, "You're going to kill me," but that he did not stop the assault until the victim stopped yelling. After the assault, the defendant searched the victim's pockets and the residence for money but did not find any. As the defendant searched the premises, the victim made "gargling" sounds. Later that evening, defendant told Tony Oliver that he thought he had killed Ray Brown. Defendant also asked Jamieka to go back to the victim's residence to get the frying pan and the telephone because defendant thought that they might have his fingerprints on them. Defendant also stated that he was not intoxicated, and that he had not used any drugs prior to murdering Brown. Defendant stated that he was aware of what he was doing and knew that killing Brown was wrong. Finally, defendant stated that he freely and voluntarily committed the murder.

Dr. Brent Hall, an expert in the field of forensic pathology, performed an autopsy on the victim. The autopsy revealed that the victim suffered numerous external lacerations, bruises and contusions, multiple skull fractures, bruises to the brain and other internal brain injuries. Dr. Hall was able to form the opinion that the victim died as a result of head trauma inflicted by a blunt object. Dr. Hall was also of the opinion that the victim suffered moderate to severe pain as a result of his injuries, and that the victim could have lived for several minutes after receiving the blows to the head.

## JURY SELECTION

**[1]** In his first assignment of error, the defendant contends that the trial court erred by permitting the State to reexamine a prospective juror whom the State had previously passed. We disagree.

During jury selection, the trial court asked prospective juror James Grange a series of death-qualifying questions. Mr. Grange indi-

cated to the trial court that he would be able to vote for a recommendation of either death or life, that he would base his recommendation on the law and the evidence presented and that he had no prior opinion as to the appropriate punishment in this case. Mr. Grange responded in similar fashion to questions posed by the prosecution. However, when asked by the defendant to describe his general feelings regarding the death penalty, Mr. Grange stated that he believed in life in prison with hard labor. Following examination and acceptance of this juror by the defendant, the prosecution moved to reexamine prospective juror Grange pursuant to N.C.G.S. § 15A-1214(g). The trial court allowed the prosecution's motion, and this prospective juror was thereafter peremptorily excused by the prosecution.

Section 15A-1214(g) of the North Carolina General Statutes permits the trial court to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. N.C.G.S. § 15A-1214(g) (1988). The decision whether to reopen the examination of a passed juror is within the sound discretion of the trial court. *State v. Rogers*, 316 N.C. 203, 216, 341 S.E.2d 713, 721 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Moreover, once the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror. *Id.*

After a thorough review of the record, we find that a "good reason" existed for reopening the examination of prospective juror Grange. Mr. Grange's answer to defense counsel's question regarding his feelings about the death penalty was inconsistent with the earlier answers he gave to both the trial court and the prosecution. The only means to assure that Mr. Grange had been forthright in his answers to the trial court and to the prosecution regarding the death penalty was for the trial court to allow further inquiry into Mr. Grange's beliefs regarding capital punishment. The trial court, having "good reason," therefore did not abuse its discretion by reopening Mr. Grange's examination. This assignment of error is overruled.

**[2]** In his second assignment of error, the defendant contends that under *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), and *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), it was error for the trial court to dismiss prospective juror Paula Dew for cause based upon her opposition to capital punishment.

In *Witherspoon*, the Supreme Court held that a prospective juror may not be excused for cause simply because he "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 20 L. Ed. 2d at 785. However, a juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52. Further, jurors may be properly excused if they are unable to " 'state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' " *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149-50 (1986)).

When initially questioned by the trial court in the case *sub judice*, Ms. Dew stated that, although she believed in capital punishment, she did not know whether she could vote for a recommendation of death. When asked if she could recommend a sentence of death if the State were to convince her personally of all the things the law requires, Ms. Dew responded, "I couldn't do it." During examination by defense counsel, Ms. Dew first indicated that she "couldn't personally hand down the death penalty" and that she "couldn't handle it." However, Ms. Dew later stated that although she did not wish to vote for the death penalty, she would if she had to. Ms. Dew also stated that she would listen to the trial court's instructions and keep an open mind about what her decision would be until she heard all of the evidence and the trial court's instructions. Following a reexplanation of the sentencing process by the prosecutor, Ms. Dew stated that she did not know whether her feelings regarding the death penalty would prevent or substantially impair her ability to sit as a juror in this case. When asked why she could not return a recommendation of death, Ms. Dew responded, "I don't think I could live with myself." Finally, when asked by the trial court if her feelings about the death penalty would interfere with her ability to be a juror, Ms. Dew responded, "Yes." Prospective juror Dew was then excused for cause.

Notwithstanding Ms. Dew's statement that she believed in the death penalty, her responses strongly indicated that she personally could not return a recommendation of death. Ms. Dew was never able to state clearly her willingness to temporarily set aside her own beliefs in deference to the rule of law. This Court has recognized "that a prospective juror's bias may not always be 'provable with unmistakable clarity,' " and in such instances, " 'reviewing courts must defer

to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially.' " *Brogden*, 334 N.C. at 43, 430 S.E.2d at 908 (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)). After a thorough review of the exchanges between the trial court, the prosecutor, counsel for the defendant and prospective juror Dew, we cannot say that the trial court abused its discretion in determining that the views of prospective juror Dew would prevent or substantially impair her from performing her duties as a juror. Deferring to the trial court's judgment, we find that the trial court did not err by granting the State's motion and excusing Ms. Dew for cause. This assignment of error is overruled.

**[3]** In his next assignment of error, the defendant contends that the State exercised its peremptory challenges to exclude prospective minority juror Michael Dancil on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the use of peremptory challenges to exclude a juror solely on account of his or her race. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. The Supreme Court established a three-part test to determine if a prosecutor has impermissibly excluded a juror based on race. First, *the defendant must* establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88; *State v. Robinson*, 330 N.C. 1, 15, 409 S.E.2d 288, 296 (1991). If the defendant succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for each challenged strike. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88; *State v. Wiggins*, 334 N.C. 18, 31, 431 S.E.2d 755, 763 (1993). Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

In the case *sub judice*, the prosecutor voluntarily offered race-neutral explanations for excusing prospective juror Dancil. Because the purpose of determining the *prima facie* case is to shift the burden of going forward to the State, the State's offer of race-neutral explanations renders it unnecessary to address whether the defendant met his initial burden of establishing a *prima facie* case of discrimination. *Id.* We proceed, therefore, as if the *prima facie* case had

been established and turn our attention to the State's reasons for peremptorily challenging prospective juror Dancil.

With regard to prospective juror Dancil, the prosecutor stated:

> Your Honor, the reason for exercising a peremptory is that in—is this. Said he had some prior connection with Mr. Kelley [Assistant District Attorney]. And as I understood him to say, he felt that Mr. Kelly had treated him rather rudely. And he also said in response to one of Mr. Kelly's questions that he could vote for the death penalty if it was proved beyond all doubt. And that's a greater burden than is required by law.

Following the prosecution's explanation for exercising its peremptory challenge, the defendant declined the trial court's invitation to make a further showing. Instead, the defendant merely argued that he did not believe the prosecution's explanation was a sufficient reason to excuse prospective juror Dancil. The defendant now argues that the State's proffered explanations were unconvincing and pretextual. We disagree.

In order to rebut a *prima facie* case of discrimination, the prosecution need only articulate legitimate reasons which are clear, reasonable and related to the particular case to be tried. *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). The prosecutor's explanation need not, however, rise to the level justifying a challenge for cause. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. In this case, the prosecutor stated that prospective juror Dancil was excused because Dancil had indicated that he had been rudely treated by the assistant district attorney and because he misunderstood the burden of proof. Although the reasons offered by the prosecution might not justify an excusal for cause, each reason is clear, reasonably specific and related to the particular case to be tried. The prosecutor is not required to provide an explanation that is persuasive, or even plausible. *Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839 (1995). "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360, 114 L. Ed. 2d at 406.

When considered in this light, we believe that the State has met its burden of coming forward with neutral, nonracial explanations for

its peremptory challenge of prospective juror Dancil. This assignment of error is therefore overruled.

**[4]** In his next assignment of error, the defendant contends that the trial court erred by preventing defense counsel from examining prospective jurors regarding their ability to consider the statutory mitigating circumstance of age.

During jury selection, the defendant attempted to ask the following question to prospective juror Michael Cartrette:

> [DEFENSE COUNSEL]: You mentioned something [awhile] ago about situations in which you would feel the death penalty might be appropriate, or—or not be considered. Would you consider the age of the defendant to be of any importance in this case?

The prosecution objected to the defendant's question, and the trial court sustained the objection.

This Court has consistently held that "a defendant may not use *voir dire* to stake out potential jurors by asking whether they could consider specific mitigating circumstances during the sentencing phase." *State v. Miller*, 339 N.C. 663, 680, 455 S.E.2d 137, 146, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995). General questions, such as the prospective jurors' ability to follow instructions relating to mitigating circumstances, are permissible. *Id.* Defendant's question to prospective juror Cartrette, however, was a clear attempt to stake out whether the juror could consider a specific mitigating circumstance. The trial court did not abuse its discretion by refusing to allow defendant to ask such a question.

**[5]** Later, during the *voir dire* of prospective juror Robert Norris, defendant asked the following:

> [DEFENSE COUNSEL]: [Do] you understand that Mr. Womble's age, of being 17 years old at the time of the commission of the crime is a statutory mitigating factor? That means that it's a factor that you could consider, that the jury could consider making this crime less deserving of the death penalty. Do you understand that that is the case?

The prosecution similarly objected to this question, and the trial court sustained the objection.

This Court has also consistently held that a defendant may not attempt to indoctrinate prospective jurors regarding the existence of

a mitigating circumstance, not then known to exist, through the use of hypothetical questions. *State v. Skipper*, 337 N.C. 1, 21, 446 S.E.2d 252, 262 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *Davis*, 325 N.C. at 621, 386 S.E.2d at 425. At the time defendant's question was asked, the jury had not been instructed regarding specific mitigating circumstances. Moreover, no evidence relating to the defendant's age had been presented to the jury other than the statement by defense counsel that defendant was seventeen years old at the time the offense was committed. Standing alone, the fact that defendant was seventeen years old does not establish the existence of the mitigating circumstance of age. "The mitigating circumstance of defendant's age may not be determined solely by reference to defendant's chronological age at the time of the crime, but rather it must be determined in light of 'varying conditions and circumstances.' " *State v. Gregory*, 340 N.C. 365, 422, 459 S.E.2d 638, 671 (1995) (quoting *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986)), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996). The defendant's question, therefore, was hypothetical and was properly disallowed by the trial court. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

**[6]** In his next assignment of error, the defendant contends that the trial court erred by refusing to give a peremptory instruction on the statutory mitigating circumstance of defendant's age at the time the crime was committed. N.C.G.S. § 15A-2000(f)(7) (Supp. 1995).

A capital defendant is entitled to a peremptory instruction when a mitigating circumstance is supported by uncontroverted evidence. *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). Conversely, a defendant is not entitled to a peremptory instruction when the evidence supporting a mitigating circumstance is controverted.

Chronological age standing alone is not determinative of the existence of the (f)(7) mitigating circumstance. *Skipper*, 337 N.C. at 47, 446 S.E.2d at 277. "The mitigating circumstance of defendant's age may not be determined solely by reference to defendant's chronological age at the time of the crime, but rather it must be determined in light of 'varying conditions and circumstances.' " *Gregory*, 340 N.C. at 422, 459 S.E.2d at 671 (quoting *Johnson*, 317 N.C. at 393, 346 S.E.2d at 624). In this case, there was evidence that the defendant was seventeen years old at the time he committed the crime, was mentally and emotionally young in years, had an unstable home environment, had

a learning disability, read at a fourth-grade level, left school after the seventh grade and had judgment and insight skills that were below average. However, there was also evidence that the defendant's intellectual functioning, judgment and insight were within the normal range. Additionally, there was evidence that the defendant had previously assaulted the victim, that defendant formed the intent to assault the victim earlier in the day, that defendant was not coerced by anyone, that defendant was not under duress at the time he murdered the victim and that defendant instructed his accomplice to return to the crime scene and remove items that might contain defendant's fingerprints. Based on these facts, we find that the evidence as to the (f)(7) mitigating circumstance was controverted and did not warrant a peremptory instruction.

Furthermore, the defendant requested and received a peremptory instruction that all of the evidence showed that the defendant was seventeen years old. The defendant failed to object to the trial court's peremptory instruction, indicate dissatisfaction with the trial court's peremptory instruction or request a different peremptory instruction on age. As the defendant did not specifically request a different peremptory instruction, the trial court did not err by failing to give such an instruction. *See Skipper*, 337 N.C. at 41, 446 S.E.2d at 274. This assignment of error is accordingly overruled.

**[7]** In a related argument, the defendant contends that the trial court's instruction to the jury regarding the statutory mitigating circumstance of age allowed the jury to give the circumstance no weight in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982). The identical argument has been considered previously and rejected. *See Skipper*, 337 N.C. at 45-47, 446 S.E.2d at 277. We find no compelling reason to depart from our prior holding and conclude that the trial court did not err in its instruction. This assignment of error is overruled.

**[8]** In his next assignment of error, the defendant contends that the trial court erred by refusing to give a peremptory instruction on the nonstatutory mitigating circumstance that nothing was taken from the victim's residence. We find no merit in the defendant's argument.

Before the defendant will be entitled to a peremptory instruction upon a mitigating circumstance, he must specifically request a peremptory instruction. *Skipper*, 337 N.C. at 41, 446 S.E.2d at 274. In *Skipper*, the defendant made a written request that peremptory instructions be given as to each mitigating circumstance submitted to

the jury. However, when the trial court questioned defendant as to this request, defendant specifically requested peremptory instructions on only two of the mitigating circumstances submitted. This Court found no error in the trial court's failure to give peremptory instructions on all the uncontroverted mitigating circumstances, stating that "the trial judge did not err when he gave peremptory instructions pursuant only to defendant's specific request." *Id.* at 42, 446 S.E.2d at 275.

In the case *sub judice*, the defendant made a general request that peremptory instructions be given as to any uncontroverted mitigating circumstances. However, the defendant failed to make a specific request that a peremptory instruction be given as to *this* mitigating circumstance. As in *Skipper*, the trial court did not err by failing to give a peremptory instruction where defendant failed to specifically request such an instruction. This assignment of error is overruled.

**[9]** In his next assignment of error, the defendant contends that the trial court coerced a jury verdict by ordering that the jury be sequestered if it did not reach a sentencing recommendation before a 9:00 p.m. deadline.

The jury began its deliberations at 10:25 a.m. and, with the exception of a lunch break, continued its deliberations throughout the afternoon. At 5:05 p.m., the trial court called the jury into the courtroom and asked the jury foreman whether the jury was still making progress. The jury foreman answered affirmatively. The trial court then addressed the jurors as follows:

> Now, ladies and gentlemen, I'd like to tell you what my proposed schedule is, because at some point you may—some of you may need to contact your families.
>
> It is now five o'clock. I propose to let you folks continue your deliberations until about six o'clock. At six o'clock you will go for your dinner. That again will be provided for you by the State, and you will be kept together during your dinner hour.
>
> I will then bring you back here to continue your deliberations. If you have not reached a unanimous recommendation by nine o'clock, at that point we will put all of you up for the night in one of the local motels. You will not be allowed to go home.
>
> So, those of you who need to should go ahead and start making arrangements with the bailiffs to make phone calls to notify

your families. And of course you're going to need some supplies including toiletries and what other items you may need to spend the night.

So, I tell you that. We will give you a chance to do that. If any of you want to call now, to go ahead and begin making those preparations, that's fine. And I am not assuming that you will not reach a unanimous recommendation before nine o'clock tonight. I have no way of knowing, and so we have to prepare for that.

And I want you to understand I'm not trying to put you under any time constraints or pressure you in any way, but at the same time because of the very serious nature of your deliberations, at this point, I will not let you return home. You will remain together, and in the presence of a sheriff's deputy until there is a—a conclusion to this case.

Do any of you have any questions you need to ask?

All right. Do any of you wish to make a phone call at this point, before you go back in for further deliberations?

After the jurors returned from their dinner break, at the defendant's request, the trial court instructed the jury:

Now, ladies and gentlemen, before you go back to your jury room to continue your deliberations, I want to emphasize the fact that it is your duty to do whatever you can to reach a sentence recommendation in this case. You should reason the matter over together, as reasonable men and women, and reconcile your differences if you can, without the surrender of conscientious convictions. But no juror should surrender his or her honest conviction as to the weight or effect of the evidence, solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a sentence recommendation.

I will now let you resume your deliberations and see if you can reach a unanimous recommendation as to sentence in this matter.

Following this instruction, the jury retired to the jury room at 8:00 p.m. to continue deliberations. At 8:35 p.m., the jury returned with a sentencing recommendation.

Defendant argues that the trial court coerced the jury into reaching a verdict by (1) ordering that the jury be sequestered and inform-

ing the jurors that they would not be able to go home until they reached a verdict; (2) providing late notice to the jury of the sequestration order; (3) failing to discuss the sequestration order with the jurors to ensure that the sequestration would not cause any undue hardship; and (4) imposing a 9:00 p.m. deadline, at which time the trial court would stop deliberations and hold the jurors overnight.

"[I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict . . . an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). When viewed in this light, we find no merit to the defendant's arguments.

The jury in the instant case deliberated for approximately seven hours before reaching its sentencing recommendation. This is not an inordinately long period of time considering that the capital sentencing proceeding lasted more than two weeks and required the jury to consider two aggravating circumstances and fifteen mitigating circumstances. At the time the trial court addressed the jury, there was no indication of an impasse; rather, the foreman reported that the jury was making progress and moving forward with its deliberations. At no time did the trial court inform the jurors that they would not be able to go home until they "reached a unanimous verdict." The trial court only informed the jurors that they would remain together until there was a "conclusion to this case." The trial court did not intimate to the jury that it had to reach a unanimous verdict by 9:00 p.m. To the contrary, the trial court specifically instructed the jury, "I want you to understand I'm not trying to put you under any time constraints or pressure you in any way." The trial court's clear message was that if a unanimous decision was not reached by 9:00 p.m., the jury would retire, be sequestered overnight and continue deliberations the next day. The imparting of this information to the jury at this time of normal adjournment was a courtesy and proper courtroom and jury management by the trial court. At this time of the day, the jury was entitled to know the court's proposed schedule and to react thereto. Further, the trial court instructed the jurors to reconcile their differences but only if such could be done without the surrender of honest and conscientious convictions and not for the mere purpose of returning a sentence recommendation. This portion of the trial court's instruction conveyed to the jurors that they were not to sacrifice their individual beliefs in order to reach a verdict. Based on these circumstances, we hold that the trial court's proposed sequestration order

and subsequent instructions were not coercive in any manner. This assignment of error is overruled.

**[10]** The defendant next contends that his sentence of death must be vacated and a life sentence imposed because the execution of juveniles constitutes cruel and unusual punishment in violation of the United States and North Carolina Constitutions. The defendant's argument is without merit.

This Court has repeatedly held that the North Carolina death penalty statute, which provides that a person seventeen years old or older who commits first-degree murder may be sentenced to death, is not unconstitutional. *Skipper*, 337 N.C. at 58, 446 S.E.2d at 284. Further, the United States Supreme Court has held that the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age does not constitute cruel and unusual punishment under the Eighth Amendment. *Stanford v. Kentucky*, 492 U.S. 361, 380, 106 L. Ed. 2d 306, 325 (1989). Accordingly, this assignment of error is overruled.

**[11]** By another assignment of error, the defendant contends that the trial court erred by sustaining the State's objection to the admission of evidence regarding plea bargain discussions between the State and defendant's accomplice, Tony Oliver. We disagree. This Court has held that the treatment of an accomplice by the criminal justice system is not a proper subject for consideration by a capital jury. *See State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The defendant requests that this Court reconsider its prior decisions in light of *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 812 (1991). This Court has previously considered and rejected this argument in *State v. Ward*, 338 N.C. 64, 114-15, 449 S.E.2d 709, 737 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). We find no compelling reason to depart from our prior holding and conclude that the trial court did not err by sustaining the State's objection. This assignment of error is overruled.

**[12]** In his next assignment of error, the defendant contends that the trial court erroneously admitted into evidence a tape recorded conversation between the defendant and his accomplice, Jamieka Oliver. Defendant specifically contends that the recording was erroneously admitted on two grounds. First, defendant argues that the recording was not competent because parts of it were inaudible or unintelligible. Second, defendant argues that the recording should have been excluded under N.C.G.S. § 8C-1, Rules 401 and 402 as irrel-

evant or, in the alternative, Rule 403 because the prejudicial effect of the recording substantially outweighed its probative value because of the likelihood that violent acts unrelated to the instant crime were discussed therein.

In *State v. Lynch*, 279 N.C. 1, 17, 181 S.E.2d 561, 571 (1971), this Court held that a tape recording, if audible and properly authenticated, is admissible into evidence. Whether a tape recording is sufficiently audible to be admitted is a matter left to the discretion of the trial court. *State v. Williams*, 334 N.C. 440, 459, 434 S.E.2d 588, 599 (1993), *judgment vacated on other grounds*, — U.S. —, 128 L. Ed. 2d 42 (1994). Moreover, " 'a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard.' " *Id.* (quoting *Searcy v. Justice*, 20 N.C. App. 559, 565, 202 S.E.2d 314, 317-18, *cert. denied*, 285 N.C. 235, 204 S.E.2d 25 (1974)).

While portions of the tape recording in the case *sub judice* were inaudible, the tape was sufficiently audible to be admissible. After listening to the tape recording, the trial court specifically found as fact that although there were significant portions of the tape which were inaudible and were not intelligible, there were other parts of the tape which were "very clear and extremely intelligible and audible to the court." Further, the trial court found as fact that significant portions of the tape were highly probative regarding the validity of the opinion rendered by defendant's expert witness. Defendant did not assign error to the trial court's findings of fact. These findings of fact are therefore binding on this Court. *See State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). Based on the trial court's findings of fact and our own review of the tape recording, we cannot conclude as a matter of law that the trial court abused its discretion by admitting the tape into evidence.

Similarly, we find that the tape recording was relevant and admissible under Rules 401 and 402, and was not unfairly prejudicial under Rule 403.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Dr. John Warren, a psychologist, testified that at the time of the crime, defendant exhibited the phenomena of "dissociation" and "depersonalization," which refer to the psychological response to trauma of removing oneself

emotionally from the situation and experiencing a traumatic situation as though it were an out-of-body experience or happening to someone else. Dr. Warren further testified that the defendant felt remorse for what he had done. The trial court found that significant portions of the tape recording were highly probative regarding the validity of Dr. Warren's testimony. Therefore, the tape recording was relevant under Rule 401 to rebut the testimony of Dr. Warren. Relevant evidence is generally admissible. N.C.G.S. § 8C-1, Rule 402 (1992).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court and will only be reversed upon a showing that the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *Williams*, 334 N.C. at 460, 434 S.E.2d at 600. After reviewing the tape recording and considering it in context with the other evidence presented in this case, we find that portions of the recording which defendant claims are unduly prejudicial clearly relate to the instant crime. The admission of evidence implicating the defendant is by its nature prejudicial. However, we cannot say that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice or that the trial court abused its discretion by admitting such evidence. This assignment of error is therefore overruled.

**[13]** In his next assignment of error, the defendant contends that the trial court erroneously limited the scope of the (f)(2) mitigating circumstance.

The trial court instructed the jury as follows:

> [C]onsider whether this murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar but not the same as being in [the] heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that

> the defendant's mind or emotions were disturbed, from any cause, and that he was under the influence of the disturbance when he killed the victim.
>
> You would find this mitigating circumstance if you find that at the time of the murder the defendant, Curtis Womble, suffered from a condition known as depersonalization or dissociation, and that as a result the defendant was under the influence of mental or emotional disturbance when he killed the victim.

