NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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IN MEMORIAM

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CHIEF JUSTICE
2 JANUARY 1975 - 31 JULY 1979

ASSOCIATE JUSTICE
14 MARCH 1962 - 1 JANUARY 1975

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THE SUPREME COURT
OF
NORTH CAROLINA

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H. JAMES HUTCHESON

---

1. Appointed by Chief Justice Mitchell effective 1 January 1997 to replace Acting Director Jack Cozort, who resumed his duties as Judge of the Court of Appeals 1 January 1997.
2. Appointed by Chief Justice Mitchell effective 6 January 1997.

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1. Elected and sworn in 3 January 1997 to replace Joe Freeman Britt who retired 31 December 1996.
2. Elected and sworn in 1 January 1997 to replace W. Steven Allen, Sr., who resigned 31 December 1996.
3. Moved from District 20 to District 19B due to redistricting 16 December 1996.
4. Elected and sworn in 2 January 1997 to replace Donald R. Huffman who retired 31 December 1996.
5. Recalled to the Court of Appeals 1 September 1995.

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H. HORTON ROUNTREE	Greenville
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LIVINGSTON VERNON	Morganton
JOHN M. WALKER	Wilmington

1. Appointed Chief Judge and sworn in 4 December 1996.
2. Elected and sworn in 6 December 1996.
3. Appointed Chief Judge and sworn in 2 December 1996.
4. Elected and sworn in 2 December 1996.
5. Appointed Chief Judge and sworn in 2 December 1996 to replace George M. Britt who retired 1 December 1996.
6. Elected and sworn in 2 December 1996.
7. Elected and sworn in 2 December 1996 to replace Kenneth R. Ellis who retired 30 November 1996.
8. Elected and sworn in 2 December 1996 to replace William A. Creech who resigned 30 November 1996.
9. Elected and sworn in 2 December 1996.
10. Appointed to the Court of Appeals effective 21 February 1997.
11. Appointed and sworn in 24 October 1996 to replace William Y. Manson who retired 31 July 1996.
12. Appointed as Chief Judge 3 December 1996 to replace Lowry B. Betts who retired 30 November 1996.
13. Elected and sworn in 2 December 1996.
14. Appointed to a new position and sworn in 31 January 1997.
15. Elected and sworn in 2 December 1996.
16. Appointed Chief Judge 4 December 1996 to replace J. Bruce Morton who retired 30 November 1996.
17. Elected and sworn in 2 December 1996.
18. Elected and sworn in 2 December 1996.
19. Elected and sworn in 2 December 1996.
20. Moved from District 20 to District 19B due to redistricting 16 December 1996.
21. Appointed Chief Judge 2 December 1996 to replace Michael Earle Beale who was elected to Superior Court.
22. Appointed Chief Judge 3 December 1996 to replace James A. Harrill, Jr., who resigned 30 November 1996.
23. Elected and sworn in 2 December 1996.
24. Elected and sworn in 2 December 1996.
25. Elected and sworn in 9 December 1996.
26. Appointed and sworn in 3 September 1996 to replace Marilyn R. Bissell who retired 1 August 1996.
27. Elected and sworn in 2 December 1996 to replace Daphene L. Cantrell who retired 1 December 1996.
28. Elected and sworn in 2 December 1996 to replace Stephen F. Franks who retired 30 November 1996.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN RABON

Special Counsel to the Attorney General
HAMPTON DELLINGER

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Chief Legal Counsel
JOHN R. MCARTHUR

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. GEORGE FRANKLIN HEATWOLE, III

No. 119A89-2

(Filed 31 July 1996)

1. Criminal Law § 475 (NCI4th)— capital murder—graduate student on jury—question in class—same subject as defense contention—motion for appropriate relief denied

The trial court did not err in a capital resentencing proceeding by denying a motion for appropriate relief made two days after the verdict where defense counsel had informed prospective jurors during jury selection that one defense contention would be that defendant was a paranoid schizophrenic; a juror who was enrolled in a graduate class in developmental psychology asked his professor during the trial if paranoid schizophrenics were violent; the professor replied that they were not; and defense counsel received a phone call from another student in the class the day after the trial. This juror's contact with his professor involved neither extraneous information pursuant to N.C.G.S. § 8C-1, Rule 606(b) nor a matter not in evidence implicating defendant's confrontation rights within the meaning of N.C.G.S. § 15A-1240(c)(1). The juror's question in class was a logical, generic one arising from the natural sequence of class events, did not deal with defendant or with any events arising from this sentencing proceeding, and was not mentioned to other jurors. The right to confront witnesses was not implicated because the question did not deal with defendant or the case, was not discussed with other jurors, and similar testimony was

presented to the jury by the State's psychiatrist. Defendant's psychiatric expert never testified to the contrary.