The defendant argues that the trial court's instruction precluded the jurors from considering evidence of the victim's acts of racial bigotry as a source of defendant's mental or emotional disturbance by instructing the jury that it should find the (f)(2) mitigator only if it found that the source of the defendant's mental or emotional disturbance was the condition of "depersonalization or dissociation." We disagree.

Unquestionably, the trial court instructed the jurors that they could find the (f)(2) mitigating circumstance if they found that the defendant suffered from "depersonalization or dissociation." However, the trial court also instructed the jury that the mitigating circumstance would exist if "the defendant's mind or emotions were disturbed, from *any cause*, and that he was under the influence of the disturbance when he killed the victim." (Emphasis added.) Although the trial court's instruction did not review the evidence or specifically instruct the jury that it could consider evidence of the victim's alleged racial bigotry, the trial court's instruction in no manner precluded the jurors from considering such evidence.

Assuming *arguendo* that a juror might have understood the trial court's instruction as precluding the consideration of any evidence regarding the victim's acts of racial bigotry, we would still find no merit to the defendant's argument, as any such juror could have considered such evidence in his or her determination of the existence of the "catchall" circumstance. *See State v. Payne*, 337 N.C. 505, 529, 448 S.E.2d 93, 107 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). We note that the jury considered and rejected the "catchall" mitigating circumstance found in N.C.G.S. § 15A-2000(f)(9). This assignment of error is therefore overruled.

The defendant next contends that the trial court erred on two separate occasions during closing arguments by allowing the prose-

cutors to ridicule defendant's expert witness and misconstrue the expert's testimony.

It is well established that control of counsel's arguments is left to the sound discretion of the trial court. *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979). Prosecutors are given wide latitude in the scope of their argument. *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). "Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *Johnson*, 298 N.C. at 368, 259 S.E.2d at 761. Counsel may, however, argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom. *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144.

**[14]** In light of these principles, the defendant first contends that the trial court committed plain error by failing to act *ex mero motu* and instruct the jury to disregard the following statement by prosecutor Britt:

> We had two doctors that testified for the defense—or let me back up. We had one doctor. When I use the word doctor I associate that with a medical person. And we had one Ph.D. You had Dr. Groce and you had Mr. Warren. Dr. Groce was a medical doctor. His is by education. He has no special medical training. Dr. Groce deals in science. Mr. Warren deals in theory, the abstract. He deals with hard—Dr. Groce deals with hard, cold facts. He's the one who's received the training to determine whether or not someone knows right from wrong, what their intellectual ability is.

Defendant argues that the prosecutor's speculations about the differences between psychiatry and psychology were without foundation in the evidence and ridiculed Dr. Warren's professional credentials in an unjustified and unprofessional manner.

We note for purposes of our review that the defendant failed to object to the prosecutor's argument above. "When no objections are made at trial . . . the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996). When determining whether the prosecutor's remarks are grossly improper,

the remarks must be viewed in context and in light of the overall factual circumstances to which they refer. *Id.* Further, the remarks "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." *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

In the case *sub judice*, Dr. James Groce testified that he was a physician practicing in psychiatry; that he graduated from medical school; and that when evaluating people sent to him by the courts, a series of scientific tests are performed in addition to psychological and intellectual testing. Dr. Warren, on the other hand, testified that he was not a medical doctor; that he had a Ph.D. in psychology; and that while psychiatrists are medical doctors and can prescribe medications, psychologists focus more on psychotherapy and educational testing and approach their analysis from a "research science point of view."

Review of this evidence supports the challenged argument. When read in context, the prosecutor did not ridicule Dr. Warren, but merely pointed out the differences between practicing psychiatrists and psychologists. Further, the prosecutor did not inject his own personal opinion into the case. The prosecutor's argument was a fair and accurate interpretation of the evidence and the reasonable inferences that could be drawn therefrom. We therefore find no impropriety with the prosecutor's argument in this regard and no error with the trial court's decision not to intervene to prevent this argument.

**[15]** The defendant next contends that in his closing argument, prosecutor Kelly attacked Dr. Warren by misconstruing Dr. Warren's testimony as follows:

> MR. KELLY: Mr. Britt asked [Dr. Warren], Mr. Britt asked him, "Isn't it true, Doctor, that when you put three psychologists together and you examine one man, each one of you at different times, isn't it entirely possible that each of you is going to come up with something different?" Yes. Yes. That's because what he's talking about, folks, up here is not a science, it's an art. Educated, I would argue to you, guesswork.
>
> [DEFENSE Counsel]: Objection.
>
> COURT: Overruled.

The defendant specifically argues that the above argument misstated both Mr. Britt's question on cross-examination and Dr. Warren's response.

On cross-examination, Dr. Warren testified that the Termatic Appreciation Test ("TAT") which he performed on the defendant is subject to various interpretations and that there is a risk that two or more psychologists giving the same test could interpret the results differently. A fair interpretation of Dr. Warren's testimony, therefore, is that two or more psychologists could interpret a test differently and, as a result, reach differing conclusions as to an individual's personality trait. When read in context, Mr. Kelly's remarks did not misrepresent Dr. Warren's testimony and fall well within the wide latitude afforded counsel in the scope of their argument. Therefore, the trial court did not abuse its discretion by failing to sustain the defendant's general objection to the prosecutor's argument. This assignment of error is overruled.

**[16]** The defendant next argues that the trial court erred by failing to declare a mistrial during trial on the basis of juror misconduct following allegations that jurors had engaged in inappropriate conversation in the jury room. The trial court conducted an inquiry into the alleged misconduct and excused two jurors. Defendant fails to submit any compelling argument or authority in support of his contention that the trial court erred by failing to declare a mistrial and therefore waives this argument. Regardless, a careful review of the record indicates that the trial court made an appropriate inquiry and took corrective action to remedy this matter. We find no abuse of discretion in the trial court's decision not to declare a mistrial. This assignment of error is overruled.

PRESERVATION ISSUES

The defendant raises ten issues which he concedes have been decided against his position by this Court: (1) the trial court erred by failing to submit three nonstatutory mitigating circumstances regarding the favorable treatment afforded defendant's accomplices; (2) the trial court erred by giving an instruction on the burden of proof applicable to mitigating circumstances that was too vague to be understood by jurors; (3) the trial court erred by instructing the jurors that they could reject nonstatutory mitigating circumstances on the grounds that the circumstances had no mitigating value; (4) the trial court erred by instructing jurors that they "may" rather than "must" consider mitigating circumstances found in Issues II, III and IV on the

"Issues and Recommendation as to Punishment" form; (5) the trial court erred by instructing the jurors that they could consider at Issues III and IV only mitigating circumstances which the juror himself or herself found at Issue II; (6) the trial court erred by instructing the jury that at Issue III, a death sentence may be imposed unless the mitigating circumstances outweigh the aggravating circumstances; (7) the trial court erred by instructing the jury on the "especially heinous, atrocious, or cruel" aggravating circumstance because the instruction was unconstitutionally vague; (8) the trial court erred by denying defendant's pretrial motion requesting permission to examine jurors regarding their feelings regarding parole eligibility; (9) the trial court erred by giving an ambiguous instruction as to unanimity regarding Issues III and IV on the "Issues and Recommendation as to Punishment" form; and (10) the trial court erred by dividing prospective jurors into panels and exhausting one panel before any juror from the next panel was called to the box. We have considered the defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule each of these assignments of error.

PROPORTIONALITY REVIEW

Having found no error in the capital sentencing proceeding, we are required by statute to review the record and determine (1) whether the evidence supports the aggravating circumstances found by the jury; (2) whether passion, prejudice, or "any other arbitrary factor" influenced the imposition of the death sentence; and (3) whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). After thoroughly reviewing the record, transcript and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544

(1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We defined the pool of cases for proportionality review in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. 66, 106-07, 446 S.E.2d 542, 563-64 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), and we compare the instant case to others in the pool that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

**[17]** In the case *sub judice*, the defendant pled guilty to the offense of first-degree murder. At sentencing, the trial court submitted two aggravating circumstances, each of which the jury found: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). The trial court submitted five statutory mitigating circumstances, of which the jury found two: that the defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1); and that defendant aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8). The jury also found the following nonstatutory mitigating circumstances: (1) that the defendant admitted his guilt, (2) that the relationship between the defendant and the victim was extenuating, (3) that the defendant acknowledged his wrongdoing at an early stage of the criminal process, (4) that the defendant has been a person of good character and reputation in the community, (5) that the defendant was raised under undesirable and deprived circumstances, and (6) that the defendant did not plan to murder the victim when he went to the victim's residence. The jury specifically declined to find the defendant's age as a statutory mitigating circumstance or that the defendant committed the murder while under the influence of a mental or emotional disturbance. The jury also failed to find the statutory catchall mitigating circumstance.

This case has several distinguishing characteristics: the victim's brutal murder was found to be especially heinous, atrocious, or cruel; the victim was killed in his own home; the victim suffered great physical and psychological pain before death; the victim was not only in pain, but aware of his impending death as he was beaten; the victim was of unequal physical strength to defendant; the defendant failed to

exhibit remorse after the killing; and finally, the jury found the existence of more than one aggravating circumstance. These characteristics distinguish this case from those in which we have held the death penalty disproportionate.

In our proportionality review, it is proper to compare the present case to those 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). "Of the cases in which this Court has found the death penalty disproportionate, only two involved the 'especially heinous, atrocious, or cruel' aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983)." *Syriani*, 333 N.C. at 401, 428 S.E.2d at 146-47. Neither *Stokes* nor *Bondurant* is similar to this case.

In *Stokes*, the defendant and a group of coconspirators robbed the victim's place of business. No evidence showed who the "ringleader" of the group was. This Court vacated the sentence of death because the defendant was only a teenager and it did not appear that defendant Stokes was more deserving of death than an accomplice, who was considerably older and received only a life sentence. *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. In the present case, the defendant was the "ringleader," and he alone entered the victim's residence and took the victim's life. Although both defendant Stokes and the defendant in this case were only seventeen years old at the time of their crimes, unlike in *Stokes*, the jury in the present case failed to find that the defendant's age was a mitigating circumstance. Finally, in *Stokes*, the victim was killed at his place of business. In this case, the victim was killed in his home. A murder in one's home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

In *Bondurant*, the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant also went into the hospital to secure medical help for the victim, voluntarily spoke with police officers, and admitted to shooting the victim. In the present case, by contrast, the defendant rendered the victim helpless by beating him first with his fist, and then with a glass object, then with

the base of a telephone and finally with a frying pan. The defendant continued his assault even as the victim yelled repeatedly, "You're going to kill me." Instead of seeking aid for his victim, the defendant chose to take the victim's life and then leave the scene. Finally, the defendant failed to show any remorse over what he had done. Instead, defendant bragged to his friends and talked about the need to return to the victim's residence in order to remove any objects containing his fingerprints and to burn down the residence to destroy any possible evidence.

As noted above, one distinguishing characteristic of this case is that two aggravating circumstances were found by the jury. Of the seven cases in which this Court has found a sentence of death disproportionate, including *Stokes* and *Bondurant*, in only two, *Bondurant* and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find the existence of multiple aggravating circumstances. *Bondurant*, as discussed above, is clearly distinguishable. In *Young*, this Court focused on the failure of the jury to find the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance. The present case is distinguishable from *Young* in that one of the two aggravating circumstances found by the jury was that the murder was especially heinous, atrocious, or cruel.

For the foregoing reasons, we conclude that each case where this Court has found a sentence of death disproportionate is distinguishable from the case *sub judice*.

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 this Court reviews all of the cases in the pool when engaging in our duty of proportionality review, we have repeatedly stated 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 those in which we have found the sentence of death disproportionate or those in which juries have consistently returned recommendations of life imprisonment.

Finally, we noted in *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), that similarity of cases is not the last word on the subject of proportionality. Similarity "merely serves as an initial point of inquiry." *Id.*; *see also Green*, 336 N.C. at 198, 443 S.E.2d at 46-47. The issue of

whether the death penalty is proportionate in a particular case ultimately rests "on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances." *Daniels*, 337 N.C. at 287, 446 S.E.2d at 325.

Based on the nature of this crime, and particularly the distinguishing features noted above, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that the defendant received a fair sentencing proceeding, free of prejudicial error.

NO ERROR.

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STATE OF NORTH CAROLINA v. KENNETH LEE BOYD

No. 547A88-2

(Filed 31 July 1996)

**1. Evidence and Witnesses § 2302 (NCI4th)— absence of cool state of mind—expert testimony properly excluded**

The trial court did not err by preventing an expert in forensic psychology from using the phrase "cool state of mind" to convey to the jury that defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time he shot the two victims where the trial court on *voir dire* explained to the psychologist the legal import of acting in a cool state of mind; the witness conceded that the legal and medical definitions of the phrase differed but stated that he meant to convey to the jury that defendant was not acting with a cool state of mind in the medical sense; and the trial court emphasized that the psychologist could use other terminology to convey his opinion to the jury and ruled that other questions regarding defendant's state of mind that defendant sought to pose to the expert witness would be allowed.

**Am Jur 2d, Evidence §§ 338, 351; Expert and Opinion Evidence §§ 190, 256; Trial § 341.**

**Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.**

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

2. **Evidence and Witnesses § 2051 (NCI4th)— belief by witness—instantaneous conclusion of the mind**

Testimony by defendant's brother-in-law in a prosecution for two first-degree murders that he believed that "[defendant was] going to kill everybody" was admissible as an instantaneous conclusion as to defendant's condition and state of mind based upon the witness's opportunity to observe defendant shoot his father, yell at his own children, reload his weapon, and threaten to shoot the witness.

**Am Jur 2d, Evidence §§ 556, 557.**

**Comment Note.—Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness. 10 ALR3d 258.**

**Construction and application of Rule 701 of Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain circumstances. 44 ALR Fed. 919.**

3. **Homicide § 706 (NCI4th)— first-degree murder—failure to instruct on voluntary manslaughter—error cured by verdict**

Where the trial court instructed the jury on first-degree and second-degree murder for each of two killings and the jury returned a verdict of guilty of first-degree murder based on malice, premeditation and deliberation for each, any error in the court's failure to instruct on voluntary manslaughter is harmless.

**Am Jur 2d, Trial §§ 1142, 1427-1435, 1483.**

**Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.**

4. **Homicide § 663 (NCI4th)— voluntary intoxication—instruction not required**

The trial court was not required to instruct on voluntary intoxication in a prosecution for two first-degree murders where the combined testimony of defendant and other witnesses established that defendant was intoxicated at the time of the murders,

but defendant failed to produce substantial evidence that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.

**Am Jur 2d, Evidence § 746; Trial §§ 769, 1279, 1280.**

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

**When intoxication deemed involuntary so as to constitute a defense to criminal charge. 73 ALR3d 195.**

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

**5. Criminal Law § 774 (NCI4th); Homicide § 694 (NCI4th)—defense of unconsciousness or automatism—instruction not required**

The trial court did not err by refusing to instruct on the defense of unconsciousness or automatism in a prosecution for two first-degree murders where defendant relied only upon his own self-serving testimony at trial that he could not remember many of his actions on the day of the crimes, attributing his memory loss to flashbacks from his experiences in Vietnam; defendant's testimony was contradicted by an inculpatory statement he gave to police within hours of committing the murders in which he was able to recall many of the graphic details of the murders; and neither of defendant's expert witnesses gave testimony in support of defendant's unconsciousness claim.

**Am Jur 2d, Homicide §§ 116, 406.**

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

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

**Automatism or unconsciousness as defense to criminal charge. 27 ALR4th 1067.**

**6. Criminal Law § 682 (NCI4th)— mitigating circumstance—mental or emotional disturbance—peremptory instruction not required**

Even though the expert testimony of a psychiatrist and a psychologist was some evidence from which the jury could conclude

that defendant was under the influence of a mental or emotional disturbance when he murdered his father-in-law and wife, the trial court was not required to peremptorily instruct the jury on this mitigating circumstance where this expert testimony was contradicted by the testimony of a defense witness that defendant was his usual self and did not appear disoriented or unaware of what was going on around him on the afternoon of the murders, and by the testimony of a detective that defendant was able to provide a detailed statement in which he confessed to the murders and to answer numerous questions within the hour after his arrest. N.C.G.S. § 15A-2000(f)(2).

**Am Jur 2d, Homicide §§ 114, 256, 406, 516, 576; Trial §§ 768, 835, 841, 1270-1278.**

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

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

**7. Criminal Law § 681 (NCI4th)— mitigating circumstance—impaired capacity—peremptory instruction not required**

The evidence of defendant's capacity to conform his conduct to the requirements of the law when he committed two murders was in controversy so that the trial court did not err by failing to give a peremptory instruction on this mitigating circumstance where two experts testified that defendant's capacity to conform his conduct to the requirements of the law was impaired, but this testimony was contradicted by evidence that, immediately after he committed the murders, defendant called 911, identified himself, and alerted the dispatcher to the murders, and that defendant thereafter surrendered and cooperated with law enforcement. N.C.G.S. § 15A-2000(f)(6).

**Am Jur 2d, Homicide §§ 114, 256, 406, 516, 576; Trial §§ 768, 835, 841, 1270-1278.**

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

**8. Criminal Law § 680 (NCI4th)— nonstatutory mitigating circumstances—peremptory instructions not required**

The trial court did not err by failing to give a peremptory instruction on the nonstatutory mitigating circumstance that

defendant suffered from learning disabilities which hindered his chances for success in school, although testimony by a psychologist supported this circumstance, where defendant's school record which was introduced into evidence did not identify any disability, and the psychologist's assessment over thirty years after defendant dropped out of school was not so manifestly credible as to mandate a peremptory instruction. Nor did the trial court err by failing to give a peremptory instruction on the nonstatutory mitigating circumstance that defendant was not acting in an entirely calm, rational manner at the time of each killing, assuming that this circumstance could properly be deemed mitigating, where there was evidence that defendant called 911 and surrendered to law enforcement immediately after he committed the crimes.

**Am Jur 2d, Homicide §§ 114, 256, 406, 516, 576; Trial §§ 768, 835, 841, 1270-1278.**

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

**9. Constitutional Law § 342 (NCI4th)— capital trial—absence of defendant from portion—harmless error standard**

Article I, Section 23 of the Constitution of North Carolina guarantees a criminal defendant the right to be present at every stage of his trial. The absence of a defendant from some portion of his capital trial is not automatically reversible error, however, as the Supreme Court applies a harmless error standard in such cases under which the State has the burden of establishing that the error was harmless beyond a reasonable doubt.

**Am Jur 2d, Constitutional Law § 842; Trial § 1692.**

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

**10. Constitutional Law § 342 (NCI4th)— capital trial—mitigating circumstances—conference in chambers—absence of defendant—harmless error**

The trial court's error in conducting a conference in chambers to discuss defendant's proposed mitigating circumstances in a capital sentencing proceeding without the presence of defend-

ant was harmless beyond a reasonable doubt where defendant was represented by counsel at the conference; the entire conference was transcribed and made part of the record; defendant's counsel were given the opportunity to preserve on the record every objection to the trial court's rulings and the reasons for their objections; and the substance of each mitigating circumstance requested by defendant and discussed by defendant's counsel during the conference was later submitted to the jury.

**Am Jur 2d, Constitutional Law § 842; Judges § 28; Trial § 1692, 1777.**

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

**11. Criminal Law § 1347 (NCI4th)— aggravating circumstance—course of conduct—not unconstitutionally vague**

The course of conduct aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(11) does not violate due process by reason of constitutional vagueness.

**Am Jur 2d, Constitutional Law § 818; Trial §§ 841, 1760.**

**12. Criminal Law § 1347 (NCI4th)— two murders—aggravating circumstance—course of conduct—each killing as aggravator for the other**

The submission of one killing as an aggravating circumstance for another murder under the "course of conduct" provision of N.C.G.S. § 15A-2000(e)(11) does not violate due process or double jeopardy. Therefore, where the State presented substantial evidence tending to show that after defendant fatally shot his father-in-law, he fired his weapon at his wife and killed her, and the jury returned guilty verdicts of first-degree murder for each killing, the trial court correctly allowed the jury to consider the murder of each victim as the crime of violence to support the course of conduct aggravating circumstance in sentencing defendant for the murder of the other victim.

**Am Jur 2d, Constitutional Law §§ 813-815; Criminal Law §§ 243-248; Trial §§ 841, 1760.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in**

**committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like—post-*Gregg* cases. 64 ALR4th 837.**

**13. Criminal Law § 1347 (NCI4th)— aggravating circumstance—course of conduct—other crimes of violence—charge or conviction not required**

N.C.G.S. § 15A-2000(e)(11) does not require that defendant be charged or convicted of the "other crimes of violence" before the course of conduct aggravating circumstance may be submitted. Rather, the import of the (e)(11) aggravating circumstance is that such crimes connect with the capital murder, whether temporally, by *modus operandi* or motivation, or by some common scheme or pattern.

**Am Jur 2d, Trial §§ 841, 1760.**

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

**14. Criminal Law § 1347 (NCI4th)— aggravating circumstance—course of conduct—other crime of violence—uncharged assault against third person**

Where the State presented compelling evidence that immediately after fatally shooting his father-in-law and his wife, defendant assaulted his wife's brother with a deadly weapon with the intent to kill him, the trial court did not err by instructing the jury that it could find as an aggravating circumstance for each murder that defendant committed the assault as part of the same course of conduct with the killing of the victims even though defendant has not been charged with the assault.

**Am Jur 2d, Trial §§ 841, 1760.**

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

**15. Criminal Law § 1355 (NCI4th)— mitigating circumstance—no prior criminal history—submission not required**

The trial court did not err by refusing to submit to the jury the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where neither the State nor defendant presented any evidence as to defendant's prior criminal history. N.C.G.S. § 15A-2000(f)(1).

**Am Jur 2d, Evidence §§ 180, 1336; Trial §§ 528, 841, 1760.**

**16. Constitutional Law § 309 (NCI4th)— capital sentencing—counsel's concession of aggravating circumstance—record silent as to defendant's consent—no ineffective assistance of counsel**

Assuming *arguendo* that defendant's trial counsel conceded the existence of the sole aggravating circumstance submitted to the jury during his closing argument in a capital sentencing proceeding, this concession did not violate defendant's right to the effective assistance of counsel since (1) defendant's lack of consent to the argument will not be presumed from a silent record, and (2) the decision of *State v. Harbinson*, 315 N.C. 175, which held that in cases in which defendant's trial counsel admits defendant's guilt to the jury without defendant's consent, the defendant has been denied the effective assistance of counsel *per se* in violation of the Sixth Amendment does not apply to sentencing proceedings.

**Am Jur 2d, Criminal Law §§ 732-753; Trial §§ 841, 1760, 1947.**

**When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel—Supreme Court cases. 83 L. Ed. 2d 1112.**

**17. Criminal Law § 1373 (NCI4th)— sentences of death not disproportionate**

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases where defendant was convicted of each count of first-degree murder under the theory of malice, premeditation, and deliberation, and the jury found as the sole aggravating circumstance that each murder was part of a course

of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons.

**Am Jur 2d, Criminal Law § 628; Trial §§ 841, 1760.**

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

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Greeson, J., on 14 July 1994, in Superior Court, Rockingham County, upon two jury verdicts finding defendant guilty of first-degree murder. Heard in the Supreme Court 16 February 1996.

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

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

MITCHELL, Chief Justice.

On 16 May 1988, defendant was indicted for the 4 March 1988 murders of his estranged wife, Julie Boyd, and her father, Dillard Curry. He was tried capitally. The jury found him guilty and recommended a sentence of death for each murder. On appeal, this Court held that the trial court erred by excusing a juror after a private, unrecorded bench conference with the juror and awarded defendant a new trial. *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992).

In June 1994, defendant was again tried capitally and convicted of the first-degree murders of Julie Boyd and Dillard Curry. The jury recommended that defendant be sentenced to death for each murder and the trial court sentenced accordingly. 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 *inter alia* that on 4 March 1988 defendant entered the home of his estranged wife's father, where

his wife and children were then living, and shot and killed both his wife and her father with a .357 Magnum pistol. The shootings were committed in the presence of defendant's children—Chris, age thirteen; Jamie, age twelve; and Daniel, age ten—and other witnesses, all of whom testified for the State. Immediately after the shootings, law enforcement officers were called to the scene. As they approached, defendant came out of some nearby woods with his hands up and surrendered to the officers.

Later, after being advised of his rights, defendant gave a lengthy inculpatory statement in which he described the fatal shootings:

> I walked to the back door [of Dillard Curry's house] and opened it. It was unlocked. As I walked in, I saw a silhouette that I believe was Dillard. It was just like I was in Vietnam. I pulled the gun out and started shooting. I think I shot Dillard one time and he fell. Then I walked past him and into the kitchen and living room area. The whole time I was pointing and shooting. Then I saw another silhouette that I believe was Julie come out of the bedroom. I shot again, probably several times. Then I reloaded my gun. I dropped the empty shell casings onto the floor. As I reloaded, I heard someone groan, Julie I guess. I turned and aimed, shooting again. My only thoughts were to shoot my way out of the house. I kept pointing and shooting at anything that moved. I went back out the same door that I came in, and I saw a big guy pointing a gun at me. I think this was Craig Curry, Julie's brother. I shot at him three or four times as I was running towards the woods.

Dr. Patricio Lara and Dr. John Warren both testified for defendant as experts in forensic psychology. Dr. Lara testified that at the time of the offenses, defendant suffered from an adjustment disorder with psychotic emotional features, alcohol abuse, and a personality disorder with predominate compulsive dependent features. Further, Dr. Lara opined that defendant's emotional condition was impaired and that defendant suffered from some level of alcohol intoxication at the time of the offenses. Likewise, Dr. Warren opined that at the time of the offenses defendant suffered from chronic depression, alcohol abuse disorder, dependent personality disorder, and a reading disability.

**[1]** In his first assignment of error, defendant argues that the trial court erred in prohibiting Dr. Warren, who testified as an expert in forensic psychology, from testifying that defendant was not acting with a "cool state of mind" during the commission of the murders.

During a *voir dire* on the admissibility of Dr. Warren's testimony, the following exchange occurred:

> Q: Dr. Warren, based on your experience and your review of the records that you described concerning [defendant], do you have an opinion as to whether at the time of the events that Mr. Boyd is charged with, he was acting in a cool state of mind?
>
> A: Yes, sir.
>
> Q: What is that opinion?
>
> A: Because of his emotional problems and in the context of the situation, the context of the situation and his alcohol consumption, I believe that all of his bottled up feelings, that related to his dependent relationship with his wife, exploded at the time of the shooting. That his manner and statements that I have seen indicate an impulsive and explosive act. And if it is possible to use the specific question, that this is not in a calm and cool and rational state of mind, but rather was an impulsive outburst of emotion.

The trial court then questioned Dr. Warren about his understanding of the legal definition of "cool state of mind" and explained the pattern jury instruction that defines the legal concept. After this exchange, Dr. Warren conceded that he "thought he had a better understanding of the legal concept," but from the court's instructions, his understanding was "not as precise" as he thought. Dr. Warren then admitted that the legal import of "cool state of mind" was clearly not the same as the medical meaning, to which he was referring. In light of this admission and after considering arguments from counsel, the trial court ruled that Dr. Warren's testimony that defendant did not act with a "cool state of mind" was inadmissible under Rule 403 of the Rules of Evidence in that such testimony would confuse the jury as to the legal import of the phrase. *See* N.C.G.S. § 8C-1, Rule 403 (1992) (allowing court to exclude otherwise relevant testimony when the probative value of the testimony is substantially outweighed by a danger of confusing the issues).

Defendant argues that Dr. Warren's expert opinion that defendant did not act with a cool state of mind is admissible under the rules of evidence and precedent established by this Court. We disagree and conclude that the trial court did not err by preventing Dr. Warren from using the phrase "cool state of mind" to convey his opinion to the jury that defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time of the shootings.

Defendant correctly argues that expert opinion testimony is not rendered inadmissible on the basis that it embraces ultimate issues to be determined by the jury. N.C.G.S. § 8C-1, Rule 704 (1992). Further, "expert opinion testimony concerning a defendant's state of mind is admissible to negate the first-degree murder elements of premeditation and deliberation." *State v. Baldwin*, 330 N.C. 446, 460, 412 S.E.2d 31, 39 (1992); *State v. Shank*, 322 N.C. 243, 248-49, 367 S.E.2d 639, 643 (1988). Nevertheless, we have held previously that a trial court does not abuse its discretion by preventing an expert witness from testifying that a defendant did not act in a cool state of mind. *State v. Weeks*, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988). In *Weeks* we said:

> Such testimony embraces precise legal terms, definitions of which are not readily apparent to medical experts. What defendant sought to accomplish with this testimony was to have the experts tell the jury that certain legal standards had not been met. . . . Having the experts testify as requested by defendant would tend to confuse, rather than help, the jury in understanding the evidence and determining the facts in issue.

*Id.* at 166-67, 367 S.E.2d at 904.

Defendant argues that *Weeks* is not dispositive because the trial court on *voir dire* explained to Dr. Warren the legal import of acting with a cool state of mind. After this explanation, Dr. Warren conceded that the legal and medical definitions of the phrase differed, but that he meant to convey to the jury that defendant did not act with a cool state of mind in a medical sense. Thus, defendant argues that after the trial court clarified any confusion over the intended use of the phrase, there was no basis for preventing the expert witness from opining that defendant did not act with a cool state of mind in the medical sense. We disagree.

After a careful review of the transcript, we conclude that the trial court did not err under Rule 403 and *State v. Weeks* by excluding Dr. Warren's testimony. Further, the trial court emphasized to Dr. Warren that he could use other terminology to convey his opinion to the jury and ruled that all other questions regarding defendant's state of mind that defendant sought to pose to the expert witness would be allowed. Defendant's assignment of error is overruled.

**[2]** In another assignment of error, defendant argues the trial court erred by overruling his objection to certain testimony of Craig Curry,

the victims' brother and son. On direct examination, Curry testified that

> [Defendant] was loading his pistol and he hollered down to me, he said come on up here, Craig, I am going to kill you too, and when he said that I started thinking, you know, if I run up there that is what he was going to do.
>
> . . . .
>
> My brother's girl friend's little girl was down there. I had three little younguns [sic] down there and I told [my wife] to get them out and get them in the woods because if he gets me I know that he is going to kill everybody.

Defendant argues that Craig Curry's statement that "I know that he is going to kill everybody" was wholly speculative in that the witness did not know defendant would kill anyone, much less everyone. Thus, defendant argues the testimony was erroneously admitted into evidence over his objection. Further, defendant argues the admission of this testimony prejudiced him during his capital sentencing proceeding in that it inaccurately portrayed him as a "bloodthirsty child-killer."

Rule 701 of the Rules of Evidence provides that

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

N.C.G.S. § 8C-1, Rule 701 (1992). Further, this Court

> has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.

*State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987) (citation omitted).

Craig Curry's testimony that he believed that "[defendant was] going to kill everybody" clearly falls within the realm of lay testimony permitted by Rule 701 and *State v. Williams*. Prior to defendant's

objection, Curry had testified that he had seen defendant shoot his father and reload his gun. Curry had testified that defendant was hollering at defendant's own children, that Curry's immediate reaction was to protect his own family, and that Curry told his wife to call the police as he retrieved his own gun from a security box. In the context of this testimony, Curry's statement that "[defendant was] going to kill everybody" was an instantaneous conclusion as to defendant's condition and state of mind. It was based upon Curry's opportunity to observe defendant shoot his own father, holler at his own children, reload his weapon, and threaten to shoot Curry. Thus, the trial court did not err by overruling defendant's objection to Craig Curry's statement. Defendant's assignment of error is overruled.

**[3]** In his next assignment of error, defendant argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. However, because the trial court instructed the jury on first- and second-degree murder for each killing and the jury returned a verdict of guilty of first-degree murder based on malice, premeditation and deliberation for each, any error in failing to give an instruction on voluntary manslaughter is harmless. *See, e.g., State v. Exxum*, 338 N.C. 297, 300, 449 S.E.2d 554, 556 (1994). Defendant's assignment of error is therefore overruled.

**[4]** In another assignment of error, defendant argues that the trial court erred by refusing to instruct the jury on voluntary intoxication. Defendant contends that substantial evidence was introduced at trial that "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). Thus, defendant argues he has met his burden of production on the issue of voluntary intoxication and was entitled to the instruction.

In support of this argument, defendant points to his own testimony at trial. Defendant testified that he remembered buying twelve beers the day of the murders and that he thought he drank all the beer because he "[didn't] let beer sit around." In addition, defendant notes that Dr. Warren testified that defendant had "alcohol intoxication at the time of these offenses" and that two law enforcement officers would have tested him for a driving while impaired (DWI) infraction had the officers stopped defendant while driving. *But see State v. Medley*, 295 N.C. 75, 80, 243 S.E.2d 374, 378 (1978) (evidence of a blood alcohol concentration that would violate motor vehicle laws does not require an instruction on voluntary intoxication).

Taking the evidence in the light most favorable to defendant, *State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985), defendant has failed to produce substantial evidence that he was so intoxicated that he could not form a deliberate and premeditated intent to kill. At best, the combined testimony of defendant and the other witnesses establishes that defendant was intoxicated at the time of the murders. Evidence of mere intoxication, however, is not sufficient to meet defendant's burden of production. *State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989). Such testimony did not tend to show that "at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536; *McQueen*, 324 N.C. at 140, 377 S.E.2d at 51. Therefore, the trial court was not required to instruct on voluntary intoxication. *Id.* Defendant's assignment of error is overruled.

**[5]** Defendant next assigns as error the trial court's refusal to instruct on the defense of unconsciousness or automatism. Relying on *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983), defendant argues that his own uncontradicted testimony was sufficient evidence from which the jury could have found that he was unconscious at the time he committed the murders. On direct examination, defendant testified that he could not remember many of his actions on the day of the crimes, attributing his memory loss to flashbacks from his experiences in Vietnam. He stated that he could not remember driving to Dillard Curry's residence and that he had no memory of picking up his son before driving to the residence. When asked if he had a clear recollection of what happened inside the Curry residence, defendant testified:

> What I remember come [sic] back to me since this has happened. I can remember as I walked into the door I shot again and I stepped up into the kitchen and Julie was coming out of the living room and the living room stepped down into the kitchen and she stopped and right there she saw me and said, "Oh, my God," and put her hands out in front of her and said, "don't, please don't, I am sorry."
>
> All of the time she was saying that she was walking backwards and I took my eyes off her and I looked down and my hand raised and I shot her. And I looked back and she was laying face down.

Based on this and other similar statements relating his memory loss, defendant argues that there was sufficient evidence that he suffered from blackouts to warrant an instruction on the unconsciousness defense.

First recognized by this Court in *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969), *overruled in part on other grounds by State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975), the defense of unconsciousness, or automatism, is a complete defense to a criminal charge. *Jerrett*, 309 N.C. at 264, 307 S.E.2d at 353. This is so because " '[t]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *Id.* (quoting *Mercer*, 275 N.C. at 116, 165 S.E.2d at 334). Unconsciousness is an affirmative defense, and the burden rests upon defendant to prove its existence to the satisfaction of the jury. *Caddell*, 287 N.C. at 290, 215 S.E.2d at 363. After a careful scrutiny of the transcript, we conclude that defendant has not met his burden.

Defendant has pointed only to his own testimony at trial as evidence to support an instruction on unconsciousness. Although defendant repeatedly testified that he had difficulty recalling the events and his actions surrounding the murders, he was able to recall many of the graphic details of the murders as shown by the inculpatory statement he gave to police within hours of committing the murders. *See State v. Fisher*, 336 N.C. 684, 705, 445 S.E.2d 866, 877 (1994) (defendant's detailed statement the day of the murder belies claim of unconsciousness), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 665 (1995). After surrendering to police the day of the murders, defendant gave a lengthy statement. At no point during this statement did defendant attribute his actions to blackouts, amnesia, or automatism. Additionally, he demonstrated a very complete and detailed recollection of his actions. Defendant's ability to recall completely the details of the killings within several hours of the commission of those crimes contradicts his testimony at trial that he could not remember the events surrounding the murders. In light of his detailed confession, defendant's testimony at trial concerning his alleged inability to remember many of the events surrounding the crimes implies that any such memory lapses were attributable to nothing but the passage of time.

The case *sub judice* is therefore distinguishable from *State v. Jerrett*, the decision on which defendant relies. In *Jerrett*, the defend-

ant's evidence of unconsciousness included uncontradicted testimony from both defendant and his parents. The defendant described in detail blackouts that he had experienced on numerous occasions since serving in Vietnam. He related to the jury that he would walk, talk, and drive for hours without any recollection of doing so. The defendant's father also testified that he had observed defendant on at least a half dozen occasions during which defendant was experiencing blackouts. In addition, this Court said that "defendant's very peculiar actions in permitting the kidnapped victim to repeatedly ignore his commands and finally lead him docilely into the presence and custody of a police officer lends credence to his defense of unconsciousness." *Jerrett*, 309 N.C. at 266, 307 S.E.2d at 353. Based on this evidence, this Court concluded that the trial court should have given the requested instruction on unconsciousness. *Id.*; *see also State v. Fields*, 324 N.C. 204, 212, 376 S.E.2d 740, 745 (1989) (instruction required based on testimony from expert witness that defendant was unable to exercise conscious control of his physical actions at the moment of the shooting). However, unlike the testimonial corroborating evidence and other evidence that supported Jerrett's claim that he committed his crimes during a blackout, defendant in the case *sub judice* relies only upon his own self-serving testimony at trial that is wholly contradicted by the statement he gave to police within hours of committing the murders. Further, neither of defendant's expert witnesses gave testimony in support of defendant's unconsciousness claim. We conclude that the trial court did not err by refusing to instruct the jury on unconsciousness. Defendant's assignment of error is overruled.

After the jury returned a verdict finding defendant guilty of first-degree murder, the trial court conducted a capital sentencing proceeding as required by N.C.G.S. § 15A-2000. The sole aggravating circumstance submitted and found by the jury was that the 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 or persons." N.C.G.S. § 15A-2000(e)(11). One or more jurors found two statutory and eighteen nonstatutory mitigating circumstances to exist. The jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and recommended the imposition of the death penalty.

Defendant assigns as error the trial court's refusal to peremptorily instruct the jury on two statutory mitigating circumstances and

two nonstatutory circumstances. A trial court should give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted and manifestly credible evidence. *State v. Gay*, 334 N.C. 467, 492-93, 434 S.E.2d 840, 854-55 (1993). However, the peremptory instructions to be given with regard to *nonstatutory* mitigating circumstances differ from those to be given with regard to *statutory* mitigating circumstances. *State v. Green*, 336 N.C. 142, 172-74, 443 S.E.2d 14, 32, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

**[6]** Defendant first argues in support of this assignment of error that the evidence as to the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance, that the murders were committed while defendant was under the influence of mental or emotional disturbance, was uncontradicted. Defendant contends that the State failed to present testimony that contradicted the testimony of Drs. Warren and Lara. Dr. Warren opined that at the time of the murders, defendant suffered from chronic depression, acute alcohol intoxication, dependent personality disorder, and a learning disability. Dr. Lara concurred in this diagnosis, which defendant argues supports the (f)(2) mitigating circumstance.

Even though the expert testimony of Drs. Warren and Lara is some evidence from which the jury could determine that defendant was under the influence of a mental or emotional disturbance, we conclude that such evidence was contradicted. Steve Lowman, who testified on behalf of defendant, stated that defendant was his usual self and did not appear disoriented or unaware of what was going on around him on the very afternoon of the murders. Further, Detective Rick Hopper of the Rockingham County Sheriff's Department testified that defendant was able to provide a detailed statement in which he confessed to the murders and to answer numerous questions within the hour after his arrest. This evidence, in conjunction with defendant's ability to recall many of the graphic details of the murders, contradicts the expert testimony that defendant was under the influence of a mental or emotional disturbance when he murdered his wife and father-in-law. *See State v. Noland*, 312 N.C. 1, 22-23, 320 S.E.2d 642, 655-56 (1984) (evidence of defendant's actions and statements before and after the shootings contradicted evidence that defendant was operating under a mental or emotional disturbance), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). Thus, the trial court correctly denied defendant's request for a peremptory instruction as to the (f)(2) mitigating circumstance.

**[7]** Defendant also argues in support of this assignment that the trial court erred by refusing to peremptorily instruct the jury as to the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. Dr. Warren testified that both defendant's capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of law were impaired. Dr. Lara testified that defendant's capacity to appreciate the criminality of his conduct was not impaired but that his capacity to conform his behavior to the requirements of law was impaired. Defendant concedes that Dr. Lara contradicted Dr. Warren on whether defendant's capacity to appreciate the criminality of his conduct was impaired. Nevertheless, he argues that because the (f)(6) mitigating circumstance is written in the disjunctive, the trial court must give a peremptory instruction if uncontradicted and manifestly credible evidence shows *only* that his capacity to conform his conduct to law was impaired. Evidence in the present case tended to show that immediately after he committed the murders, defendant called 911, identified himself, and alerted the dispatcher to the murders. Thereafter, defendant surrendered and cooperated with law enforcement. Such evidence was sufficient to put in controversy defendant's capacity to conform his conduct to the requirements of law, and the trial court correctly refused to give a peremptory instruction.

**[8]** Defendant also argues in support of this assignment of error that the trial court erred by failing to give peremptory instructions as to the nonstatutory mitigating circumstances (1) that defendant suffered from learning disabilities which hindered his chances for success in school and (2) that defendant was not acting in an entirely calm, rational manner at the time of each killing. We conclude the trial court correctly refused to give peremptory instructions as to these nonstatutory mitigating circumstances. Defendant argues that Dr. Warren's testimony that a learning and reading disability hindered defendant's chances for success in school was uncontradicted and credible evidence. We disagree. Defendant's school record, which was introduced into evidence, did not identify any disability. While the school record did establish that defendant dropped out of school in the ninth grade, we conclude that Dr. Warren's assessment over thirty years after defendant dropped out is not so manifestly credible as to mandate a peremptory instruction.

Regarding the nonstatutory mitigating circumstance that defendant was not acting in an entirely calm, rational manner at the time of each killing, the evidence that defendant called 911 and surrendered to law enforcement immediately after he committed the crimes is sufficient to put in controversy the existence of this circumstance. Thus, assuming *arguendo* that this nonstatutory circumstance could ever properly be deemed mitigating, the trial court correctly refused to peremptorily instruct the jury as to its existence. For the foregoing reasons, this assignment of error is without merit and is overruled.

By his next assignment of error, defendant argues that his state constitutional right to be present at all stages of his trial was violated when the trial court conducted a conference in chambers to discuss defendant's proposed mitigating circumstances without defendant's actual presence. Before the charge conference began, the following colloquy took place:

> COURT: I don't mind having the defendant brought in, even though it's recorded. Give him an opportunity if he wants to be present. I can have you all relay all this information. In addition, it is recorded.
>
> I feel like this is better for all the parties. That's all up to you whether we bring him in or not as far as that goes. He might find this extremely boring, but at the same time—
>
> [DEFENSE COUNSEL]: My sense is that he probably prefers to go back to the jail, for the truth of it.
>
> COURT: I thought that, too, but I am recording it for anything that needs to be put, you know, on the record. But it has to be on the record if it's not in his presence, I know, but I just—if you wanted to bring him in, if you thought he was that interested in the law.
>
> [DEFENSE COUNSEL]: He's not.

**[9]** It is well settled that Article I, Section 23 of the Constitution of North Carolina guarantees a criminal defendant the right to be present at every stage of his trial. *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991); *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 capital cases, this right is not waivable. *Huff*, 325 N.C. at 29, 381 S.E.2d at 651. The absence of a defendant from some portion of his capital trial is not automatically reversible error,

however, as this Court applies a harmless error standard in such cases under which the State has the burden of establishing that the error was harmless beyond a reasonable doubt. *Id.* at 33, 381 S.E.2d at 653.

**[10]** In the case *sub judice*, the trial court held a recorded conference in chambers to discuss defendant's proposed mitigating circumstances without defendant present. However, defendant was represented by counsel at the conference, and the entire conference was transcribed and made part of the record. Defendant's counsel were given the opportunity to preserve on the record every objection to the trial court's rulings and the reasons for their objections. Further, the substance of each mitigating circumstance requested by defendant and discussed by defendant's counsel during the conference was later submitted to the jury. Therefore, we conclude that the error in conducting a conference in chambers to discuss defendant's proposed mitigating circumstances, without defendant present, was harmless beyond a reasonable doubt. *See Brogden*, 329 N.C. at 542, 407 S.E.2d at 163 (violation of defendant's right to be present held harmless beyond a reasonable doubt); *State v. Wise*, 326 N.C. 421, 433, 390 S.E.2d 142, 149-50 (same), *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). This assignment of error is without merit and is overruled.

In another assignment of error, defendant argues that his death sentence must be vacated because the trial court erred by submitting as an aggravating circumstance that the murders for which he was convicted were part of a course of conduct by defendant which included the commission by him of other crimes of violence against another person. N.C.G.S. § 15A-2000(e)(11). Defendant contends that the (e)(11) aggravating circumstance is unconstitutionally vague, overbroad, and indefinite. Alternatively, defendant argues that it was not supported by the evidence in the case *sub judice*. We disagree with defendant and conclude the trial court properly submitted this aggravating circumstance to the jury.

**[11]** The (e)(11) aggravating circumstance itself does not violate due process by reason of unconstitutional vagueness. *State v. Williams*, 305 N.C. 656, 685, 292 S.E.2d 243, 261, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Further, we conclude that the evidence in the present case was sufficient to support its submission to the jury.

**[12]** The State presented substantial evidence tending to show that after defendant fatally shot Dillard Curry, he fired his weapon at Julie

Boyd, intending to kill her. The jury, by returning guilty verdicts of first-degree murder for each killing, found beyond a reasonable doubt that defendant had committed the two murders. We have previously held under similar circumstances that the submission of one killing as an aggravating circumstance for another murder under the (e)(11) aggravating circumstance is correct and does not violate due process of law or double jeopardy. *State v. Pinch*, 306 N.C. 1, 30-31, 292 S.E.2d 203, 225, *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). Thus, the trial court correctly allowed the jury to consider the murder of Dillard Curry as the crime of violence to support the (e)(11) aggravating circumstance in sentencing defendant for the murder of Julie Boyd. Likewise, the trial court was correct to allow the jury to consider the murder of Julie Boyd as the crime of violence that supported the (e)(11) aggravator in sentencing defendant for the murder of Dillard Curry. In summary, therefore, the trial court properly submitted the aggravating circumstance that each of the murders for which defendant stood convicted was part of a course of conduct in which he engaged and which included the commission of other crimes of violence against another person. *Id.; see also State v. Chapman*, 342 N.C. 330, 345, 464 S.E.2d 661, 669-70 (1995); *State v. Cummings*, 332 N.C. 487, 507-12, 422 S.E.2d 692, 703-06 (1992); *State v. Brown*, 306 N.C. 151, 183, 293 S.E.2d 569, 589, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

Defendant argues, however, that the trial court did not rely solely on the separate killings for which defendant was found guilty as the other crime of violence. He contends that the trial court improperly instructed the jury that it also could consider an alleged and uncharged assault on Craig Curry as that other crime. Defendant argues that relying on this alleged assault was error in that a prerequisite to the submission of the course of conduct circumstance is that defendant be charged with the other crime of violence. We disagree.