Am Jur 2d, Trial §§ 1556, 1561.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases. 35 ALR4th 626.

2. Constitutional Law § 252 (NCI4th)— capital sentencing—State's psychiatrist—pretrial statement that no mitigating circumstances found—testimony supported two circumstances

The trial court did not err in a capital resentencing proceeding by denying defendant a new sentencing hearing based on the State's psychiatrist informing the previous defense counsel and personally informing trial counsel that his examinations of defendant did not reveal the existence of any mitigating circumstances and then testifying at the sentencing hearing that defendant's mental condition supported the existence of two mitigating circumstances. It is clear that the State did not intentionally suppress the evidence; to the contrary, the State elicited testimony in support of mitigating circumstances and in effect helped defendant sustain his burden of persuading the jury of their existence. Even assuming that the State was attempting to suppress evidence, defendant cannot show prejudice.

Am Jur 2d, Criminal Law §§ 598, 599; Trial § 841.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

3. Constitutional Law § 252 (NCI4th); Criminal Law § 101 (NCI4th)— capital sentencing—defendant's statements to his sister—not disclosed

The trial court did not abuse its discretion in a capital resentencing proceeding by not ordering a new sentencing hearing based on the State's failure to provide defense counsel with statements defendant made to his sister where, upon notification of the potential discovery violation, the trial court immediately ordered the State to disclose to defendant the notes concerning the sister's testimony and any other oral statements defendant made which the State had in its possession, the State promptly complied, and defendant requested no further action by the trial court at that time. The evidence supports the trial court's finding

and conclusion that the State's failure to divulge the notes containing defendant's statements was neither prejudicial nor in bad faith.

Am Jur 2d, Trial §§ 1621, 1622.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

4. Criminal Law §§ 137, 196.1 (NCI4th)— capital sentencing—guilty pleas—waiver of counsel—not in writing

The trial court did not err in a capital resentencing proceeding by denying defendant's motion to set aside his guilty pleas because there was no written waiver of counsel signed by defendant. The trial judge complied with the constitutional requirements codified in N.C.G.S. § 15A-1242 and adhered to the spirit, if not the letter, of N.C.G.S. § 7A-457 in that he repeatedly asked defendant whether he understood the nature of all the charges against him and the possible punishments for each, whether he understood that he was entitled to assistance of counsel, whether he was under the influence of any intoxicants, whether he was literate, whether he understood that he must abide by court and evidentiary rules, whether he understood that standby counsel would be appointed, and whether he fully understood and appreciated the consequences of his decision to represent himself. Defendant answered in the affirmative in each instance and expressed without equivocation that he wished to proceed *pro se*. This inquiry fully satisfied the requirements of N.C.G.S. § 15A-1242; the fact that there is no written record of the waiver neither alters this conclusion nor invalidates the waiver.

Am Jur 2d, Criminal Law §§ 592, 593, 758-763.

Waiver of right to counsel by insistence upon speedy trial in state criminal case. 19 ALR4th 1299.

Supreme Court's views as to what constitutes valid waiver of accused's federal constitutional right to counsel. 101 E. Ed. 2d 1017.

5. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstances—previous felony involving violence—testimony from witnesses to prior felony

The trial court did not err in a capital resentencing hearing by permitting the State to introduce extensive evidence of the aggra-

vating circumstance that defendant had previously been convicted of a felony involving violence or the threat of violence to another person where three witnesses testified to circumstances surrounding a 1976 crime spree which culminated in defendant's attempted shooting of a law enforcement officer. Although defendant asserts that duly authenticated court records should have sufficed, it has been repeatedly held that the prosecution may introduce the testimony of witnesses to establish the defendant's involvement in the use or threat of violence in the commission of a prior felony, notwithstanding defendant's stipulation. The prosecution must be permitted to present any competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty so as to avoid an arbitrary or erratic imposition of the death penalty.