**[13]** N.C.G.S. § 15A-2000(e)(11) does not require that defendant be charged or convicted of the "other crimes of violence" before that aggravating circumstance may be submitted. Unlike other aggravating circumstances that require a conviction, the course of conduct aggravating circumstance is supported not by convictions, but crimes. *Compare* N.C.G.S. § 15A-2000(e)(11) *with* N.C.G.S. § 15A-2000(e)(2) (1995) ("defendant had been previously convicted of

another capital felony") *and* N.C.G.S. § 15A-2000(e)(3) ("defendant had been previously convicted of a felony involving the use or threat of violence"). Further, in several decisions, this Court has found that the course of conduct aggravating circumstance was properly submitted when the "other crimes of violence" consisted of evidence of uncharged crimes. *State v. Price*, 326 N.C. 56, 80-83, 388 S.E.2d 84, 98-99 (course of conduct supported by uncharged arson), *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990); *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250 (course of conduct supported by uncharged assault with a deadly weapon inflicting serious bodily injury), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985). As our decisions have instructed, the import of the (e)(11) aggravating circumstance is not that defendant has been charged or convicted of such crimes, but that such crimes connect with the capital murder, whether temporally, by *modus operandi* or motivation, or by some common scheme or pattern. *Cummings*, 332 N.C. at 510, 422 S.E.2d at 705.

**[14]** In the case *sub judice*, the State presented compelling evidence that immediately after fatally shooting both Dillard Curry and Julie Boyd, defendant turned his weapon and attention toward Craig Curry. Curry testified that while defendant reloaded his weapon, defendant yelled to him, "Come on up here, Craig. I am going to kill you too." Further, defendant testified at trial that

> I remember that he [Craig Curry] was standing—I can't swear that it was him. The silhouette was facing toward me with his arm out. I don't know if he had a gun or was just pointing, so I came up with the pistol and started shooting at the silhouette holding it and it took off running across the street.

This was substantial evidence that defendant assaulted Craig Curry with a deadly weapon with the intent to kill him. Thus, the trial court did not err by instructing the jury that it could find as an aggravating circumstance that defendant committed the crime of assault with a deadly weapon with the intent to kill as part of the same course of conduct with the killing of the victims. Defendant's assignment of error is without merit and is overruled.

**[15]** Defendant also assigns as error the trial court's refusal to submit to the jury the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). Defendant concedes, however, that neither the State nor defendant presented any evidence as to defendant's prior crimi-

nal history. Thus, the trial court did not err by refusing to instruct the jury on the (f)(1) mitigating circumstance. *State v. Gibbs*, 335 N.C. 1, 57, 436 S.E.2d 321, 353 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994); *see also Delo v. Lashley*, 507 U.S. 272, 277, 122 L. Ed. 2d 620, 626 (1993) (concluding that "[n]othing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them").

**[16]** In another assignment of error, defendant argues that his Sixth Amendment right to effective assistance of counsel was violated when his trial counsel allegedly conceded that the jury should find the sole aggravating circumstance submitted to the jury. During closing arguments of the capital sentencing proceeding, defense counsel stated:

> Ms. Foster [the prosecutor] has said, consider ten minutes in Kenneth Boyd's life on March fourth, 1988 and take his life. That's her argument. How many times have you heard her talk about what happened on March fourth, 1988, and base her whole argument to you on taking Kenneth's life based on what happened in ten minutes out of Kenneth's life?
>
> . . . .
>
> We can't take ten minutes of a person's life and consider that as outweighing everything else they ever did, and that's what Ms. Foster is asking you to do. That's not the law, that's not just, and that's not fair.
>
> *Take the ten minutes to find the aggravating circumstance.* If you take that ten minutes, think about all of the other evidence that you are required to consider, that you've got to consider, because it's lawful mitigating evidence in spite of what Ms. Foster says.

(Emphasis added.)

Assuming *arguendo* that by this assignment defendant's trial counsel conceded the existence of the aggravating circumstance, the record is silent as to whether defendant consented to the argument. This Court will not presume defendant's lack of consent from a silent record. *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995).

Defendant also argues in support of this assignment that his trial counsel's alleged concession was tantamount to a concession of guilt without his consent in violation of the Sixth Amendment. In *State v.*

*Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), this Court held that in cases in which a defendant's trial counsel, without consent from the defendant, admits the defendant's guilt to the jury, the defendant has been denied effective assistance of counsel, *per se* in violation of the Sixth Amendment. We have recently concluded, however, that *Harbison* does not apply to sentencing proceedings. *State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3763 (1996). Further, as already pointed out, we will not presume the defendant's lack of consent from the silent record before us. Thus, defendant's assignment of error is overruled.

Defendant also has presented assignments of error raising seven additional issues that have been previously decided contrary to his position by this Court: (1) that the death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional on the grounds that execution by lethal gas violates the Eighth Amendment; (2) that the trial court erred by refusing to allow defendant to introduce evidence concerning parole eligibility; (3) that a "death qualified" jury violates the Eighth Amendment; (4) that the trial court erred by refusing to allow defendant to rehabilitate jurors challenged for cause on death qualification grounds; (5) that the instruction that the jury has a duty to recommend a sentence of death upon certain findings is unconstitutional; (6) that placing the burden of proof of mitigating circumstances on defendant is unconstitutional; and (7) that the death penalty violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina. We have reviewed defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

**[17]** 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 finding of the aggravating circumstance 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.

In the present case, defendant was convicted of two counts of first-degree murder under the theory of malice, premeditation, and deliberation. The jury found as the sole aggravating circumstance that each murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). One or more jurors found two statutory mitigating circumstances for each murder, that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6). In addition, one or more jurors found eighteen nonstatutory mitigating circumstances.

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.

None of the seven cases in which this Court has found the death penalty disproportionate involved a defendant convicted of murdering multiple victims. *See State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Further, we have said that the fact that defendant is a multiple killer is "[a] heavy factor to be weighed against the defendant." *State v. Laws*, 325 N.C. 81, 123, 381 S.E.2d 609, 634 (1989), *sentence*

*vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990); *see also State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 879 (1996); *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 872 (1996); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Because the jury in the present case found defendant guilty of two counts of first-degree murder, this case is easily distinguishable from the seven cases in which the death penalty has been found disproportionate by this Court.

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. We have reviewed all of the cases in the pool of similar cases used to fulfill this statutory duty and 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 sentences of death recommended by the jury and ordered by the trial court in the present case are not disproportionate.

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

NO ERROR.

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STATE OF NORTH CAROLINA v. MICHAEL LEE FULLWOOD

No. 37A86-3

(Filed 31 July 1996)

**1. Indigent Persons § 26 (NCI4th)— capital sentencing—jury selection—questions by only one attorney—statutory rights not violated**

The trial court did not abuse its discretion or violate defendant's statutory right to two attorneys in a capital trial by allowing

only one of defendant's two attorneys to question prospective jurors in a capital sentencing proceeding where the record fails to show the acceptance of any juror to whom defendant had legal objections upon any ground; defendant failed to exhaust his peremptory challenges; and the trial court did not prohibit defendant's attorneys from communicating with, prompting, or consulting one another. N.C.G.S. § 7A-450(b1).

**Am Jur 2d, Jury §§ 200, 234, 235.**

**2. Appeal and Error § 150 (NCI4th)— constitutional issue—failure to preserve for appeal**

Defendant failed to preserve for appellate review the constitutional issue of whether defendant's right to the assistance of counsel was violated by the trial court's ruling that only one of defendant's two attorneys could question prospective jurors in a capital sentencing proceeding where defendant did not raise this issue at trial.

**Am Jur 2d, Criminal Law §§ 732 et seq.; Jury §§ 200, 234, 235.**

**When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel—Supreme Court Cases. 83 L. Ed. 2d 1112.**

**3. Jury § 64 (NCI4th)— capital sentencing—jury selection—comments by court—no abuse of discretion**

The trial judge did not improperly discourage prospective jurors in a capital sentencing proceeding from disclosing prejudicial information and did not abuse his discretion by comments during jury selection that he did not want prospective jurors asking questions and that prospective jurors should "be cautious in what you may say, and do not say, and do not say anything that would tend to taint any other juror" where defense counsel actively questioned the jurors and they responded to his questions; defendant does not contend that he was dissatisfied with the jury as seated; and defendant did not exhaust his peremptory challenges.

**Am Jur 2d, Jury §§ 191, 194, 196, 234, 235.**

**4. Jury § 190 (NCI4th)— death penalty views—exclusion of question—failure to exhaust peremptory challenges**

The trial court's refusal to permit defense counsel to ask a prospective juror a general question concerning his feelings about the death penalty was not preserved for appellate review where defendant failed to exhaust his peremptory challenges.

**Am Jur 2d, Jury §§ 208, 210, 234, 235.**

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

**5. Evidence and Witnesses § 2089 (NCI4th)— lay opinion—emotional state of defendant—personal knowledge**

Defendant failed to show prejudicial error in the trial court's exclusion of lay opinion testimony by defendant's mother in a capital sentencing proceeding that defendant was depressed following the shooting death of his brother in New York where, at the time defendant's mother was asked the question about defendant's reaction to his brother's death, no evidence had been presented that she had personal knowledge of defendant's mental state; and although testimony was presented during a subsequent *voir dire* to establish that defendant's mother had a personal knowledge sufficient to answer the question, defendant did not pursue the matter again before the jury.

**Am Jur 2d, Evidence §§ 282, 556.**

**Comment Note.—Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness. 10 ALR3d 258.**

**Construction and application of Rule 701 of Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain circumstances. 44 ALR Fed. 919.**

**6. Evidence and Witnesses § 2803 (NCI4th)— capital sentencing—exclusion of leading question**

In a capital sentencing proceeding in which defendant testified that, a few days before the murder, he told the victim he had been using cocaine and had thoughts of harming her, and the victim told him he "needed to get some help," the trial court did not abuse its discretion in sustaining the State's objection to a ques-

tion as to whether defendant wished now that he had gotten help because the question was leading.

**Am Jur 2d, Trial §§ 403, 427.**

**Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR2d 952.**

**7. Criminal Law § 1314 (NCI4th)— capital resentencing proceeding—private conversation with officer—previous knowledge by district attorney—exclusion of testimony—irrelevancy to show remorse mitigating circumstance**

Where the State disclosed in a suppression hearing in a capital resentencing hearing that it had a previously undisclosed portion of the police interview with defendant, and an officer testified that, after recording defendant's statement, he had a private conversation with defendant in which defendant began to cry and stated that he was on cocaine the night before the killing and that he lost control and killed the victim, any error by the trial court in excluding testimony by the officer that he had told the district attorney nine years earlier about this private conversation was harmless beyond a reasonable doubt where the jury heard similar accounts of the conversation from both defendant and the officer, and testimony that the officer had previously relayed this information to the district attorney would not have caused any juror to find the mitigating circumstance that defendant displayed remorse or sorrow for what he had done.

**Am Jur 2d, Criminal Law §§ 998, 1010, 1020; Evidence § 1158.**

**8. Criminal Law § 446 (NCI4th)— capital sentencing—prosecutors' arguments—one of worst murders prosecuted in courthouse**

The trial court did not err by allowing the prosecutors to argue to the jury in a capital sentencing proceeding in support of the especially heinous, atrocious, or cruel aggravating circumstance that this was one of the worst murders anyone had ever heard of and one of the worst ever prosecuted in the sixty-year history of the Buncombe County courthouse.

**Am Jur 2d, Trial §§ 841, 1076.**

**Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR4th 664.**

**9. Criminal Law § 1322 (NCI4th)— capital sentencing—life without parole—amended statute inapplicable**

The trial court did not deny defendant due process of law by refusing to instruct the jury in a capital sentencing proceeding that it could consider life without parole as the sentencing alternative to death pursuant to the amendment to N.C.G.S. § 15A-2002 since that amendment specifically provides that it applies only to offenses occurring on or after 1 October 1994; defendant's offense occurred in 1985; and defendant was sentenced after rehearing on 18 August 1994, also prior to the effective date of the amended statute. Even though defendant purportedly waived his *ex post facto* objections to retroactive application of the amended statute, defendant had no right to be sentenced under that statute.

**Am Jur 2d, Trial §§ 1077, 1078, 1132.**

**10. Criminal Law § 496 (NCI4th)— jury request to review testimony—denial by court—exercise of discretion**

The trial court did not fail to exercise its discretion in denying the jury's request to review a portion of defendant's mother's testimony in a capital sentencing proceeding where the trial judge stated for the record that the testimony of defendant's mother would not be sent into the jury room because the previous court reporter who had recorded the testimony had left; the trial judge added that the decision was in his discretion; when the jury returned to the courtroom, the judge explained the situation with the two reporters but added that the decision was in his discretion and reminded the jury to use its recollection of the evidence; and it is clear that the trial court did not rely solely on the fact that the transcript was not readily available.

**Am Jur 2d, Evidence § 1243.**

**11. Criminal Law § 1373 (NCI4th)— death penalty not disproportionate**

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalty imposed in similar cases where the jury found defendant guilty under the theory

of malice, premeditation, and deliberation; it also convicted defendant of felonious breaking or entering; the jury found the aggravating circumstance that the murder was especially heinous, atrocious, or cruel; defendant was twenty-nine years old and was the sole perpetrator of the murder; defendant followed the infliction of the fatal stab wounds upon the victim with a self-inflicted stab wound in an attempt to convince law enforcement authorities that the victim had attacked him; defendant expressed no concern for the victim and obtained no assistance for her; and the jury rejected the submitted mitigating circumstance that defendant had expressed remorse for the killing.

**Am Jur 2d, Trial §§ 841, 1076.**

**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.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.**

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sitton, J., at the 1 August 1994 Criminal Session of Superior Court, Buncombe County. Heard in the Supreme Court 14 May 1996.

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

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.*

FRYE, Justice.

Defendant, Michael Lee Fullwood, was convicted in 1985 of felonious breaking and entering and of the first-degree murder of Deidre Waters. He was sentenced to ten years' imprisonment for the breaking and entering conviction and to death for the first-degree murder conviction. On defendant's direct appeal, this Court found no error in the convictions and affirmed the sentences entered by the trial court.

*State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988). Subsequently, the Supreme Court of the United States vacated defendant's sentence of death for the murder of Deidre Waters and remanded the case to this Court for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Fullwood*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). On remand, this Court determined that *McKoy* error had occurred and that the error was not harmless beyond a reasonable doubt and remanded the case for a new capital sentencing proceeding. *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991). At the new capital sentencing proceeding, the jurors returned a recommendation of death. Judge Claude S. Sitton, in accordance with the jury's recommendation, imposed a sentence of death.

A detailed summary of the evidence introduced during defendant's original trial is set forth in our prior opinion on defendant's direct appeal, in which the majority of this Court found no error in defendant's trial. *Fullwood*, 323 N.C. 371, 373 S.E.2d 518. Except where necessary to develop and to determine the issues presented to this Court arising from defendant's resentencing proceeding, we will not repeat the evidence supporting defendant's convictions.

Defendant appeals to this Court as of right from the sentence of death. Defendant has brought forward twenty-six assignments of error. After a careful and thorough review of the transcript, record, briefs, and oral arguments of counsel, we reject each of these assignments of error and conclude that defendant's capital sentencing proceeding was free of prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's sentence of death.

**[1]** By an assignment of error, defendant contends that the trial court committed reversible error by dictating that only one of defendant's two attorneys could question jurors during most of the jury selection process. Defendant argues that, during the jury *voir dire*, the trial court arbitrarily prohibited one of his attorneys from questioning prospective jurors and that this ruling impermissibly infringed on his statutory right to the assistance of two attorneys in a capital trial and his constitutional right to the assistance of counsel. We disagree.

On the second day of jury selection, the trial court stated that only one of defendant's two attorneys would be permitted to question prospective jurors during the remainder of the jury selection process.

Defense counsel thrice requested the judge to reconsider, and the requests were denied. Defendant argues that N.C.G.S. § 7A-450(b1) entitles a capital defendant to two attorneys for his trial and sentencing proceeding and that the violation of this statute is *per se* prejudicial. *See State v. Hucks*, 323 N.C. 574, 579-81, 374 S.E.2d 240, 244-45 (1988) ("The statute requires the trial court to appoint assistant counsel as a matter of course when an indigent is to be prosecuted in a capital case.").

Defendant, relying on *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), and *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986), argues that a capital defendant has a constitutional right to have both his attorneys question potential jurors during the jury selection process. Defendant further argues that the court's decision to allow only one of his attorneys to question prospective jurors effectively relegated his second attorney to the position of a paralegal. We disagree.

In both *Eury* and *Mitchell*, we held that it was error for the trial court not to allow both attorneys to make closing arguments to the jury because N.C.G.S. § 84-14 specifically provides that "[i]n all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number." N.C.G.S. § 84-14 (1985). We note, however, that nothing in the statute provides that each attorney is entitled to question prospective jurors.

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992). Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge. N.C.G.S. § 15A-1214(c) (1988). The trial judge has broad discretion to regulate jury *voir dire*. *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994). "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Id.* The right to an adequate *voir dire* to identify unqualified jurors does not give rise to a constitutional violation unless the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning renders the

trial fundamentally unfair. *Morgan v. Illinois*, 504 U.S. 719, 730 n.5, 119 L. Ed. 2d 492, 503 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 114 L. Ed. 2d 493, 506 (1991).

In the instant case, the trial court did not abuse its discretion by allowing only one of defendant's two attorneys to question prospective jurors. We note that defendant does not argue, and the record fails to show, that because of the trial judge's control over the jury *voir dire*, any juror was accepted to which defendant had legal objections upon any ground. Indeed, defendant failed to exercise all of his peremptory challenges. We also note that defendant does not argue, and nothing in the record suggests, that during the jury *voir dire*, the trial judge prohibited or prevented defendant's attorneys from communicating, prompting, or consulting one another. *See State v. Frye*, 341 N.C. 470, 492-93, 461 S.E.2d 664, 675 (1995) (defendant's statutory entitlement to two attorneys and constitutional right to effective assistance of counsel were not violated where the trial court ruled that only one attorney from each side could make objections during jury *voir dire*), *cert. denied*, — U.S. —, 134 L. Ed. 2d 526 (1996). Because the trial court did not "deny defendant the assistance of a second attorney or so drastically circumscribe the second attorney's role as to render the appointment of two attorneys meaningless," *id.* at 493, 461 S.E.2d at 675, we conclude that the statute was not violated.

**[2]** Defendant also contends that the trial court's ruling that only one attorney could question prospective jurors violated defendant's right to the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. However, since defendant did not raise this constitutional issue at trial, he has failed to preserve it for our review. *See State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994). Accordingly, we reject this assignment of error.

**[3]** By three assignments of error, defendant contends that the trial court's comments to prospective jurors created a constitutionally unacceptable risk that jurors would not disclose information that was prejudicial to defendant.

Defendant argues that, at several points during jury *voir dire*, the trial court made comments that discouraged reasonable prospective jurors from volunteering potentially prejudicial information which otherwise might have surfaced during questioning by the parties.

When one juror was being asked if she knew defendant, she responded, "Is he a graduate of Asheville High?" The court immediately said, "I don't want jurors asking questions." Three prospective jurors heard this statement by the judge. On the second day of jury selection, the judge said:

> [I]t may be possible that I excuse some of you from the jury box at various times while certain questions may be asked, and that I may do that in an effort so that something might not be said that would tend to taint some other jurors. So be cautious in what you may say, and do not say, and do not say anything that would tend to taint any other juror.

All but one of the prospective jurors seated thereafter heard this comment. Defendant essentially contends that the court's instruction had a tendency to discourage prospective jurors from disclosing information that they considered prejudicial. Defendant argues that this was hardly the foundation upon which an impartial jury might be selected.

We note, however, that control of jury *voir dire* rests within the sound discretion of the trial court. *See Lee*, 335 N.C. at 268, 439 S.E.2d at 559. In the instant case, defendant has failed to show that the trial court abused its discretion. The transcript shows that defense counsel actively questioned the jurors and that they responded to his questions. Defendant does not allege that he was dissatisfied with the jury as seated. Further, defendant did not exhaust his peremptory challenges but passed upon the jurors. Under these circumstances, defendant has failed to show prejudice. Accordingly, we reject these assignments of error.

By two assignments of error, defendant contends that the trial court committed reversible error by preventing defense counsel from adequately inquiring into prospective jurors' attitudes about the death penalty.

**[4]** The trial court sustained the prosecutor's objection to defense counsel's question, "What are your feelings about the death penalty?" The court stated that the question was too general. Defendant argues that questions of this nature are routinely permitted and are essential to assess the jurors' ability to be fair to a capital defendant. Defendant concedes, however, that he did not exhaust his peremptory challenges, and therefore, error was not preserved. *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994). Nevertheless, defendant argues that this requirement serves no valid purpose. After carefully

considering defendant's argument, we find no compelling reason to depart from our precedent. Accordingly, we reject these assignments of error.

**[5]** By three assignments of error, defendant contends that the trial court erred in excluding admissible, relevant, and potentially compelling mitigating evidence in violation of the Eighth Amendment to the United States Constitution.

During defendant's direct examination of his mother, the following exchange took place:

> Q And I think you earlier testified that one of your sons is deceased?
>
> A Yes. My eldest son, Daniel Fullwood, Jr., was murdered in New York City September 16, 1984.
>
> Q What was [defendant's] reaction to that event?
>
> [PROSECUTOR]: Objection; calls for hearsay.
>
> COURT: Sustained.

After the trial court sustained the prosecutor's objection to this question, defense counsel pursued another line of questioning. Thereafter, out of the presence of the jury, defense counsel made an offer of proof to reflect what defendant's mother's answer would have been. During defendant's offer of proof, the following exchange took place with defense counsel questioning defendant's mother:

> Q What was [defendant's] reaction to the death of his brother about five months prior to [the victim's] murder?
>
> A [Defendant] was very upset at the death of his brother. He was there at the nursing home when I received the call about the death of my son.
>
> Q What did he do—did you see him do or say something?
>
> A Well, he called [the victim] and [the victim] came on over. She came in from work. She was right there with me. . . . But [defendant] was very upset about the death of his brother.
>
> Q Did [defendant] continue to be upset about the death of his brother?
>
> A I don't think he ever really got over it completely. He was depressed and everything.

Q Was [your son] who died [defendant's] older brother?

A He was, and they were very close. He was my first-born child.

Q You indicated that [defendant] was depressed over the loss of his brother?

A He was.

COURT: Now [defense counsel], you haven't asked those questions previously.

[DEFENSE COUNSEL]: No, sir, but I asked what [defendant's] reaction was to his brother's death and you sustained that.

COURT: Yes, sir, I did.

[DEFENSE COUNSEL]: Would you allow me to ask these questions?

COURT: I rule upon them when they're asked. . . .

Following defendant's offer of proof, the jury returned. However, defendant did not question defendant's mother further regarding defendant's reaction to his brother's death.

The "state of a person's health, the emotions he displayed on a given occasion, or other aspects of his physical appearance are proper subjects for lay opinion." *State v. Jennings*, 333 N.C. 579, 607, 430 S.E.2d 188, 201, *cert. denied*, ––– U.S. ––––, 126 L. Ed. 2d 602 (1993). Lay opinion on the emotional state of another is permissible if rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony. N.C.G.S. § 8C-1, Rule 701 (1992); *State v. Hutchens*, 110 N.C. App. 455, 429 S.E.2d 755, *disc. rev. denied*, 334 N.C. 437, 433 S.E.2d 181 (1993); *see also* N.C.G.S. § 8C-1, Rule 602 (1992) (witness may not testify to a matter unless he has personal knowledge of the matter).

At the time defendant's mother was asked the question regarding defendant's reaction to his brother's death, no evidence had been presented that defendant's mother had personal knowledge of defendant's mental state. Although testimony was presented during *voir dire* to establish that defendant's mother had personal knowledge sufficient to answer the question, defendant did not pursue the matter again before the jury. Thus, defendant has failed to show prejudicial error.