Am Jur 2d, Trial §§ 841, 1946.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

6. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstances—prior felony involving violence—offense committed in Texas a misdemeanor in North Carolina—admissible

There was no plain error in a capital resentencing proceeding where the court did not intervene *ex mero motu* when the State asked a defense witness on cross-examination whether a document from the Texas Department of Corrections indicated that defendant was a recidivist serving a five-year sentence for assaulting a police officer. Although defendant argued that this offense is only a misdemeanor in North Carolina and should not have been admitted relating to the aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to the person, this circumstance reflects upon a defendant's long-term course of violent conduct and evidence of an individual's prior record is generally a sentencing issue. The Texas incident, which occurred after a North Carolina conviction for assault on a police officer, is relevant because it demonstrates defendant's apparent unwillingness or inability to learn from prior attempts at correction for violent crimes.

Am Jur 2d, Evidence § 139; Trial § 841.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

7. Criminal Law § 1314 (NCI4th)— capital sentencing—testimony of psychiatrist—no connection between schizophrenia and murder

The trial court did not err in a capital resentencing proceeding by allowing the prosecutor to elicit testimony from a psychiatric expert that there is no connection between schizophrenia and murder or by denying defendant's motion *in limine* to prohibit the prosecutor from arguing that most people with a mental illness do not commit crimes. The State was entitled to present evidence rebutting or explaining the proffered mitigating circumstances that the murders were committed while defendant was mentally or emotionally disturbed and that his capacity to appreciate his criminality or to conform his conduct to the law was impaired. Questioning the nexus between suffering from schizophrenia and the tendency to kill is clearly relevant to whether the claimed mental disorder contributed to defendant's ability to appreciate his criminality or to conform to the law and ultimately to his moral culpability for the murders.

Am Jur 2d, Expert and Opinion Evidence §§ 180, 190, 250.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

8. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's argument—belittling mitigating circumstance

There was no gross impropriety in a first-degree murder sentencing hearing where the prosecutor said, "You may find the defendant suffers from a serious mental illness. So what." Prosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance; this comment constituted a proper argument on the weight of defendant's evidence.

Am Jur 2d, Trial §§ 554-556, 841.

9. Constitutional Law § 372 (NCI4th)— capital sentencing—constitutionality of death penalty—guilty plea and life sentence in another case

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to declare the death penalty unconstitutional as applied in that judicial district based upon the State permitting another defendant to plead guilty to first-degree murder and receive a life sentence. The trial court found as fact that the other defendant was sentenced to life imprisonment only after findings as to the nonexistence of aggravating circumstances and a ruling that the case was to be tried noncapitally. In this case, the decision to try defendant capitally was supported by sufficient evidence of the existence of aggravating circumstances and defendant has not shown that the decision was improperly based upon on an unjustifiable standard such as race, religion, or other arbitrary classification.

Am Jur 2d, Trial §§ 149, 150.

10. Criminal Law § 108 (NCI4th)— capital sentencing—discovery—district attorney's file from another case

The trial court did not abuse its discretion in a first-degree murder prosecution by sealing the district attorney's file in another case and not allowing defendant access to its contents. Defendant requested discovery of documents pertaining to a wholly unrelated case and defendant and it would strain the discovery statutes to grant such a request. Moreover, defendant can make no showing of unfair surprise since the evidence is merely collateral, nor can he demonstrate any legitimate assistance to his defense.

Am Jur 2d, Depositions and Discovery §§ 84, 104.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

11. Criminal Law § 1314 (NCI4th)— capital sentencing—statement and letter by defendant—admissible

The trial court did not err in a capital resentencing proceeding where the especially heinous, atrocious, or cruel aggravating circumstance was not submitted by allowing the State to introduce two documents, one an "affidavit" sent by defendant to officers admitting to the murders and explaining the details, and the other a letter from defendant to his father expressing lack of

remorse for killing one victim. Defendant did not challenge the admission of these materials on his direct appeal from his first trial and sentencing hearing. Evidence presented during the guilt-innocence phase of a capital case is admissible and competent as a mater of law during the sentencing phase in the same case; whether the evidence was properly admitted in the first instance is not controlling in a subsequent resentencing proceeding. Although defendant elected to appear *pro se*, constitutional confrontation concerns are not present because the evidence consisted of materials reflecting defendant's own words, not those of a witness whom defendant was entitled to cross-examine. Furthermore, nothing in *State v. McLaughlin*, 341 N.C. 426, suggests that evidence admitted during the guilt-innocence phase of a trial is competent at a sentencing proceeding only where the defendant was previously represented by counsel.

Am Jur 2d, Trial § 1946.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

12. Criminal Law § 1363 (NCI4th)— capital murder—instructions—value of honorable military discharge

The trial court did not commit plain error in a capital resentencing hearing by not instructing the jury *sua sponte* that an honorable military discharge has mitigating value *per se*. Although defendant argued that an honorable discharge should have mitigating value in a capital sentencing proceeding because it has mitigating value in the Fair Sentencing Act, the legislature has determined that specific mitigating circumstances have mitigating value by including those circumstances in the death penalty statute. An honorable discharge is not listed in N.C.G.S. § 15A-2000(f) as a mitigating circumstance; thus, it is a nonstatutory mitigating circumstance that the jury may consider but need not find to be mitigating.

Am Jur 2d, Trial §§ 841, 1169.

13. Criminal Law § 1309 (NCI4th); Evidence and Witnesses § 1700 (NCI4th)— capital sentencing—autopsy photographs—admissible

The trial court did not abuse its discretion in a capital resentencing proceeding by admitting into evidence autopsy pho-

tographs. The photographs were used strictly to illustrate the testimony of the medical examiner, each illustrated either a distinct gunshot wound or the extent of the injuries the victims suffered, none were repetitive or inordinately prejudicial, and, with one exception, all had previously been admitted during the guilt-innocence phase.

Am Jur 2d, Evidence §§ 630, 964.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

14. Criminal Law § 1314 (NCI4th)— capital sentencing—redirect examination by statement of psychiatrist—whether defendant was able to understand and appreciate the nature of his actions

The trial court did not err in a capital resentencing proceeding by permitting the State on redirect examination to question its psychiatric expert about whether defendant was able to understand and appreciate the nature of his actions. Although defendant contended that his competency at the time of the crimes was not an issue at the sentencing proceeding, defendant offered evidence in support of the mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the murders and the State is entitled to present evidence tending to rebut matters proffered in mitigation.

Am Jur 2d, Expert and Opinion Evidence § 167; Trial § 841.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

15. Criminal Law § 107 (NCI4th)— capital sentencing—prosecutor's notes from interview with witness—defendant not allowed to review

The trial court did not err during a capital resentencing proceeding by denying defendant's request to view notes the prosecutor took during an interview with a witness who was defendant's stepbrother and the son of a victim. The notes were sealed

for appellate review and were devoid of information beneficial to defendant.

Am Jur 2d, Trial §§ 1621, 1622.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

16. Criminal Law § 462 (NCI4th)— capital sentencing—prosecutor's argument—defendant's violent nature—facts not in evidence—no gross error

The trial court did not err in a capital sentencing proceeding by not intervening *ex mero motu* in the prosecutor's argument where defendant contended that the prosecutor argued facts not in evidence in contending that defendant's witness admitted that defendant was convicted of assaulting a sailor while serving in the Marine Corps. Given repeated examples of defendant's violent nature, the prosecutor's misstatement cannot be construed as so grossly improper that the trial court should have intervened *ex mero motu.*

Am Jur 2d, Trial §§ 609, 616, 626.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR3d 646.

17. Criminal Law § 473 (NCI4th)— capital sentencing—cumulative conduct of prosecutor—no denial of fair hearing

The cumulative conduct of the prosecution in a capital resentencing proceeding did not deprive defendant of a fair trial where defendant's arguments were rejected individually, and, absent some further showing of prosecutorial misconduct, there is no basis for finding them to constitute error collectively. *State v. Sanderson*, 336 N.C. 1, upon which defendant relies, involved a persistent pattern of uncorrected and prejudicial abuse before the jury which clearly prevented the defendant from receiving a fair sentencing proceeding; here, the prosecutor's conduct was within the permissible parameters of professionalism, viewed in the context of his role as a zealous advocate for criminal convictions.

Am Jur 2d, Trial § 490.

18. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

A death sentence for a first-degree murder was not disproportionate where the record fully supports the aggravating circumstances the jury found, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration, and this case is distinguishable from those cases where the death penalty was found disproportionate. The present case is more similar to cases in which the sentence of death was found proportionate to those in which it was found disproportionate.

Am Jur 2d, Criminal Law § 609; Trial § 841.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed. 51 L. Ed. 2d 886.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two sentences of death entered by Cornelius, J., at the 24 October 1994 Criminal Session of Superior Court, Moore County, on a jury verdict finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 11 March 1996.