**[6]** Defendant also contends that the trial court erred in not allowing defendant to testify as to whether the victim had done anything to assist defendant in getting treatment for himself and whether defendant wished that he had gotten treatment prior to the commission of this offense. At trial, defendant testified that a few days before the murder, he returned to Asheville from an out-of-town trip and that he contacted the victim two days later and told her that he had been using cocaine and had thoughts of harming her. Defendant further testified that the victim told him that he "needed to get some help" and that he did not. Defendant argues that the trial court's ruling precluded him from showing how he had not followed the advice of the victim and how he regretted not getting help that would have saved her life.

During the direct examination of defendant, the following exchange took place:

Q Did [the victim] suggest anything that you should do?

A Well, she said that I needed to get some help.

. . . .

Q Did you get help, [defendant]?

A No, I didn't.

Q Do you wish now that you had?

A Yes.

[PROSECUTOR]: Objection.

COURT: Sustained.

The State argues that the trial court was correct in sustaining the objection because the question was leading. In *State v. Howard*, 320 N.C. 718, 721-22, 360 S.E.2d 790, 792 (1987), we said:

> The traditional North Carolina view is that, as a general proposition, leading questions are undesirable because of the "danger that they will suggest the desired reply to an eager and friendly witness. In effect, lawyers could testify, their testimony punctuated only by an occasional 'yes' or 'no' answer." *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986). However, the fact that a question may be answered yes or no does not make it leading. *State v. Thompson*, 306 N.C. 526, 529, 294 S.E.2d 314, 316-17 (1982) (quoting *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644,

652 [(1977)]). Whether a question is leading "depends not only on the form of the question but also on the context in which it is put." *State v. Thompson*, 306 N.C. at 529, 294 S.E.2d at 317.

Considering both the form of the question and the context in which it was put, we believe that the question was objectionable as leading defendant to defense counsel's desired response. 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, *Hosey*, 318 N.C. at 333-34, 348 S.E.2d at 808, and that these rulings are reversible only for an abuse of discretion, *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). In the instant case, we find no abuse of discretion by the trial court. Accordingly, we reject these assignments of error.

**[7]** By another assignment of error, defendant contends that the trial court violated his right to fundamental fairness and his right to make a complete defense by not allowing the defense to bolster the credibility of a key defense witness concerning a crucial portion of his testimony by presenting evidence that the witness had previously made a statement that was consistent with that testimony.

During the hearing on the motion to suppress defendant's confession, the State disclosed that it had a previously undisclosed portion of the police interview with defendant. This information consisted of statements made by defendant to Detective Walter Robertson, one of the investigators who had interrogated defendant in the hospital several days after the defendant's surgery for a self-inflicted abdominal wound.

Robertson testified in the suppression hearing that after he and Sergeant Ted Lambert had turned off the tape recorder when recording defendant's statement, Lambert left the room at defendant's request. Defendant then began to cry and told Robertson, whom defendant had known for fifteen years, that he was on cocaine the night before the killing and that he had lost control and killed the victim. When Lambert returned to the interrogation room, defendant repeated the statement but added that the victim had stabbed him first.

Robertson, when called to the witness stand by defendant, testified about the contents of the private conversation. When defense counsel attempted to elicit information from Robertson that he had told the district attorney nine years earlier about this private conversation, the State objected, and the trial court sustained the objection.

Defendant argues that the court's ruling allowed the jurors to discredit Robertson's testimony by making them think that he had held this information to himself. Defendant argues that Robertson's credibility was further attacked by the fact that Robertson was a friend of defendant's family and had known defendant for fifteen years and that Robertson did not reduce the statement to writing. Defendant contends that the testimony of Robertson was relevant to show that defendant was remorseful shortly after the victim's death. Defendant argues that he was prejudiced by the trial court's ruling in that no juror found as a mitigating circumstance that defendant displayed remorse or sorrow for what he had done.

Assuming *arguendo* that defendant's challenge is one of constitutional proportion, we nevertheless conclude that any error in excluding this testimony was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). A careful review of the transcripts in the instant case indicates that the jurors heard the account of the private conversation from both defendant and Robertson and that these accounts were substantially the same. We do not believe that Robertson's testimony that he had previously relayed this information to the district attorney would have caused any juror to find that defendant displayed remorse or sorrow for what he had done. Thus, the error, if any, was harmless beyond a reasonable doubt. Accordingly, we reject this assignment of error.

**[8]** By another assignment of error, defendant contends that the trial court erred in allowing the prosecutors' arguments to the jury that this was one of the worst murders anyone had ever heard of and one of the worst ever prosecuted in the sixty-year history of the Buncombe County courthouse. Defendant contends that these arguments denied him due process of law and violated his rights under the Eighth Amendment to the United States Constitution.

Defendant notes that the sole aggravating circumstance submitted to the jury in this case was that the murder was especially heinous, atrocious, or cruel. Defendant argues that the State used its closing arguments to improperly and unconstitutionally lend weight to this circumstance and to show prejudice not based on the evidence or the law. During closing arguments, the prosecutor argued:

> If he told the whole truth, that would exonerate her, and she would rest in peace and the resentment he carries for the fact that he had to go to prison over this and he might get sentenced to death over this still lingers in him, and the whole truth would be

that he massacred her, that he committed one of the worst murders anybody has ever heard of—

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: —24 stab wounds

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: That is an especially heinous, atrocious and cruel crime.

Thereafter, the second prosecutor argued:

Ladies and Gentlemen, if you look up at the wall behind you, there's some pictures of the fellows who have sat in this courtroom as Judges. The Buncombe County Courthouse was built back in the thirties. It's been here for over 60 years. We try hundreds of cases each year in this courthouse, so over that period there have been thousands of cases heard in this room, and I submit to you that there have not been many that were heard worse than this case.

[DEFENSE COUNSEL]: Objection. I ask that the jury be instructed, Your Honor.

COURT: Overruled.

It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases. *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). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 844 (1984). Conversely, counsel is prohibited from arguing facts which are not supported by the evidence. *State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980). These principles apply not only to ordinary jury arguments, but also to arguments made at the close of the sentencing phase in capital cases. *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

In the instant case, we note that defendant makes no argument that the evidence presented at trial was insufficient to support the jury's finding of the aggravating circumstance that this murder was

especially heinous, atrocious, or cruel. Instead, defendant argues that the prosecutors gave an improper assessment of the evidence by comparing this case with other cases tried in Buncombe County over the past sixty years. We conclude that the record in this case supports the prosecutors' arguments that this crime was especially heinous, atrocious, or cruel. After reviewing the prosecutors' arguments in their entirety, we conclude that while they argued vigorously for imposition of the death penalty, their arguments were not such as to violate defendant's rights under the Eighth Amendment or to deny him due process of law. Accordingly, we reject this assignment of error.

**[9]** By another assignment of error, defendant contends that the trial court denied him due process of law by refusing to allow the jury to consider life without parole as the sentencing alternative to death. Defendant argues that because the General Assembly recently amended N.C.G.S. § 15A-2002 to require the trial court to instruct the jury during a capital sentencing proceeding that "a sentence of life imprisonment means a sentence of life without parole," he was entitled to such an instruction in this case. N.C.G.S. § 15A-2002 (Supp. 1995). We disagree.

Since N.C.G.S. § 15A-2002 applies prospectively only and was not made to apply retroactively, it has no effect in this case. *See State v. Green*, 336 N.C. 142, 157, 443 S.E.2d 14, 23, *cert. denied*, —— U.S. ——, 130 L.Ed.2d 547 (1994). Defendant "concedes" that "[r]etroactive application of the new legislation in question in the case at bar would violate the prohibition against *ex post facto* laws because it makes the minimum sentence for first degree murder more onerous, life without parole, than life with the possibility of parole after twenty years, the punishment in effect when the crime was committed." Nevertheless, defendant argues that he "waived his *ex post facto* objections by stating on the record that he wished to be placed in the same position as defendants whose offenses occurred after October 1, 1994."

The amended statute specifically provides:

> This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occuring before the effective date of this act are not abated or affected by the repeal or amendment in this act [or] any statute, and the statute that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences.

Act of March 26, 1994, ch. 24, sec. 14(b), 1994 N.C. Sess. Laws, 82, 96. In the instant case, defendant's offense occurred in 1985, some nine years before the effective date of the amended statute. Additionally, defendant was sentenced after rehearing on 18 August 1994, also prior to the effective date of the amended statute. Under these circumstances, defendant had no right to be sentenced under the amended statute, and it would have been improper for the trial judge to instruct the jury contrary to the statute then in effect. Accordingly, we reject this assignment of error.

**[10]** By another assignment of error, defendant contends that the trial court committed reversible error by failing to exercise its discretion in determining the proper response to a jury request to review a portion of defendant's mother's testimony. We disagree.

Following the court's charge to the jury, the jury deliberated one hour and forty-five minutes before recessing. Shortly after resuming deliberations, the jury sent a note requesting certain exhibits and asking to review a portion of defendant's mother's testimony having to do with a racially motivated attack on defendant when he was a child. The trial judge stated for the record that the testimony of defendant's mother would not be sent into the jury room because the previous court reporter who had recorded the testimony had left. The trial judge added that the decision was in his discretion. When the jury returned to the courtroom, the judge explained the situation with the two reporters but added that the decision was in his discretion and reminded the jury to use its recollection of the evidence.

In *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985), we said:

> [N.C.G.S. § 15A-1233] imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue. Insofar as the statute requires the judge to exercise discretion, it is merely a codification of the common law rule. Insofar as the statute requires the trial court to summon all jurors to the courtroom, it is a codification of a long-standing practice in the trial courts of this state.

In the instant case, the question is whether the trial court exercised its discretion in denying the jury's request to review the testimony. After reviewing the transcripts and the record, we are convinced that the trial judge plainly exercised his discretion and did not rely solely on the fact that the transcript was not readily available. Defendant does not contend that the trial court abused its discretion. This assignment of error is without merit.

## PRESERVATION ISSUES

Defendant raises additional assignments of error which he concedes have been decided against him by this Court: (1) the trial court violated defendant's due process rights by denying his motion to inform jurors of parole eligibility; (2) the trial court violated defendant's right to effective assistance of counsel, to due process of law, and to reliability in capital sentencing by denying his motion for individual jury *voir dire*; (3) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the instructions used the inherently ambiguous and vague terms "satisfaction" and "satisfy" to define the burden of proof, thus permitting jurors to establish for themselves the legal standard to be applied to the evidence; (4) the trial court's instructions that permitted jurors to reject submitted mitigation evidence on the basis that it had no mitigating value violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (5) the trial court violated defendant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by denying defendant the opportunity to examine each juror challenged by the State during death-qualification prior to his or her excusal and by excusing jurors defendant was not permitted to question; (6) the trial court's use of the term "may" in sentencing Issues Three and Four made consideration of proven mitigation discretionary in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; (7) the trial court's failure to prevent the improper and inflammatory argument of the prosecutor in the penalty phase denied defendant due process of law, the right to be free of cruel and unusual punishment, and the right to effective assistance of counsel; and (8) the trial court committed reversible error in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by submitting to the jury the "especially heinous, atrocious, or cruel"

aggravating circumstance based upon instructions that failed adequately to limit the application of this inherently vague and overbroad circumstance.

Defendant 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. Accordingly, we reject these assignments of error.

## PROPORTIONALITY REVIEW

**[11]** Having concluded that defendant's capital resentencing proceeding was free of 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) (Supp. 1995).

In the instant case, the original jury found defendant guilty of first-degree murder under the theory of malice, premeditation, and deliberation. It also convicted defendant of felonious breaking and entering. The trial court submitted one aggravating circumstance to the jury: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury found this aggravating circumstances to exist. One or more jurors found the following mitigating circumstances: (1) the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (2) at the time of the murder, defendant suffered from alcohol and substance abuse; (3) defendant had never been convicted of any felony involving violence prior to 29 March 1985; (4) defendant had never been convicted of any crime involving violence to another person prior to 29 March 1985; (5) defendant was raised in a home where his father abused alcohol and physically abused his mother; (6) defendant has not received any disciplinary actions or write-ups in the nine and one-half years since he has been incarcerated; (7) defendant has been a model inmate at Central

Prison; (8) defendant has consistently acted in a mature, responsible manner in dealing with prison personnel; (9) defendant has shown determination in pursuing his G.E.D., despite borderline intellectual functioning; (10) defendant has grown and matured spiritually in his religious faith since he has been at Central Prison, (11) defendant has shown the capacity to continue to adjust well to prison life; and (12) the catchall circumstance, N.C.G.S. § 15A-2000(f)(9).

After thoroughly examining the record, transcripts, and briefs in the instant 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.

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 have found the death penalty disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate.

Of the seven cases in which this Court has found the death penalty disproportionate, only two involved the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170. Neither requires a finding that the death penalty is disproportionate in this case.

In *Stokes*, defendant and three young men robbed the victim's place of business. During the robbery, one of the assailants severely beat the victim about the head, killing him. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. The facts of *Stokes* are distinguishable from the present

case. First, the defendant in *Stokes* was seventeen years old; defendant in this case was twenty-nine years old. Second, in *Stokes* there was no evidence showing who was the leader in the robbery or that the defendant deserved a death sentence any more than an older participant who received a life sentence. In the instant case, defendant was the sole perpetrator of this brutal murder. Third, the defendant in *Stokes* was convicted on a felony murder theory, and there was little or no evidence that he premeditated the killing. Here, defendant was convicted on the basis of premeditation and deliberation, and there was ample evidence of premeditation and deliberation. Fourth, in *Stokes*, the jury found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. In the instant case, this mitigating circumstance was submitted to the jury and rejected.

In *Bondurant*, the defendant shot the victim while they were riding together in a car. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. The Court "deem[ed] it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's life] and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. The defendant in *Bondurant* then went inside to secure medical treatment for the victim. In the instant case, by contrast, defendant followed the infliction of the fatal wound with a self-inflicted stab wound in an attempt to convince law enforcement authorities that the victim had attacked him. When ambulance drivers arrived, defendant did not express any concern for the victim; instead, he acted as if the victim had stabbed him. The trial court submitted and the jury rejected the mitigating circumstance that defendant had expressed remorse about killing the victim. In the instant case, defendant took no actions comparable to the actions taken by the defendant in *Bondurant*, and his later expressions of remorse are hardly comparable to the actions of the defendant in *Bondurant*.

It is also proper to compare this case to those where the death sentence was found 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 our 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 our duty." *Id.* It suffices to say here that we conclude the present case is similar to certain cases in which we have found the death sentence proportionate.

There are six similar cases in the proportionality pool in which the jury recommended a sentence of death after finding as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (the defendant stabbed his wife while she was in an automobile with their ten-year-old son, who tried to stop the defendant), *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 341 (1993); *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987) (the defendant killed his former girlfriend in the parking lot of a nightclub by cutting her throat), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (the defendant slashed his lover's husband's throat, shot him twice, dragged him into a ditch, and then shot him two more times in the face), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (the defendant beat his mother-in-law to death with a cast-iron skillet, inflicting multiple wounds to her head, neck, and shoulders); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984) (the defendant killed his estranged girlfriend by stabbing her repeatedly in front of her mother and daughter), *cert. denied*, 471 U.S. 1030, 84 L. Ed. 2d 324 (1985); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (the defendant shot and killed his wife in the presence of their young child), *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240 (1981). We find these cases to be most comparable to the one at hand.

In *Syriani*, the most similar of the six cases, the defendant accosted his estranged wife and stabbed her to death. Following the assault, the defendant walked calmly back to his van and drove to a nearby fire station, where he told a fireman he needed medical attention because he had been in a fight. *Syriani*, 333 N.C. at 359, 364, 428 S.E.2d at 121-22, 124. The jury found as the single aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The jury also found eight mitigating circumstances. *Id.* at 401, 428 S.E.2d at 146. This Court concluded that the sentence of death was not disproportionate based on evidence similar to that in the present case, including the nature of the killing, the lack of remorse or pity, and the defendant's cool actions after the murder. *Id.* at 401-06, 428 S.E.2d at 146-49. In the instant case, defendant expressed no concern for the victim and obtained no assistance for her. Instead, he faked a suicide attempt and told the police that the victim had attacked him.

After comparing this case to other roughly similar cases as to the crime and the defendant, we conclude that this case has the charac-

teristics of first-degree murders for which we have previously upheld the death penalty as proportionate. Accordingly, we cannot conclude that defendant's death sentence is excessive or disproportionate. We hold that defendant received a fair trial, free of prejudicial error.

NO ERROR.

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

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

No. 328P96

Case below: 123 N.C.App. 256

Motion by plaintiffs (Act-Up et al) for temporary stay allowed 31 July 1996.

AL SMITH BUICK CO. v. MAZADA MOTOR OF AMERICA

No. 283P96

Case below: 122 N.C.App. 429

Petition by defendants for writ of supersedeas denied and temporary stay dissolved 30 July 1996. Motion by plaintiff for supersedeas bond denied 30 July 1996. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

BRADDY v. NATIONWIDE MUTUAL LIABILITY INS. CO.

No. 285P96

Case below: 122 N.C.App. 402

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 30 July 1996. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

CARTER v. GAMBRELL

No. 44P96

Case below: 121 N.C.App. 219

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

DAVIS v. CENTRAL CAROLINA BANK

No. 234P96

Case below: 122 N.C.App. 395

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

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

No. 43P96

Case below: 121 N.C.App. 105

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

DODDER v. YATES CONSTRUCTION CO.

No. 299PA96

Case below: 122 N.C.App. 577

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996.

DURHAM v. BRANCH BANKING & TRUST CO.

No. 160P96

Case below: 121 N.C.App. 787

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

EURY v. NATIONWIDE MUTUAL INS. CO.

No. 224P96

Case below: 116 N.C.App. 490

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

GLOSSON v. DURHAM HOUSING AUTH.

No. 250P96

Case below: 122 N.C.App. 575

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

H.B.S. CONTRACTORS v. CUMBERLAND BD. OF EDUCATION

No. 180PA96

Case below: 122 N.C.App. 49

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996.

IN RE JACKSON

No. 191P96

Case below: 122 N.C.App. 197

Petition by respondent (Bridget Walker) for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

IN RE WALDREN

No. 516P95

Case below: 120 N.C.App. 646

Notice of appeal by respondent (Jinnell Waldren) (substantial constitutional question) dismissed ex mero motu 30 July 1996. Petition by respondent (Jinnell Waldren for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996. Petition by respondent (Jerry Waldren, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

KING v. N.C. DEPT. OF TRANSPORTATION

No. 110P96

Case below: 121 N.C.App. 706

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

METRIC CONSTRUCTORS, INC. v.
HAWKER SIDDELEY POWER ENGINEERING

No. 122A96

Case below: 121 N.C.App. 530

Motion by defendant (Hawker Siddeley) to withdraw notice of appeal and petition for discretionary review allowed 25 July 1996.

MILTLAND RALEIGH-DURHAM v. MUDIE

No. 208P96

Case below: 122 N.C.App. 168

343 N.C. 512

Motion by defendant for reconsideration of notice of appeal and petition for discretionary review dismissed 30 July 1996.

N.C. CENTRAL UNIVERSITY v. TAYLOR

No. 282P96

Case below: 122 N.C.App. 609

Motion by Attorney General for temporary stay allowed 26 July 1996 pending determination of North Carolina Central University's petition for discretionary review.

N.C. STATE BAR v. COLEMAN

No. 218P96

Case below: 122 N.C.App. 197

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996. Motion by plaintiff to dismiss petition for discretionary review denied 30 July 1996.

PRESBYTERIAN-ORTHOPAEDIC HOSP. v.
N.C. DEPT. OF HUMAN RESOURCES

No. 329P96

Case below: 122 N.C.App. 529

Motion by Appellant (Stanly Memorial) for temporary stay allowed 30 July 1996.

QURNEH v. COLIE

No. 275P96

Case below: 122 N.C.App. 553

Motion by plaintiff to withdraw notice of appeal and petition for discretionary review allowed 10 July 1996.

ROSE v. ISENHOUR BRICK & TILE CO.

No. 448A95

Case below: 120 N.C.App. 235

Motion by defendant (Isenhour Brick) to dismiss appeal for substantial noncompliance with North Carolina Rules of Appellate Procedure denied 30 July 1996.

SPURLOCK v. ALEXANDER

No. 153P96

Case below: 121 N.C.App. 668

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. ARTIS

No. 316P96

Case below: 123 N.C.App. 114

Motion by the Attorney General for temporary stay allowed 22 July 1996.

STATE v. BURR

No. 179A93-2

Case below: Alamance County Superior Court

Upon consideration of defendant's petition for writ of certiorari to review the order of the Superior Court, Alamance County dated 29 April 1996, denying defendant's motion for a stay of execution, the following order is entered 10 July 1996: Defendant's 26 July 1996 execution is stayed. This case is remanded to Superior Court, Alamance County, where defendant shall be given 120 days from the date of the appointment of counsel, 29 April 1996, to file a motion for appropriate relief up to and including 28 August 1996.

STATE v. DAUGHTRY

No. 412A93-2

Case below: Johnston County Superior Court

Upon defendant's petition for writ of certiorari to review the order of the Superior Court, entered 1 July 1996, denying defendant's motions for funding and appointment of a private investigator and mitigation expert, denying defendant's motion for an ex parte hearing regarding defendant's motion for a forensic psychiatrist, and for stay of execution pending disposition of the petition for writ of certiorari, the petition for writ of certiorari is allowed for the sole purpose of entering the following order: Defendant shall have up to and including the 28th day of October 1996 to file a motion for appropriate relief in the Superior Court, Johnston County. In all other respects the petition for writ of certiorari is denied. The motion for stay of execution is allowed pending the timely filing of a motion for appropriate relief.

By order of the Court in conference, this the 23rd day of July 1996.

STATE v. DIAL

No. 251P96

Case below: 122 N.C.App. 298

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996. Petition by defendant for writ of certiorari to review the decision of the Court of Appeals denied 30 July 1996.

STATE v. GREEN

No. 385A84-4

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County, denied 30 July 1996. Motion by the State to dismiss defendant's petition for writ of certiorari allowed 31 July 1996.

STATE v. JONES

No. 395A91-3

Case below: Wake County Superior Court

Petition by defendant for writ of supersedeas denied 30 July 1996. Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County, denied 30 July 1996. Motion by defendant for remand denied 30 July 1996. Motion for defendant for discovery/preservation of audiotapes and documents held in possession of the State denied 30 July 1996.

STATE v. KEEL

No. 134A93-5

Case below: Edgecombe County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Edgecombe County, denied 30 July 1996. Petition by defendant for a writ of mandamus denied 30 July 1996.

STATE v. LYNCH

No. 242A93-2

Case below: Gaston County Superior Court

Upon the pro se petition by defendant for a writ of certiorari to review the order of the Gaston County Superior Court, defendant's 12 July 1996 execution is stayed and the case is remanded 26 June 1996 to the Gaston County Superior Court for a hearing pursuant to N.C.G.S. § 15-194, at which time the superior court shall set a new execution date and appoint counsel to represent defendant in the filing of a new motion for appropriate relief.

STATE v. McCOY

No. 258P96

Case below: 122 N.C.App. 482

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. MILLER

No. 99P96

Case below: 121 N.C.App. 625

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. MOORE

No. 245P96

Case below: 122 N.C.App. 576

Petition by Attorney General for writ of supersedeas denied 30 July 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. POPE

No. 182P96

Case below: 122 N.C.App. 89

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. RAINEY

No. 269P96

Case below: 122 N.C.App. 580

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. SHERRON

No. 260P96

Case below: 122 N.C.App. 400

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 30 July 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. WARD

No. 158A92-2

Case below: Pitt County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Pitt County, denied 30 July 1996.

STATE v. WHITLOR

No. 207P96

Case below: 122 N.C.App. 197

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STATE v. WORTHINGTON

No. 265P96

Case below: 122 N.C.App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

STONE v. G & G BUILDERS

No. 161PA96

Case below: 121 N.C.App. 671

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996.

THREE GUYS REAL ESTATE v. HARNETT COUNTY

No. 242PA96

Case below: 122 N.C.App. 362

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996.

TISE v. YATES CONSTRUCTION CO.

No. 300PA96

Case below: 122 N.C.App. 582

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 July 1996.

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

No. 87P96

Case below: 121 N.C.App. 602

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

WOOTEN v. MATTHEWS

No. 214P96

Case below: 121 N.C.App. 789

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 July 1996.

# APPENDIXES

RULES FOR PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

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AMENDMENT TO THE RULES OF APPELLATE PROCEDURE

---

AMENDMENT TO INTERNAL OPERATING PROCEDURES PRINTING DEPARTMENT

---

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

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AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

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AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

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# AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

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# AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

## ORDER ADOPTING RULES IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

WHEREAS, section 7A-38.3 of the North Carolina General Statutes establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to the bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to implement section 7A-38.3 by adopting rules and standards concerning said program,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e) Rules Implementing the Prelitigation Farm Nuisance Mediation Program are adopted to read as in the following pages. These Rules shall be effective on the 1st day of July, 1996.

Adopted by the Court in conference the 3rd day of April, 1996. The Appellate Division Reporter shall publish the Rules Implementing the Prelitigation Farm Nuisance Mediation Program in their entirety at the earliest practicable date.

Orr, J.
For the Court

## RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

### RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

### RULE 2. EXEMPTION FROM G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1.

### RULE 3. SELECTION OF MEDIATOR.

A. *Time Period for Selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. *Selection of Certified Mediator by Agreement.* The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form pre-

pared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of Non-Certified Mediator by Agreement.* The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court Appointment of Mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. *Mediator Information Directory.* To assist parties in learning more about the qualifications and experience of certified mediators,

the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

## RULE 4. THE PRELITIGATION FARM MEDIATION.

A. *When Mediation is to be Completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the Conference is to be Held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a sixty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. *Duties of Parties, Attorneys and Other Participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. *Sanctions for Failure to Attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

## RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. *Authority of Mediator.*

(1) *Control of Mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private Consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) *Scheduling the Conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of Mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(1);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) *Declaring Impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and Holding the Conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

## RULE 6. COMPENSATION OF THE MEDIATOR.

A. *By Agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. *By Court Order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $100.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $100.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. *Indigent Cases.* No party found to be indigent by the court for the purposes of there rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee. Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. The judge may take into consideration the outcome of the action and whether a

judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Payment of Compensation by Parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

## RULE 7. WAIVER OF MEDIATION.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

## RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. *Contents of Certification.* Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. *Deadline for Filing Mediator's Certification.* The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

## RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

## RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

## ORDER ADOPTING
## AMENDMENT TO RULES OF APPELLATE PROCEDURE

Appendix F. Fees and Costs of the North Carolina Rules of Appellate Procedure, paragraph 6, is hereby amended to read as follows:

> Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

This amendment shall be effective 1 July 1996.

Adopted by the Court in Conference this 9th day of May, 1996. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Orr, J.
For the Court

## ORDER ADOPTING AMENDMENT TO INTERNAL OPERATING PROCEDURES PRINTING DEPARTMENT

The Internal Operating Procedures of the Supreme Court Printing Department, published as the Internal Operating Procedures Mimeographing Department at 295 N.C. 743, and amended and republished as the Internal Operating Procedures Printing Department at 327 N.C. 729, are hereby amended as follows:

Rule 8 shall be amended as follows:

8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced shall be printed at a cost of **$1.75** per printed page.

This amendment shall become effective on the 1st day of July 1996.

Adopted by the Court in Conference this 9th day of May, 1996. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Orr, J.
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 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 appointment of counsel for indigent persons, as particularly set forth in 27 N.C.A.C. 1D .0503, be amended as follows (additions are underlined, deletions are stricken through):

Title 27, Chapter 1
Subchapter D

Section .0500 The Model Plan for the Appointment of Counsel for Indigent Defendants

. . .

Section .0503 List of Attorneys

(a) Any attorney engaged in the private practice of law primarily in the judicial district who

(1) maintains an office in the judicial district; and

(2) practices criminal law in the courts of the _____ Judicial District to any appreciable extent, or intends or desires to do so, may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorney will be placed on the lists.

(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies ~~punishable by imprisonment for not more than five years~~ classified as Class I or Class J.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly

adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of September, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of November, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of November, 1996.

s/Orr, J.
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0129, be amended as follows (additions are underlined):

Title 27, Chapter 1

Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .0129 Confidentiality

(a) Except as otherwise provided in this rule and G.S. 84-24(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

. . .

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. Further, this provision will not be construed to prohibit the North Carolina State Bar, with the consent of the chairperson of the Grievance Committee, from providing relevant information concerning a letter of caution, letter of warning or admonition to authorized agencies investigating complaints against North Carolina attorneys, so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as the North Carolina State Bar. In addition, the secretary will transmit . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of September, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of November, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of November, 1996.

s/Orr, J.
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0115, be amended as follows (additions are underlined, deletions are stricken through):

Title 27, Chapter 1
Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .0115 Effect of a Finding of Guilt in any Criminal Case

(a) Any member convicted of or sentenced for the commission of a serious crime in any state or federal court, whether such a conviction or judgment results from a plea of guilty, no contest, or nolo contendere or from a verdict after trial, will, upon the conviction or judgment becoming final by affirmation on appeal or failure to perfect an appeal within the time allowed, be suspended from the practice of law as set out in Rule .0115(d) below.

. . .

(c) Upon the receipt of a certificate of the conviction of a member of a serious crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, will authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. ~~No hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.~~ The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. 84-24(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding

against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of September, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of November, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of November, 1996.

s/Orr, J.
For the Court

## AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1996.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0123, be amended as follows: (additions are underlined, deletions are stricken through):

Title 27, Chapter 1
Subchapter B

Section .0100 Discipline and Disability of Attorneys

. . .

Rule .0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken:

. . .

(3) Censure, suspension or disbarment—The chairperson of the hearing committee will file the ~~order of~~ censure, order of suspension or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address and of any county where the defendant maintains an office. A copy of the ~~order of~~ censure, order of suspension or disbarment will also be sent to ~~the clerk of the superior court in any county where the defendant maintains an office, to~~ the North Carolina Court of Appeals, to the North Carolina Supreme Court, ~~to~~ the United States District Courts in North Carolina, ~~to~~ the Fourth Circuit Court of Appeals, and to the United States Supreme Court. ~~Orders of~~ Ceensures imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as ~~orders of~~ censures imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and of any county where the disabled member maintains an office and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of September, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of November, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.
This the 7th day of November, 1996.

s/Orr, J.
For the Court

## AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D .1719, be amended as follows (additions are underlined):

Title 27, Chapter 1
Subchapter D

Section .1700 The Plan of Legal Specialization

. . .

Rule .1719 Specialty Committees

(a) . . . All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term, provided, however, that the board may reappoint the chairperson of a committee to a third three-year term if the board determines that the reappointment is in the best interest of the specialization program. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 26, 1996.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of September, 1996.

s/L. Thomas Lunsford
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of November, 1996.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of November, 1996.

s/Orr, J.
For the Court

# ANALYTICAL INDEX

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# WORD AND PHRASE INDEX

# ANALYTICAL INDEX

**Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.**

## TOPICS COVERED IN THIS INDEX

## APPEAL AND ERROR

**§ 22 (NCI4th). Dissent to decision of Court of Appeals generally**

In an appeal by the State to the Supreme Court based on a dissent in the Court of Appeals which concluded that acting with another person to buy cocaine was evidence of acting in concert in a death during the purchase, the State was not limited to arguing the reasons in the dissent as to why there was evidence to support the charge. **State v. Kaley,** 107.

**§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion**

The question of whether the trial court erred in a first-degree murder prosecution by allowing the director of medical records at a hospital to testify about recorded statements made by the victim to physicians and nurses was not preserved for appeal since defendant did not object at trial or allege plain error. **State v. Scott,** 313.

**§ 150 (NCI4th). Preserving question for appeal; constitutional issues**

Defendant failed to preserve for appellate review an issue as to whether his constitutional rights were violated by the trial court's rulings disallowing a defense witness's assertion of his right against self-incrimination for certain questions and by alleged prosecutorial misconduct in posing questions to the witness when the State knew the witness would invoke his right against self-incrimination in response to those questions where defense counsel's remarks to the court focused exclusively on protecting the witness's rights and did not inform the court that defendant contended that the questions and rulings placed defendant's rights to a fair trial and due process in jeopardy. **State v. King**, 29.

Defendant failed to preserve a constitutional issue for appellate review where defendant did not raise the issue at trial. **State v. Fullwood,** 725.

## ARREST AND BAIL

**§ 57 (NCI4th). Arrest by a law enforcement officer without a warrant generally**

There was no constitutional violation requiring the suppression of defendant's confession in a first-degree murder prosecution where defendant contended that his confession was obtained in violation of Article I, Section 20 of the North Carolina Constitution based on delay in having a magistrate determine whether there was probable cause for issuance of an arrest warrant. **State v. Chapman,** 495.

**§ 135 (NCI4th). Right of arrested person to communicate with friends or counsel generally**

A first-degree murder defendant was not prejudiced by the failure to advise him of his right to communicate with his friends. **State v. Chapman,** 495.

## ASSAULT AND BATTERY

**§ 26 (NCI4th). Sufficiency of evidence where weapon is a firearm**

The evidence was sufficient to allow the jury to reasonably conclude that defendant, individually or in concert with another, intended to and did shoot an assault victim so as to support the trial court's submission to the jury of the charge of assault with a deadly weapon with intent to kill inflicting serious injury. **State v. King,** 29.

## BUILDING CODES AND REGULATIONS

**§ 24 (NCI4th). State building code enforcement; qualifications of officials; sanctions**

The Code Officials Qualifications Board had statutory authority to revoke a "standard certificate" and a "limited certificate" issued to a county building inspector where the Board determined that the inspector was guilty of gross negligence and gross incompetence in failing to detect plainly visible building code violations in the construction of a house. **Bunch v. N.C. Code Officials Qualifications Board,** 97.

## CONSTITUTIONAL LAW

**§ 86 (NCI4th). State and federal aspects of discrimination**

An action for direct judicial review of a tax assessment claim under G.S. 105-381 which included a claim under 42 U.S.C. § 1983 based upon equal protection arising from the ad valorem assessment of engineering drawings following the sale of the company was remanded where the trial court had entered summary judgment for Wake County; a taxpayer may pursue remedies under 42 U.S.C. § 1983 regardless of the state statutory or administrative remedies provided by the North Carolina Machinery Act where the taxpayer asserts civil rights violations based upon a substantive constitutional right. **Edward Valves, Inc. v. Wake County,** 426.

**§ 172 (NCI4th). Attachment of jeopardy; punishment for violation of administrative rule or regulation**

The ten-day administrative revocation of defendant's driver's license under G.S. 20-16.5 after his arrest for DWI constitutes a remedial highway safety measure and not punishment for purposes of double jeopardy analysis, and defendant's subsequent conviction for DWI did not amount to a second punishment for the same offense in violation of his right not to be placed in double jeopardy. **State v. Oliver,** 202.

**§ 287 (NCI4th). What constitutes denial of effective assistance of counsel; failure to remove counsel at defendant's request**

The trial court did not err in a first-degree murder prosecution by not allowing trial counsel to withdraw. **State v. Cole,** 399.

**§ 309 (NCI4th). Effectiveness of assistance of counsel; counsel's abandonment of client's interest**

Assuming that defendant's trial counsel conceded the existence of the sole aggravating circumstance submitted to the jury during his closing argument in a capital sentencing proceeding, this concession did not violate defendant's right to the effective assistance of counsel. **State v. Boyd,** 699.

Defendant's counsel did not concede defendant's guilt of financial transaction card fraud during his closing argument where counsel stated that the State had put on evidence that an accomplice gave money to defendant when he used the card, that the jury would apply that evidence, and that it did not show that defendant had committed other crimes charged even if he had received and spent the money. **State v. Bishop,** 518.

**§ 314 (NCI4th). What constitutes denial of effective assistance of counsel; during sentencing hearing generally**

The trial court did not err in a capital sentencing hearing by permitting defense counsel to accede to defendant's choice to present defendant's penalty phase case

A first-degree murder defendant's right to be taken before a magistrate without unnecessary delay was not violated where defendant was arrested at 9:30 a.m. and a large part of the time until he was taken before a magistrate at 8:00 p.m. was spent interrogating defendant. **Ibid.**

**§ 107 (NCI4th). Discovery proceedings; reports not subject to disclosure by State**

The refusal of the trial court in a first-degree murder prosecution to compel the State to supply defendant with the criminal records of witnesses did not violate Rule 7.3 of the North Carolina Rules of Professional Conduct or due process. **State v. Kilpatrick,** 466.

**§ 113 (NCI4th). Regulation of discovery; failure to comply**

The trial court did not err in a noncapital first-degree murder prosecution by admitting a statement by defendant that if he ever got out he would go after the victim's parents where defendant argued that trial counsel was not made aware of the incriminating statement that defendant made to a witness, despite the open file policy, and that to allow the prosecutor to introduce this statement circumvents the intent of the discovery statute. **State v. Reeves,** 111.

**§ 375 (NCI4th). Expression of opinion on evidence during trial; miscellaneous comments and actions**

Defendant was not prejudiced by several comments the trial court and the prosecutor made out of the jury's presence indicating impatience with defense counsel's repetitive cross-examinations and concern about counsel's last-minute subpoenas and motion for a fingerprint expert. **State v. Hester,** 266.

**§ 378 (NCI4th). Expression of opinion on evidence during trial; admonition of counsel to avoid repetitious questioning**

The trial court did not express an opinion on questions of fact in the jury's presence by comments emphasizing that defense counsel's questioning was repetitive and indicating that it would like to move on. **State v. Hester,** 266.

**§ 398 (NCI4th). Expression of opinion on evidence during trial; miscellaneous statements or actions**

The trial court did not express an opinion with respect to defendant's guilt in a first-degree murder prosecution where a juror approached the judge concerned about his employment and the judge made a statement which commented on the attitude he perceived employers to have and expressed no opinion on any question of fact to be decided by the jury. **State v. Bishop,** 518.

**§ 409 (NCI4th). Argument of counsel; control of argument by court**

There was no error in a capital sentencing proceeding where defendant contended that the trial court refused to allow both of defendant's attorneys to argue during the final argument but the court's statement is at worse ambiguous; the law allows but does not require that more than one defense attorney address the jury during the defendant's final argument and the transcript cannot be interpreted to show that the court refused to permit both of defendant's attorneys to argue after the State where they never specifically requested to do so and never objected. **State v. Williams,** 345.

CRIMINAL LAW—Continued

**CRIMINAL LAW—Continued**

The prosecutor did not ridicule the psychologist who testified for defendant or inject his own personal beliefs into the case by statements in his jury argument in a capital sentencing proceeding in which he pointed out differences between practicing psychiatrists and psychologists. **State v. Womble,** 667.

**§ 442 (NCI4th). Argument of counsel; comment on jury's duty**

The prosecutor's closing argument in a trial for two first-degree murders did not impermissibly urge guilty verdicts based on general deterrence and community fear of crime; rather, the prosecutor was commenting on the seriousness of the crimes and the importance of the jury's duty. **State v. Barrett,** 164.

A prosecutor's argument in a capital sentencing proceeding was not so grossly improper that the court erred by not intervening ex memo motu where defendant contended that the prosecutor improperly advised jurors not to let feelings of mercy or sympathy overwhelm their objectivity. **State v. Bishop,** 518.

**§ 443 (NCI4th). Argument of counsel; explanation of roles of judge, prosecutor, defense counsel**

The trial court did not err by not intervening ex mero motu in the prosecutor's closing argument in a first-degree murder prosecution where defendant claimed that the prosecutor improperly described his role as the victim's personal representative. **State v. Bishop,** 518.

**§ 446 (NCI4th). Argument of counsel; inflammatory comments generally; significance or impact of case**

The trial court did not err by allowing the prosecutors to argue to the jury in a capital sentencing proceeding in support of the especially heinous, atrocious, or cruel aggravating circumstance that this was one of the worst murders anyone had ever heard of and one of the worst ever prosecuted in the sixty-year history of the Buncombe County courthouse. **State v. Fullwood,** 725.

**§ 447 (NCI4th). Argument of counsel; comment on rights of victim, victim's family**

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor improperly urged the jury to impose the death penalty as a result of the victim's good qualities by attempting to play upon sympathy for the victim and by referring to what she could have accomplished had she lived. **State v. Bishop,** 518.

**§ 453 (NCI4th). Argument of counsel; comment on sentence or punishment; life imprisonment cases**

The trial court in a first-degree murder prosecution did not err by refusing to correct the prosecutor's statement during closing argument, "Don't let anyone cause you to believe that the punishment for Second Degree Murder is life, it isn't," where the argument was in response to defense counsel's statement that this was only a second-degree murder case and "it carries life." **State v. Lynch,** 483.

**§ 454 (NCI4th). Argument of counsel; comment on sentence or punishment; capital cases, generally**

Assuming it was improper for the prosecutor to argue in a capital sentencing proceeding that defendant violated the laws of nature established by God when he decided the time and place of the victims' deaths, this error was harmless where there was overwhelming evidence of defendant's guilt and where the remarks were made in

**CRIMINAL LAW—Continued**

anticipation of contrasting biblical arguments made by defense counsel. **State v. Barrett,** 164.

There was no gross impropriety in the prosecutor's argument in the sentencing phase of a capital murder prosecution where defendant claimed that the argument drew inferences from a psychiatric report, thereby using as substantive evidence a document that had been admitted only for corroborative purposes. **State v. Williams,** 345.

There was no gross impropriety in the prosecutor's argument in the sentencing phase of a capital murder prosecution where defendant contended that the prosecutor mischaracterized the pecuniary gain evidence relating to a probation violation report. **Ibid.**

There was no error requiring intervention ex mero motu in a first-degree murder sentencing hearing where defendant contended that the State improperly argued that the mitigating circumstances were in fact aggravating circumstances; in context, the argument attacked the weight of the mitigating circumstances. **State v. Penland,** 634.

A prosecutor's argument in a capital sentencing proceeding was not grossly improper and the court did not err by not intervening ex mero motu where the prosecutor argued that the mitigating circumstances should be weighed against "a human life, and the way in which [the victim] died, and the reasons why she died." **State v. Bishop,** 518.

**§ 455 (NCI4th). Argument of counsel; deterrent effect of death penalty**

There was no prejudicial error in a capital sentencing proceeding where defendant contended that the prosecutor improperly argued that defendant should be sentenced to death to deter others by reading from reported cases. **State v. Bishop,** 518.

There was no error in a capital sentencing proceeding where defendant asserted that the State's argument suggested that the jurors would have to justify a verdict of life imprisonment to the prosecutor and the citizens of the county and that a life sentence would be justified only if the jury could guarantee beyond a reasonable doubt that defendant would never kill again. **State v. Penland,** 634.

**§ 460 (NCI4th). Argument of counsel; permissible inferences**

There was no gross impropriety in the prosecutor's closing argument in a first-degree murder retrial requiring intervention ex mero motu where the court had excluded expert testimony regarding the range of defendant's blood alcohol level and the prosecutor speculated as to that level. **State v. Cole,** 399.

**§ 463 (NCI4th). Argument of counsel; comments supported by evidence**

The prosecutor's jury arguments in a capital sentencing proceeding that one of defendant's motives in killing the victim was to prevent the victim from testifying against him and that the jury could imagine the devastation suffered by the victim's mother when a law officer knocked on her door were not so grossly improper as to require intervention by the trial court. **State v. Bates,** 564.

The prosecutor did not misconstrue testimony by defendant's psychologist when he argued to the jury in a capital sentencing proceeding that the psychologist had testified on cross-examination that two or more psychologists could interpret a test differently and reach differing conclusions as to an individual's personality trait. **State v. Womble,** 667.

**CRIMINAL LAW—Continued**

**§ 464 (NCI4th). Argument of counsel; misstatement of evidence**

There was no error in a capital sentencing proceeding where defendant contended that the prosecutor's argument that defendant pulled the trigger rather than an accomplice was based on impeachment evidence. **State v. Bishop,** 518.

**§ 468 (NCI4th). Argument of counsel; miscellaneous comments**

The trial court did not err in a first-degree murder prosecution by granting the State's motion to prohibit defendant's closing argument about residual doubt. **State v. Burke,** 129.

The trial court did not err by failing to intervene ex mero motu and instruct the jury to disregard several statements made by the prosecutor during closing arguments in a first-degree murder prosecution. **State v. Scott,** 313.

The trial court did not err by not intervening ex mero motu in the prosecutor's closing argument in a first-degree murder prosecution where defendant claimed that the prosecutor implicitly criticized his decision to exercise his right to fair trial by an impartial jury. **State v. Bishop,** 518.

There was no plain error in a capital murder prosecution where the prosecutor stated in his closing argument that a State's witness was defendant's accomplice. **State v. Rowsey,** 603.

The trial court did not err in a prosecution arising from an abduction, rape and murder by not intervening ex mero motu in the prosecutor's explanation of reasonable doubt. **State v. Penland,** 634.

**§ 480 (NCI4th). Communications between jurors and outsiders**

The trial court did not abuse its discretion in a first-degree murder prosecution by not conducting an inquiry into the precise content and possible impact of an incorrect and prejudicial statement made by outsiders which may have been heard by a juror in the canteen during a recess. **State v. Burke,** 129.

**§ 496 (NCI4th). Deliberations; review of testimony**

The trial court did not fail to exercise its discretion in denying the jury's request to review a portion of defendant's mother's testimony in a capital sentencing proceeding. **State v. Fullwood,** 725.

**§ 497 (NCI4th). Deliberations; use of evidence by the jury**

The trial court erred by allowing four of the five pages of a handwritten narrative of defendant's statements to a detective to be taken into the jury room during deliberations over defendant's objection and without his consent, but this error was not prejudicial. **State v. Wagner,** 250.

**§ 507 (NCI4th). Record of proceedings generally**

There was no prejudicial error in a first-degree murder prosecution where the court conducted ex parte interrogations of two seated jurors in chambers, conducted conferences with counsel in chambers out of the presence of defendant, and failed to reconstruct those interrogations and conferences in the presence of defendant. **State v. Williams,** 345.

**§ 538 (NCI4th). Circumstances in which mistrial may be ordered; misconduct of witnesses during trial**

The trial court did not abuse its discretion in a first-degree murder prosecution by denying a mistrial where a sequestered witness was found to be in the courtroom. **State v. Howell,** 229.

**CRIMINAL LAW—Continued**

**§ 541 (NCI4th). Mistrial; conduct or statements involving jurors; jury deliberations**

The trial court did not abuse its discretion by failing to declare a mistrial following allegations that jurors had engaged in inappropriate conversations in the jury room where the court conducted an inquiry and excused two jurors. **State v. Womble,** 667.

**§ 656 (NCI4th). Insufficient evidence motion; waiver**

Where defendant presented evidence, she waived the right to appeal the denial of her motion to dismiss made at the close of the State's evidence. **State v. Vanhoy,** 476.

**§ 680 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases generally**

The trial court did not err in a first-degree murder retrial where defendant contended that the court erred by not giving a peremptory instruction on the nonstatutory mitigating circumstance that defendant is a person of good character in the community in which he lives because the court gave the instruction after initially declining. **State v. Cole,** 399.

The trial court did not err by refusing to give peremptory instructions on mitigating circumstances that defendant was reared by poor, hardworking parents and worked to help out the family, and that before his marital problems defendant was kind, friendly, and compassionate. **State v. Bates,** 564.

Evidence as to the statutory mitigating circumstance of defendant's age at the time of a murder was controverted and did not warrant a peremptory instruction. **State v. Womble,** 667.

The trial court did not err by failing to give a peremptory instruction on the nonstatutory mitigating circumstance that nothing was taken from the murder victim's residence where defendant made no specific request for a peremptory instruction as to this mitigating circumstance. **Ibid.**

The trial court did not err by failing to give peremptory instructions on the nonstatutory mitigating circumstances that defendant suffered from learning disabilities which hindered his chances for success in school and that defendant was not acting in a calm, rational manner at the time of each killing. **State v. Boyd,** 699.

There was no error in a capital sentencing proceeding where the trial court did not give peremptory instructions on the nonstatutory mitigating circumstance that defendant's father physically abused defendant and the other children in the family. **State v. Bishop,** 518.

**§ 681 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases; defendant's ability to appreciate the character of his conduct**

The trial court did not err in the sentencing phase of a capital murder prosecution by refusing to instruct the jury peremptorily on the statutory mitigating circumstances that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. **State v. Williams,** 399.

The evidence of defendant's capacity to conform his conduct to the requirements of the law when he committed two murders was in controversy so that the trial court did not err by failing to give a peremptory instruction on this mitigating circumstance. **State v. Boyd,** 699.

CRIMINAL LAW—Continued

**§ 682 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases; defendant influenced by mental or emotional disturbance**

The trial court did not err in a capital sentencing hearing by refusing defendant's request for a peremptory instruction on the statutory mitigating circumstance that the offense was committed while the defendant was under the influence of a mental or emotional disturbance. **State v. Lyons,** 1.

The trial court did not err in the sentencing phase of a capital murder prosecution by refusing to instruct the jury peremptorily on the statutory mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance. **State v. Williams,** 345.

Even though expert testimony provided some evidence from which the jury could conclude that defendant was under the influence of a mental or emotional disturbance when he murdered his father-in-law and wife, the trial court was not required to peremptorily instruct the jury on this mitigating circumstance. **State v. Boyd,** 699.

The trial court did not err in a capital sentencing proceeding by failing to peremptorily instruct on the statutory mitigating circumstances of mental or emotional disturbance and impaired capacity and the nonstatutory circumstances that defendant was less able than others to visualize or anticipate social consequences due to his disturbances and that his turbulent family history significantly affected his mental and emotional development where the testimony of the clinical social worker on which defendant relied was developed for trial rather than to treat defendant. **State v. Bishop,** 518.

**§ 754 (NCI4th). Instructions on burden of proof and presumptions; multiple indictments or charges**

There was no prejudicial error in a prosecution arising from an abduction, rape and murder in not giving the instruction requested by defendant that the State had the burden of proving beyond a reasonable doubt defendant's identity as the perpetrator. **State v. Penland,** 634.

**§ 774 (NCI4th). Instructions on unconsciousness or automatism; intoxication**

The trial court did not err by refusing to instruct on the defense of unconsciousness or automatism in a prosecution for two first-degree murders where defendant relied only upon his own self-serving testimony that he could not remember many of his actions on the day of the crimes. **State v. Boyd,** 699.

**§ 793 (NCI4th). Instruction as to acting in concert**

The trial court did not err in its instructions on acting in concert by failing to require the jury to find that defendant had the intent necessary to support a finding of felonious breaking and entering, conspiracy, first-degree murder, and financial transaction card fraud. **State v. Bishop,** 518.

**§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence generally**

There was no plain error in a first-degree murder prosecution where the trial court instructed the jury that it could find defendant Gainey guilty of both first-degree murder by premeditation and deliberation and discharging a firearm into occupied property under the theory of acting in concert. **State v. Gainey,** 79.

**CRIMINAL LAW—Continued**

**§ 796 (NCI4th). Instruction as to aiding and abetting generally**

Evidence of defendants' constructive presence at a murder was sufficiently strong so that no instruction on actual or constructive presence at the scene of the crime under the theory of aiding and abetting was required in this first-degree murder prosecution. **State v. Vanhoy,** 476.

**§ 818 (NCI4th). Instructions on interested witnesses generally**

The trial court did not err, much less commit plain error, by refusing to give an instruction in a murder trial on the testimony of an interested witness, and the trial court's instruction that the jury could consider the interest, bias, or prejudice of a particular witness in determining whether to believe the witness was sufficient. **State v. Dale,** 71.

**§ 830 (NCI4th). Instructions on State's witnesses; accomplices; when instruction should be given or refused**

There was no plain error in a capital murder prosecution where defendant argued that the court's instruction on accomplice testimony was not supported by the evidence, validated the prosecutor's notion that the accomplice was guilty based either on actions after the fact or on a failure to act theory, and constituted an expression of opinion by the trial judge. **State v. Rowsey,** 603.

**§ 860 (NCI4th). Instruction on defendant's eligibility for parole**

When the jury inquired about parole during sentencing deliberations in a capital trial, the trial court properly instructed that a defendant's eligibility for parole is not a proper matter for consideration by the jury in recommending punishment. **State v. White,** 378.

**§ 877 (NCI4th). Instructions to jury having difficulty reaching decision or in deadlock; requirement of complete instruction on unanimity and reasoning together**

There was no plain error in a capital sentencing proceeding where defendant contended that the trial court unduly emphasized the necessity for a verdict by its omission of subsections (2) and (3) of G.S. 15A-1235(b), but the jury never indicated that it was deadlocked or that it was having difficulty reaching a unanimous decision. **State v. Lyons,** 1.

**§ 881 (NCI4th). Additional instructions after retirement of jury; particular instructions as not coercive**

The trial court did not coerce a verdict in a capital sentencing proceeding by informing the jury at 5:05 p.m., after the jury had deliberated for about seven hours, that if a unanimous decision was not reached by 9:00 p.m., the jury would retire, be sequestered overnight, and continue deliberations the next day. **State v. Womble,** 667.

**§ 904 (NCI4th). Denial of right to unanimous verdict**

The trial court did not allow a nonunanimous verdict by its instruction allowing the jury to find defendant guilty of impaired driving if it found beyond a reasonable doubt that defendant drove a vehicle on a highway in this state while he was under the influence of an impairing substance or had an alcohol concentration of .08 or more at a relevant time after driving. **State v. Oliver,** 202.

**CRIMINAL LAW—Continued**

**§ 912 (NCI4th). Polling the jury generally**

A defendant in a capital murder trial was not entitled to a new trial where the court polled each juror after the sentencing recommendation was read, one juror at first did not respond, then became emotional, then responded "Yes" to questions as to whether she had an answer and whether that answer was "Yes." **State v. Rowsey,** 603.

**§ 1073 (NCI4th). Forfeiture of gain acquired through felonies**

The trial court did not err in ordering the forfeiture of defendant's truck and automobile where defendant was found guilty of robbery with a dangerous weapon and both vehicles were used in the robbery. **State v. Bishop,** 518.

**§ 1237 (NCI4th). Fair Sentencing Act; statutory mitigating factors; defendant's cooperation in apprehending or prosecuting other felon generally**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find the statutory mitigating factor that defendant aided in the apprehension of another felon. **State v. Brewington,** 448.

**§ 1262 (NCI4th). Fair Sentencing Act; statutory migigating factors; acknowledgement of wrongdoing but denial of culpability**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to his arrest. **State v. Brewington,** 448.

**§ 1286 (NCI4th). Repeat or habitual offender; evidence of prior convictions of felony offenses**

There was no prejudicial error during an habitual felon proceeding in the admission of evidence showing that defendant previously had been adjudicated to be an habitual felon. **State v. Bishop,** 518.

**§ 1300 (NCI4th). Procedure for determining sentence in capital cases; separate sentencing proceeding**

There was no prejudice in a capital sentencing proceeding where the court had denied defendant's pretrial motion in limine asking the court to prevent an accomplice from testifying; had failed to intervene ex mero motu during the guilt-innocence phase closing arguments; and had instructed the jury that there was evidence that the witness was an accomplice and that the testimony of an accomplice should be examined with care and caution. **State v. Rowsey,** 603.

**§ 1309 (NCI4th). Capital punishment; submission and competence of evidence generally**

The trial court did not abuse its discretion in allowing the prosecutor to ask defendant's mother on cross-examination in a capital sentencing proceeding if she was aware that defendant had broken his wife's arm. **State v. Bates,** 564.

**§ 1312 (NCI4th). Capital punishment; evidence of prior criminal record or other crimes**

The State could properly cross-examine defendant's mother in a capital sentencing proceeding about rumors that defendant had killed two other persons and

**CRIMINAL LAW—Continued**

wounded a third person to rebut evidence of good character presented by defendant through the testimony of his mother. **State v. Barrett,** 164.

**§ 1314 (NCI4th). Capital punishment; submission and competence of evidence; aggravating and mitigating circumstances generally**

The trial court did not err by refusing to admit in a capital sentencing proceeding evidence of discussions between the State and defendant's accomplice. **State v. Womble,** 667.

Any error by the trial court in excluding testimony by an officer that he had told the district attorney nine years earlier about a private conversation with defendant in which defendant began to cry and stated that he was on cocaine and lost control and killed the victim was harmless where the jury heard similar accounts of the conversation from both defendant and the officer, and testimony that the officer had previously relayed this information to the district attorney would not have caused any juror to find the mitigating circumstance that defendant displayed remorse or sorrow for what he had done. **State v. Fullwood,** 725.

**§ 1316 (NCI4th). Capital punishment; submission and competence of evidence; prior criminal record or other crimes**

The trial court did not err in a capital sentencing hearing by allowing the State to inform the jury that defendant had already been sentenced to life imprisonment as an habitual felon. **State v. Bishop,** 518.

**§ 1318 (NCI4th). Capital punishment; instructions generally**

There was no prejudice in a capital sentencing proceeding by instructing the jury that before the death penalty could be imposed, it would have to find from the evidence that defendant himself delivered the fatal shot or that defendant himself, while acting in concert with others, intended to kill the victim. **State v. Walker,** 216.

**§ 1320 (NCI4th). Capital punishment; instructions; consideration of evidence**

There was no error in a first-degree murder retrial where defendant contended that the trial court erred by limiting the causes of the mitigating circumstance of impaired capacity to certain specified causes that omitted other causes supported by the uncontradicted evidence. **State v. Cole,** 399.

The trial court did not commit plain error by failing to instruct the jury that it could not consider the same evidence in support of the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in a kidnapping and the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel. **State v. Bates,** 564.

**§ 1321 (NCI4th). Capital punishment; instructions; failure to unanimously agree on sentence**

There was no plain error in a capital sentencing proceeding in instructing the jury that it must be unanimous in its answer to Issue Four on the Issues and Recommendation as to Punishment form. **State v. Rowsey,** 603.

**§ 1322 (NCI4th). Capital punishment; instructions; parole eligibility**

When the jury inquired about parole during sentencing deliberations in a capital trial, the trial court properly instructed that a defendant's eligibility for parole is not a proper matter for consideration by the jury in recommending punishment. **State v. White,** 378.

The trial court did not deny defendant due process by refusing to instruct the jury in a capital sentencing proceeding that it could consider life without parole as the sentencing alternative to death pursuant to the amendment to G.S. 15A-2002 where defendant's offense occurred before the effective date of that amendment. **State v. Fullwood,** 725.

**§ 1323 (NCI4th). Capital punishment; instructions; aggravating and mitigating circumstances generally**

The trial court in a capital sentencing hearing did not violate the Eighth and Fourteenth Amendments by allowing the jury to refuse to give effect to mitigating evidence if the jury deemed it not to have mitigating value or by allowing jurors not to give effect to mitigating circumstances found by the jurors. **State v. Burke,** 129.

The trial court erred in a capital sentencing proceeding by instructing the jury to determine whether statutory mitigating circumstances have mitigating value if found to exist. **State v. Howell,** 229.

The trial court did not err in instructing the jury in a capital sentencing proceeding that each juror was allowed, rather than required, to consider the mitigating circumstances found to exist when weighing the aggravating circumstances against the mitigating circumstances. **State v. White,** 378.

**§ 1326 (NCI4th). Capital punishment; instructions; aggravating and mitigating circumstances; burden of proof**

The trial court did not err in a capital sentencing hearing by using the terms "satisfaction" and "satisfy" to instruct the jury as to the defendant's burden of proof applicable to mitigating circumstances. **State v. Lyons,** 1.

**§ 1327 (NCI4th). Capital punishment; instructions; duty to recommend death sentence**

The trial court did not err in a capital sentencing proceeding by instructing the jury that it had the duty to impose the death penalty if it found the mitigating circumstances failed to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. **State v. Williams,** 345.

**§ 1329 (NCI4th). Capital punishment; instructions; sentence recommendation by jury; requirement of unanimity**

The trial court did not err by instructing the jury that it must unanimously agree on its answer to Issue Four on the Issues and Recommendation as to Punishment form. **State v. Lyons,** 1.

**§ 1330 (NCI4th). Capital punishment; sentence recommendation by jury; requirement of unanimity within reasonable time**

There was no error in a capital murder prosecution in the trial court not allowing defendant to argue to the jury that the court was required by law to impose a sentence of life imprisonment if the jury was unable to unanimously agree on a verdict within a reasonable time. **State v. Williams,** 345.

**§ 1334 (NCI4th). Capital punishment; consideration of aggravating circumstances; notice**

The trial court did not err in a capital murder prosecution by denying defendant's motions to require the State to specify the theory on which the State was prosecuting

**CRIMINAL LAW—Continued**

the charge of first-degree murder and the aggravating circumstances on which the State intended to rely. **State v. Williams,** 345.

**§ 1337 (NCI4th). Capital punishment; particular aggravating circumstances; previous conviction for felony involving violence**

When considering the aggravating circumstance of a prior felony involving violence, compliance with G.S. 15A-2000(e)(3) has been achieved so long as the prior violent felony occurred before the date the capital defendant committed murder and the capital defendant is convicted of the violent felony at some point prior to the capital trial. **State v. Lyons,** 1.

The trial court did not err in a capital sentencing hearing in submitting the aggravating circumstance of a prior conviction for a violent felony by instructing the jury to consider defendant's conviction for a felonious assault where the conviction occurred after the capital murder. **State v. Burke,** 129.

There was sufficient evidence in a capital sentencing proceeding to support the jury's finding of the aggravating circumstance that defendant had previously been convicted of a crime involving the use or threat of violence. **Ibid.**

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance of a prior felony involving the use or threat or violence where the conduct upon which the prior assault conviction was based occurred prior to the events out of which the capital felony charge arose. **State v. Bishop,** 518.

**§ 1339 (NCI4th). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime**

The same evidence was not used in a capital sentencing proceeding to support the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a felony (kidnapping) and the (e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel, even though the trial court instructed the jury that it must find defendant guilty of kidnapping the victim for the purpose of terrorizing him in order to find the (e)(5) circumstance. **State v. Bates,** 564.

The trial court did not err in a capital sentencing proceeding by permitting the jury to consider as statutory aggravating circumstances that the murder was committed while the defendant was engaged in the commission of kidnapping and that the murder was committed for pecuniary gain. **State v. Bishop,** 518.

**§ 1341 (NCI4th). Capital punishment; particular aggravating circumstances; pecuniary gain**

There was no plain error in a capital sentencing proceeding in the court's instructions concerning the aggravating circumstance of pecuniary gain. **State v. Bishop,** 518.

**§ 1343 (NCI4th). Capital punishment; particular aggravating circumstances; especially heinous, atrocious, or cruel offense; instructions**

The trial court's pattern jury instruction on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding was not unconstitutionally vague. **State v. White,** 378.

The jury's determination in a first-degree murder retrial that the murder was especially heinous, atrocious, or cruel was not based on unconstitutionally vague instructions. **State v. Cole,** 399.

**CRIMINAL LAW—Continued**

The aggravating circumstance in the capital sentencing proceeding that the murder was especially heinous, atrocious, or cruel is not unconstitutionally vague and overbroad. **State v. Williams,** 345.

**§ 1347 (NCI4th). Capital punishment; particular aggravating circumstances; murder as course of conduct**

The trial court did not err in a first-degree murder retrial by submitting as an aggravating circumstance that the murder was part of a violent course of conduct that included commission of another crime of violence against another person where there was sufficient evidence of another crime of violence and a violent course of conduct in that the victim's mother was stabbed when she attempted to intervene while defendant was stabbing her daughter. **State v. Cole,** 399.

Instructions in a capital murder prosecution defining the aggravating circumstance that the murder was part of a course of conduct involving commission of a crime of violence against another person were not unconstitutionally vague. **Ibid.**

The course of conduct aggravating circumstance is not unconstitutionally vague. **State v. Boyd,** 699.

The trial court correctly allowed the jury to consider the murder of each of two victims as the crime of violence to support the course of conduct aggravating circumstance in sentencing defendant for the murder of the other victim. **Ibid.**

Defendant need not be charged or convicted of the "other crimes of violence" before the course of conduct aggravating circumstance may be submitted. **Ibid.**

Where defendant assaulted his wife's brother with a deadly weapon with intent to kill immediately after fatally shooting his father-in-law and his wife, the trial court did not err by instructing the jury that it could find as an aggravating circumstance for each murder that defendant committed the assault as part of the same course of conduct even though defendant has not been charged with the assault. **Ibid.**

**§ 1348 (NCI4th). Capital punishment; consideration of mitigating circumstances; definition**

The trial court did not err in a capital sentencing proceeding in using its definition of mitigating circumstances instead of that requested by defendant. **State v. Williams,** 345.

The trial court did not err during a capital sentencing proceeding by not intervening when the prosecutor defined mitigating circumstance. **State v. Bishop,** 518.

**§ 1349 (NCI4th). Capital punishment; mitigating circumstances; submission of circumstance**

There was no prejudicial error in a capital sentencing proceeding where defendant specifically requested that the mitigating circumstance of no significant history of prior criminal activity not be submitted but the trial court chose to include it ex mero motu. **State v. Walker,** 216.

**§ 1351 (NCI4th). Capital punishment; mitigating circumstances; burden of proof**

There was no error in a capital sentencing proceeding in jury instructions that defined defendant's burden of persuasion to prove mitigating circumstances as evidence that "satisfied" each juror. **State v. Burke,** 129.

**CRIMINAL LAW—Continued**

The trial court's instructions in a first-degree murder retrial defining the burden of proof applicable to mitigating circumstances were not unconstitutional. **State v. Cole,** 399.

**§ 1355 (NCI4th). Capital punishment; particular mitigating circumstances; lack of prior criminal activity**

There was no error in the sentencing phase of a first-degree murder prosecution in the submission of the statutory mitigating circumstance of no significant history of prior criminal activity over defendant's objection. **State v. Williams,** 345.

Assuming it was error for the trial court to submit the no significant history of prior criminal activity mitigating circumstance to the jury in a capital sentencing proceeding, such error was not prejudicial to defendant. **State v. White,** 378.

The trial court did not err by refusing to submit to the jury the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Boyd,** 699.

The trial court did not err in a capital murder prosecution by submitting over defendant's objection the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Rowsey,** 603.

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity. **State v. Penland,** 634.

**§ 1357 (NCI4th). Capital punishment; particular mitigating circumstances; mental or emotional disturbance; instructions**

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance that he was under the influence of a mental or emotional disturbance where the court in effect submitted the circumstances of mental or emotional disturbance and impaired capacity. **State v. Penland,** 634.

The trial court's instruction that the jurors could find the mental or emotional disturbance mitigating circumstance if they found that defendant suffered from "depersonalization or dissociation" did not preclude the jurors from considering evidence of the victim's acts of racial bigotry as a source of defendant's mental or emotional disturbance. **State v. Womble,** 667.

**§ 1360 (NCI4th). Capital punishment; particular mitigating circumstances; impaired capacity of defendant; instructions**

The trial court did not err in a capital sentencing hearing by not submitting the statutory mitigating circumstance that the capacity of defendant to conform his conduct to the requirements of the law was impaired where defendant's psychologist testified about bipolar disorder, antisocial personality disorder and substance abuse, but did not testify that defendant himself was subject to an inability to conform or impairment in conforming his conduct to the requirements of the law at the time he murdered his victim. **State v. Lyons,** 1.

There was no error in a first-degree murder retrial where defendant contended that the trial court erred by limiting the causes of the mitigating circumstance of impaired capacity to certain specified causes that omitted other causes supported by the uncontradicted evidence. **State v. Cole,** 399.

**CRIMINAL LAW—Continued**

The trial court's instruction in a capital sentencing hearing that evidence "is what came from that witness stand there subject to oath and cross-examination" did not preclude the jury from considering defendant's demeanor as a nonstatutory mitigating circumstance. **State v. Rowsey,** 603.

**§ 1371 (NCI4th). Proportionality review generally**

The standards set by the North Carolina Supreme court for its proportionality review in capital cases are not vague and arbitrary. **State v. Williams,** 345.

**§ 1373 (NCI4th). Death penalty held not excessive or disproportionate**

A sentence of death for first-degree murder was not excessive or disproportionate. **State v. Lyons,** 1.

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where defendant shot one victim and his companion shot the second victim in order to steal money possessed by the victims during an attempt to sell the victims fake cocaine. **State v. Barrett,** 164.

A sentence of death for first-degree murder was not disproportionate. **State v. Burke,** 129.

A death sentence in first-degree murder prosecution was not disproportionate. **State v. Walker,** 216.

A death sentence in a first-degree murder retrial was not disproportionate; North Carolina has never found disproportionality in a case in which defendant was found guilty for the death of more than one person, multiple aggravating circumstances were found to exist in only one case where the death sentence was found disproportionate, and the especially heinous, atrocious, or cruel aggravating circumstance has been found as the sole aggravating circumstance in many cases where the death sentence was found proportionate. **State v. Cole,** 399.

A sentence of death for first-degree murder was not disproportionate. **State v. Williams,** 345.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant was convicted on theories of premeditation and deliberation and of lying in wait, and defendant left the victim in her bedroom unclothed, beaten, and bloody, with her hands tied behind her back. **State v. White,** 378.

A death sentence was not disproportionate. **State v. Bishop,** 518.

A sentence of death in a first-degree murder prosecution was not disproportionate. **State v. Rowsey,** 603.

A sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factors and was not excessive and disproportionate. **State v. Penland,** 634.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant kidnapped the victim, tied him to a tree, and tortured him for several hours before finally shooting him in the neck. **State v. Bates,** 564.

A sentence of death imposed upon the seventeen-year-old defendant for the first-degree murder of an elderly man was not excessive or disproportionate. **State v. Womble,** 667.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant stabbed the victim to death. **State v. Fullwood,** 725.

**EVIDENCE AND WITNESSES—Continued**

**§ 339 (NCI4th). Other crimes, wrongs, or acts; to show malice, premeditation, or deliberation**

The trial court did not err in a first-degree murder prosecution by admitting evidence of the victim's physical injuries and appearance at various times between 1978 and 1993. **State v. Scott,** 313.

**§ 345 (NCI4th). Other crimes, wrongs, or acts; admissibility to show intent; rape and other sex offenses**

Evidence of two prior sexual assaults by defendant was properly admitted in a prosecution for first-degree murder and second-degree burglary in order to show motive, purpose, intent, opportunity, and plan or design as to the charge of first-degree murder, and to show intent to commit murder as to the charge of second-degree burglary. **State v. White,** 378.

**§ 357 (NCI4th). Other crimes, wrongs, or acts; admissibility to show motive, reason, or purpose; drug offenses**

Where evidence was presented in a murder trial that the victim had robbed one of defendant's drug lieutenants, testimony concerning the details of defendant's drug dealings, including the quantities and street prices of drugs sold, was not improper character evidence but was admissible under Rule 404(b) to show defendant's motive for shooting the victim by showing how much money defendant or his drug organization may have lost from the robbery. **State v. King,** 29.

**§ 365 (NCI4th). Other crimes, wrongs, or acts; homicide offenses generally**

The trial court did not err in a first-degree murder prosecution in which the victim was a prostitute by admitting testimony from another prostitute about an encounter with defendant. **State v. Howell,** 229.

**§ 376 (NCI4th). Other crimes, wrongs, or acts; to show common plan, scheme, or design; assault offenses; kidnapping; communicating threats**

The trial court did not err in a prosecution arising from an abduction, rape and murder by admitting testimony from an ex-girlfriend concerning prior bad acts defendant allegedly committed. **State v. Penland,** 634.

**§ 555 (NCI4th). Mistrial; particular testimony; defendant's prior acquittals**

The trial court did not err in the denial of defendant's motion for a mistrial in a murder prosecution when a witness testified that defendant told him that he had already beaten a murder charge in New York and had done "a year on it" where the trial court sustained defendant's objection, allowed a motion to strike, and gave a curative instruction. **State v. King,** 29.

**§ 668 (NCI4th). Plain error rule in criminal cases**

There was no plan error in a first-degree murder retrial in allowing the State to elicit testimony on cross-examination that one of defendant's character witnesses knew defendant's brother because he had arrested him a number of times. **State v. Cole,** 399.

**§ 701 (NCI4th). Evidence admissible for restricted purpose; content or sufficiency of limiting instruction**

The trial court did not commit plain error in its final charge in a prosecution for first-degree murder and second-degree burglary because, in its limiting instruction

concerning evidence of two prior assaults by defendant, the court omitted the statement that the testimony should not be considered on the issue of character where the court gave this instruction at the time the testimony was admitted. **State v. White,** 378.

**§ 748 (NCI4th). Prejudice cured by withdrawal of particular evidence**

There was no prejudicial error in a capital sentencing proceeding where the trial court overruled defendant's objection to lay testimony elicited by the prosecutor on cross-examination but reversed the ruling the next day and instructed the jury to disregard the evidence. **State v. Rowsey,** 603.

**§ 761 (NCI4th). Cure of prejudicial error by admission of other evidence; miscellaneous evidence; substantially similar evidence admitted without objection**

There was no prejudicial error in a first-degree murder prosecution in the admission of evidence that defendant had threatened to shoot police officers in 1990 where similar evidence was admitted without objection several other times. **State v. Scott,** 313.

The trial court did not err in a prosecution for murder, rape, and kidnapping by admitting testimony that defendant had always said that he was going to handcuff another woman and beat her up. **State v. Penland,** 634.

**§ 765 (NCI4th). Where party opposing admission of evidence had opened door**

The State's direct examination of a witness in a murder trial did not open the door to testimony by the witness on cross-examination that a person called "Grip" had told her he "shot at the boy." **State v. Dale,** 71.

**§ 770 (NCI4th). Considerations in determining whether error is prejudicial; evidence admitted for restricted purpose**

There was no prejudicial error in a first-degree murder prosecution in the admission of testimony from the victim's daughter where the trial judge instructed the jurors that they should consider the testimony if they found it corroborative of a half-brother's testimony but to otherwise disregard it. **State v. Scott,** 313.

**§ 778 (NCI4th). Prejudicial error in exclusion of evidence; requirement that excluded evidence be included in record**

Defendant cannot show prejudice from the trial court's exclusion of a question asked by defense counsel where the record does not show what the answer of the witness would have been. **State v. Dale,** 71.

**§ 786 (NCI4th). Cure of prejudicial error by admission of other evidence; testimony as to defendant's physical or mental condition**

There was no prejudicial error in a first-degree murder prosecution in the exclusion of statements defendant made to a psychologist during treatment prior to the killings where defendant did not make an offer of proof and he was permitted to present substantial expert testimony describing his mental disorders and his capacity to form a specific intent to kill. **State v. Kilpatrick,** 446.

**§ 789 (NCI4th). Best evidence rule generally**

The trial court did not err in a capital murder prosecution by requiring that certain letters be admitted into evidence before the contents could be read aloud. **State v. Walker,** 216.

**EVIDENCE AND WITNESSES—Continued**

**§ 876 (NCI4th). Hearsay; statements offered to show state of mind of victim**

The trial court in a prosecution for first-degree murder did not err by overruling defendant's objections to testimony by a victim witness coordinator and an officer concerning statements made to them by the victim concerning threats made by defendant. **State v. Burke,** 129.

**§ 923 (NCI4th). Hearsay; testimony by spouse regarding spousal conversations**

The trial court in a first-degree murder prosecution properly admitted testimony from the defendant's father and from a detective that defendant's wife had told them of a telephone call in which defendant said that he had shot his mother and asked her to call his father and have him call the police. **State v. McLemore,** 240.

**§ 928 (NCI4th). Exceptions to hearsay rule; present sense impression generally**

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into an occupied vehicle by overruling defendant Huntley's objection to allowing a witness to state that another person exclaimed "he had a gun." **State v. Gainey,** 79.

**§ 929 (NCI4th). Exceptions to hearsay rule; excited utterances; statement made while declarant still under stress of excitement**

The trial court in a first-degree murder prosecution properly admitted testimony from defendant's father and from a detective that defendant's wife had told them of a telephone call in which defendant said that he had shot his mother and asked her to call his father and have him call the police; the father's testimony fits easily under the excited utterance exception because the wife called him approximately three minutes after her conversation with defendant. **State v. McLemore,** 240.

**§ 931 (NCI4th). Exceptions to hearsay rule; excited utterances; testimony as to statement by bystander**

The trial court did not err in a prosecution for first-degree murder and discharging a firearm into an occupied vehicle by overruling defendant Huntley's objection to allowing a witness to state that another person exclaimed "he had a gun." **State v. Gainey,** 79.

**§ 959 (NCI4th). Exceptions to hearsay rule; state of mind**

The trial court did not err in a first-degree murder prosecution by admitting statements by the victim that defendant had caused her injuries in the past, that she often hid from defendant, and that she was afraid of defendant. **State v. Scott,** 313.

**§ 1005 (NCI4th). Exceptions to hearsay rule; statements concerning personal or family history generally**

The family history exception to the hearsay rule set forth in Rule 804(b)(4) does not permit hearsay testimony about events occurring within the marital relationship between a murder victim and her husband which suggests that the husband, rather than defendant, may have murdered the victim. **State v. Hester,** 266.

**§ 1008 (NCI4th). Exceptions to hearsay rule; residual exception; compliance with notice requirement**

Testimony which suggested that a murder victim's husband, rather than defendant, might have committed the crime was not admissible under the residual hearsay

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

**EVIDENCE AND WITNESSES—Continued**

**§ 2311 (NCI4th). "Breathalyzer" test results generally**

The legislature did not intend by its enactment of G.S. 20-16.2(a) to require an officer, other than the arresting officer, to notify a person charged with DWI of his rights regarding chemical analysis of the breath in order for the results to be admissible in the DWI prosecution but intended to permit a qualified arresting officer to notify defendant of his rights. **State v. Oliver,** 202.

**§ 2403 (NCI4th). Testimony by a witness omitted from list provided**

The trial court did not abuse its discretion in a first-degree murder prosecution where defendant contended that a witness should not have been allowed to testify because her name was not on the list of witnesses read to prospective jurors by the State prior to voir dire. **State v. Graves,** 274.

**§ 2470 (NCI4th). *Disclosure of testimonial arrangement by trial court***

The trial court did not err in a first-degree murder prosecution by refusing to allow defendant to question prosecutors, members of the prosecutorial staff, and law enforcement officers about their decision not to seek to have a key prosecution witness arrested on outstanding warrants prior to his testimony. **State v. Burke,** 129.

**§ 2518 (NCI4th). Qualifications of witnesses; knowledge of particular facts; criminal prosecutions**

Testimony by a murder victim's sister that the victim did not possess a handgun at the time he was killed because he had pawned his gun two days earlier was incompetent because there was no showing that the witness had personal knowledge that the victim did not possess a gun on the day he was killed. **State v. King,** 29.

**§ 2750.1 (NCI4th). Scope of examination when defendant opens door**

The trial court did not err in a first-degree murder prosecution by admitting evidence of the victim's physical injuries and appearance at various times between 1978 and 1993 where defendant opened the door by stating that he and the victim had a loving relationship. **State v. Scott,** 313.

The trial court in a first-degree murder prosecution did not erroneously allow the prosecutor to impeach a defense witness with evidence that he was in jail when the victim told him that she wanted to die where defendant opened the door by asking about the witness's request that the victim bring paper and writing instruments to him. **Ibid.**

**§ 2783 (NCI4th). *Counsel's questioning of witness;* questions containing incompetent or inadmissible matters, generally**

There was no prejudicial error in a capital murder sentencing proceeding where defendant's brother testified that defendant had "a big heart," the prosecutor said that he was sure the victim's mother appreciated that, and the trial court sustained defendant's objection. **State v. Rowsey,** 603.

**§ 2797 (NCI4th). Manner of questioning witness; impertinent or insulting questions**

There was no prejudicial error in a first-degree murder prosecution in allowing the prosecutor to conduct what defendant contended was an improper, insulting, and impertinent cross-examination that did not elicit relevant evidence. **State v. Scott,** 313.

EVIDENCE AND WITNESSES—Continued

**§ 2803 (NCI4th). Leading questions; questions suggesting desired response**

A leading question as to whether defendant wished now that he had gotten help for a cocaine problem as had been suggested to him by a murder victim was properly excluded. **State v. Fullwood,** 725.

**§ 2898.5 (NCI4th). Cross-examination as to particular matters; conviction**

There was no error in a first-degree murder prosecution where defendant contended that the court erred in overruling his objection to cross-examination of defendant about the details of two crimes for which defendant had prior convictions. **State v. Burke,** 129.

**§ 2927 (NCI4th). Basis for impeachment; prior inconsistent statement**

Testimony by a State's witness on cross-examination that a person called "Grip" had told her he "shot at the boy" was not admissible as a prior inconsistent statement. **State v. Dale,** 71.

**§ 2983 (NCI4th). Basis for impeachment; conviction of crimes generally**

The prosecutor's question to a defense witness as to whether he had been convicted "for kicking Joseph Kinnion in the mouth and cutting him so that he had to get 13 stitches" did not exceed the scope of proper inquiry under Rule 609(d) since the question related to the factual elements rather than the tangential circumstances of the crime. **State v. King,** 29.

**§ 3091 (NCI4th). Basis for impeachment; collateral matters**

There was no prejudicial error in a first-degree murder prosecution in overruling defendant's objection to the State's introduction of extrinsic evidence to impeach the credibility of a defense witness on a collateral matter. **State v. Burke,** 129.

**§ 3111 (NCI4th). Corroboration; instructions**

The trial court's limiting instruction on corroborative evidence adequately informed the jury as to the proper use of such evidence even though it contained no definition of substantive versus corroborative evidence. **State v. Francis,** 436.

**§ 3168 (NCI4th). What amounts to corroboration generally; consistency requirement**

An SBI agent's testimony in a prosecution for two murders about a pretrial statement by a State's witness contained significant discrepancies from the witness's testimony at trial and should not have been admitted as corroborative evidence, but the admission of this testimony was harmless error in light of the plenary evidence of defendant's guilt of the two murders. **State v. Francis,** 436.

**§ 3218 (NCI4th). Credibility of witness; grant of immunity or testimonial arrangement**

The trial court in a capital murder prosecution properly denied defendant's motion to prohibit an accomplice from testifying that he did not plan or participate in the killing or the robbery although defendant contended that this was inconsistent with the accomplice's plea agreement. **State v. Rowsey,** 603.

**§ 3224 (NCI4th). Credibility of witnesses; character**

The trial court did not err in a prosecution arising from an abduction, rape and murder by admitting testimony from the sixth-grade teacher of defendant's accomplices, who testified against him, of the good character of the accomplices for truthfulness. **State v. Penland,** 634.

**HOMICIDE—Continued**

**§ 374 (NCI4th). Acting in concert; first-degree murder**

The State's evidence was sufficient for the jury to find that defendant was constructively present at the time of the killing of one victim so as to support his conviction of first-degree premeditated and deliberate murder under the theory of acting in concert. **State v. Barrett,** 164.

**§ 471 (NCI4th). *Instructions;* first-degree murder generally**

There was no plain error in a first-degree murder prosecution where defendant contended that the trial court erred by reading the pattern jury instructions to the jury and not giving the self-defense instruction in connection with the instruction on the felony of discharging a firearm into occupied property, in instructing the jury that the State need only prove that defendant was the aggressor in bringing on the fatal altercation, and in omitting essential elements of specific intent to kill and self-defense in portions of its final mandate regarding first-degree murder. **State v. Johnson,** 489.

**§ 485 (NCI4th). Instructions; premeditation and deliberation; "cool state of blood"**

There was no plain error in a first-degree murder prosecution where the trial court did not instruct the jury that a killing is not done with deliberation if defendant forms the intent to kill during a quarrel or struggle where no evidence was presented that defendant formed the intent to kill during the quarrel or struggle. **State v. Burke,** 129.

**§ 510 (NCI4th). Instructions; conspiracy, acting in concert, aiding and abetting; effect of presence or absence at time of crime**

Evidence of defendants' constructive presence at a murder was sufficiently strong so that no instruction on actual or constructive presence at the scene of the crime under the theory of aiding and abetting was required in this first-degree murder prosecution. **State v. Vanhoy,** 476.

**§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of premeditated and deliberated murder, generally; lack of evidence of lesser crime**

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on second-degree murder. **State v. Gainey,** 79.

The trial court did not err in a first-degree murder prosecution by failing to instruct the jury on second-degree murder where a careful review of the evidence shows no conflicting evidence regarding defendant's intent to kill the victim. **State v. Walker,** 216.

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on the lesser included offense of second-degree murder where the evidence would not have permitted the jury rationally to acquit defendant of felony murder and premeditated and deliberate murder and to find him guilty of second-degree murder. **State v. Williams,** 345.

**§ 555 (NCI4th). Instructions; lesser included offenses; second-degree murder; effect of evidence indicating lack of premeditation and deliberation**

The State's evidence satisfied its burden of proof on the element of premeditation and deliberation in a prosecution for first-degree murder, and the trial court did not err in refusing to instruct the jury on second-degree murder, where defendant kidnapped

the victim, tied him to a tree, tortured and questioned him, and then shot him. **State v. Bates,** 564.

**§ 583 (NCI4th). Instructions; acting in concert**

The trial court did not err by charging the jury on acting in concert in a second-degree murder trial which resulted in an involuntary manslaughter conviction where defendant and a companion went to buy cocaine, a woman leaned into the car, and that woman was killed after being dragged by the car as it pulled away. **State v. Kaley,** 107.

**§ 588 (NCI4th). Instruction on imperfect self-defense**

Evidence presented by the defendant in a first-degree murder trial that she suffered from battered woman syndrome did not entitle defendant to an instruction on self-defense. **State v. Grant,** 289.

**§ 596 (NCI4th). Self-defense; manner of giving instructions; definitions of terms and use of particular words or phrases generally**

The trial court did not err in a first-degree murder prosecution by instructing the jury that, in order to be entitled to self-defense, defendant must reasonably believe that it was necessary to kill the victim in order to protect himself from death or serious bodily injury. **State v. Johnson,** 489.

**§ 663 (NCI4th). Instructions; effect of voluntary intoxication**

The trial court did not improperly shift the burden of proof from the State to defendant by instructing the jury that defendant was not guilty of first-degree murder if, as a result of voluntary intoxication, he "could not," rather than "did not," have the specific intent to kill. **State v. White,** 378.

The trial court was not required to instruct on voluntary intoxication in a prosecution for two first-degree murders. **State v. Boyd,** 699.

**§ 668 (NCI4th). Instructions; necessity of showing intoxication sufficient to negate specific intent to kill**

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on voluntary intoxication. **State v. Williams,** 345.

**§ 694 (NCI4th). Instructions; unconsciousness generally**

The trial court did not err by refusing to instruct on the defense of unconsciousness or automatism in a prosecution for two first-degree murders where defendant relied only upon his own self-serving testimony that he could not remember many of his actions on the day of the crimes. **State v. Boyd,** 699.

**§ 706 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to voluntary manslaughter instruction**

Any error by the trial court in failing to instruct on voluntary manslaughter was cured by the jury's verdict finding defendant guilty of first-degree murder. **State v. Wagner,** 250.

Defendant was not prejudiced by the trial court's failure to instruct on voluntary manslaughter where the court instructed on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder. **State v. Lynch,** 483.

## JUDGES, JUSTICES, AND MAGISTRATES



## JUDGMENTS



## JURY

**JURY—Continued**

**§ 114 (NCI4th). Examination of veniremen individually or as group; to give fair trial in capital cases**

The trial court did not abuse its discretion in a capital murder prosecution by denying defendant's motion for an individual voir dire of prospective jurors where defendant simply stated in his brief that individual voir dire is necessary because potential jurors could be tainted by hearing the responses of others during death-qualification. **State v. Walker,** 216.

**§ 119 (NCI4th). Voir dire examination; cure of error in excluding question**

There was no prejudice in jury selection for a first-degree murder prosecution where defendant claimed the court limited the scope of his voir dire of a prospective juror, but that juror was an alternate throughout the case and did not deliberate or return a verdict against defendant. **State v. Bishop,** 518.

**§ 123 (NCI4th). Voir dire examination; hypothetical questions tending to stake out or indoctrinate jurors**

Defense counsel's question as to whether a prospective juror in a capital trial would consider the age of the defendant to be of any importance in determining the appropriateness of the death penalty was an improper attempt to stake out whether the juror would consider a specific mitigating circumstance. **State v. Womble,** 667.

Defense counsel's question as to whether a prospective juror in a capital trial understood that the fact defendant was seventeen years old at the time of the commission of the crime was a statutory mitigating circumstance that the jury could consider to make the crime less deserving of the death penalty was an improper attempt to indoctrinate prospective jurors as to the existence of a mitigating circumstance, not then known to exist, through the use of hypothetical questions. **Ibid.**

**§ 127 (NCI4th). Voir dire examination; relating to juror's qualifications, personal matters, and the like generally**

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by not allowing defendant to ask if any juror was a member of any type of club, social club, or community civic or political organization. **State v. Bishop,** 518.

**§ 132 (NCI4th). Voir dire examination; relating to opinions or feelings about defendant or case; ability to be fair and follow court's instructions generally**

There was no prejudice during jury selection for a first-degree murder prosecution where a prospective juror indicated that she had had a friend who had been a homicide victim but stated that she would try to do her best to base her verdict only on the evidence and instructions in the present case and the court sustained an objection to the question "Are there any factors that you think may interfere with that ability?" **State v. Bishop,** 518.

The trial court did not unduly restrict defendant's voir dire of prospective jurors in a capital trial and thus did not abuse its discretion by sustaining an objection to one question to the jury panel regarding whether the prospective jurors would hold defendant's election not to testify against him. **State v. Bates,** 564.

**JURY—Continued**

**§ 154 (NCI4th). Voir dire examination; propriety of non-death qualifying questions**

The trial court did not abuse its discretion during jury selection in a first-degree murder prosecution by sustaining the State's objection to the defendant's question, "Would you find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?" **State v. Bishop,** 518.

**§ 190 (NCI4th). Waiver of right to challenge for cause; necessity of exhausting peremptory challenges**

The trial court's refusal to permit defense counsel to ask a prospective juror a general question concerning his feelings about the death penalty was not preserved for appellate review where defendant failed to exhaust his peremptory challenges. **State v. Fullwood,** 725.

**§ 203 (NCI4th). Challenges for cause; effect of preconceived opinions, prejudices, or pretrial publicity where a juror indicated ability to be fair and impartial**

The trial court did not abuse its discretion in a first-degree murder retrial by refusing to excuse a juror who expressed bias against defendant where the juror first responded that he thought defendant was guilty but unambiguously responded after being questioned by the judge that he could put aside his knowledge of the case and base his verdict on the evidence presented at trial. **State v. Cole,** 399.

**§ 219 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; necessity that juror be able to follow trial court's charge and state law**

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by excusing for cause a potential juror based on her opinions about the death penalty. **State v. Williams,** 345.

It was not error for the trial court to dismiss a prospective juror for cause based on her death penalty views, even though she stated she believed in the death penalty, where her responses indicated she personally could not return a recommendation of death, and she was never able to state her willingness to set aside her own beliefs in deference to the rule of law. **State v. Womble,** 667.

**§ 226 (NCI4th). Challenges for cause; exclusion based on opposition to capital punishment; rehabilitation of jurors**

The trial court did not err in a first-degree murder prosecution by denying defendant the right to examine each juror challenged by the State during death qualification prior to his or her excusal for cause. **State v. Lyons,** 1.

**§ 227 (NCI4th). Necessity that veniremen be unequivocal in opposition to imposition of death sentence; effect of equivocal, uncertain, or conflicting answers**

There was no error in a capital murder prosecution in granting the State's motion to excuse for cause a prospective juror where the record shows that the prospective juror gave equivocal and conflicting answers about whether he would be able to set aside his own beliefs with respect to the death penalty and left the impression that he would be unable to follow the law. **State v. Rowsey,** 603.

## SEARCHES AND SEIZURES

**§ 25 (NCI4th). Right to challenge lawfulness of search; standing to challenge consent search**

The trial court did not err in a capital murder prosecution by denying defendant's motion to suppress evidence obtained during a search of a bus in which he had lived where it was clear that defendant was leaving the state and that the persons to whom he was indebted had authority to sell the bus. **State v. Howell,** 229.

**§ 28 (NCI4th). Exceptions to warrant requirement; requirement of exigent circumstances**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress evidence found in the crawl space under his home, and a subsequent search inside his home, and his statement to police where an officer was on defendant's premises investigating a missing person report; he observed green flies and went to the rear of the house, where he again observed green flies, this time accompanied by the smell of rotting flesh; he leaned into the crawl space from which the flies and odor emanated and found the victim's body; the officer secured the scene and called for assistance; investigators arrived and conducted a protective sweep of the house; and officers did not conduct a more complete search until a warrant was obtained. **State v. Scott,** 313.

## SHERIFFS, POLICE AND OTHER LAW ENFORCEMENT OFFICERS

**§ 21 (NCI4th). *Civil and criminal liability; death or injury caused by law enforcement officer***

Although plaintiff's forecast of evidence may have shown ordinary negligence by defendant pursuing police officer by exceeding the speed limit, it was insufficient to show gross negligence by the officer within the meaning of G.S. 20-145. **Young v. Woodall,** 459.

## WORKERS' COMPENSATION

**§ 41 (NCI4th). Prisoners**

The Court of Appeals correctly held that the provisions of the Workers' Compensation Act bar plaintiff's wrongful death action where plaintiff, a prison inmate, died while working with a minimum custody road crew. **Blackmon v. N.C. Dept. of Correction,** 259.

**§ 57 (NCI4th). Applicability of exclusivity of remedy provision**

The Court of Appeals correctly held that the provisions of the Workers' Compensation Act bar plaintiff's wrongful death action where plaintiff was a prison inmate who died while working with a minimum custody road crew. **Blackmon v. N.C. Dept. of Correction,** 259.

**§ 141 (NCI4th). Injuries sustained while going to or returning from work**

Under the "coming and going" rule applicable in this state, an injury by accident occurring while an employee travels to and from work does not arise out of or in the course of employment. **Royster v. Culp, Inc.,** 279.

**WORKERS' COMPENSATION—Continued**

**§ 154 (NCI4th). Injuries sustained while in, on way to, or from parking lots on employer's premises**

An employee injured when he was struck by a car while attempting to cross a public highway that separated his place of employment from a parking lot owned and operated by the employer did not sustain an injury by accident arising out of and in the course of his employment. **Royster v. Culp, Inc.**, 279.

# WORD AND PHRASE INDEX