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

Bruce T. Cunningham, Jr., and Marsh Smith for defendant-appellant.

WHICHARD, Justice.

In February 1989 defendant pled guilty to the first-degree murders of his stepmother, Alta Heatwole, and a security guard, John Garrison. On appeal this Court found prejudicial error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), and remanded for a new capital sentencing proceeding. *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992). Upon resentencing, the jury again recommended sentences of death for each murder. Defendant now appeals from these sentences. We find no prejudicial error and hold that defendant received a fair capital sentencing proceeding and that the sentences of death are not disproportionate.

The State's evidence tended to show that around 11:00 p.m. on 26 February 1988, defendant went to the home of his former girlfriend,

Kim Chavis Garcia. There, he shot at Garcia's sister, Vicky Chavis. The shot missed Chavis, but she fell, feigning death. Garcia and others ran to the bedroom. Defendant fired two or three shots at two men, Ricky Cummings and Donald Locklear, who were attempting to escape through the bedroom window. One shot struck Cummings, wounding him in the left leg.

Defendant then handcuffed Garcia and, taking her with him, drove to the Woodlake subdivision where his father and stepmother lived. At the entrance gate the security guard, Edgar John Garrison, said "hello" to defendant and waved him through. Defendant stopped, rolled down the window, and shot Garrison twice, fatally wounding him.

Defendant proceeded to his father's house where he forced Garcia, who was still handcuffed, out of the truck and to the front door. Defendant rang the doorbell; when his father answered, defendant pushed his way inside and put the pistol to his father's head. He then handcuffed his father and Garcia together. When defendant's stepmother, Alta Hamilton Heatwole, came out of the bedroom, defendant shot her twice. She fell and made her way back into the bedroom. Defendant followed her to the bedroom where he kicked her several times, screamed "Die b----," and shot her twice in the head at close range, fatally wounding her.

By this time law enforcement officers had converged on the house. Defendant removed the handcuffs from his father. While defendant's attention was diverted, his father ran out the front door with his hands up. Defendant then removed the handcuffs from Garcia, gave her the pistol, and sent her out of the house. Defendant followed Garcia out, laid down, and was arrested.

[1] Defendant first contends that the trial court erred in denying his motion for appropriate relief made two days after the jury returned its verdict. Defendant seeks a new trial based on what he asserts was juror misconduct. During jury selection defense counsel informed the prospective jurors that a defense contention was that defendant was a paranoid schizophrenic. The trial began on 24 October 1994 and lasted until 9 November 1994. On 2 November 1994 juror Robert Kennedy, who was enrolled in a graduate class in developmental psychology, asked his professor if paranoid schizophrenics were violent. The professor replied that they were not. On 10 November 1994 defense counsel received a phone call from another student in the class informing them of the question. Based on this information,

defendant filed his motion for relief seeking a new trial due to juror misconduct.

Defendant now contends that juror Kennedy's exchange with his professor violated defendant's Sixth Amendment constitutional right to confront the witnesses and evidence against him. He further argues that it was extraneous information within the meaning and intent of Rule 606(b) of the North Carolina Rules of Evidence, which information contradicted the defense position, thereby prejudicing him and entitling him to a new trial. We disagree.

Generally, once a verdict is rendered, jurors may not impeach it. *State v. Cherry*, 298 N.C. 86, 100, 257 S.E.2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). Section 15A-1240 of the North Carolina General Statutes and Rule 606(b) of the Rules of Evidence provide limited exceptions to the rule against impeachment. Section 15A-1240 allows impeachment of a verdict only in a criminal case and only concerning (1) whether the verdict was reached by lot; (2) bribery, intimidation, or attempted bribery or intimidation of a juror; or (3) matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him. N.C.G.S. § 15A-1240(b), (c) (1988). Rule 606(b) provides that when the validity of a verdict is challenged, a juror is competent to testify only "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." N.C.G.S. § 8C-1, Rule 606(b) (1988). We hold that juror Kennedy's contact with his professor was neither "extraneous information" pursuant to Rule 606(b) nor a "matter not in evidence" implicating defendant's confrontation rights within the meaning of N.C.G.S. § 15A-1240(c)(1).

This Court has interpreted extraneous information under Rule 606(b) to mean information that reaches a juror without being introduced into evidence and that deals specifically with the defendant or the case being tried. *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988). It does not include general information that a juror has gained in his day-to-day experiences. *Id.* Here, the evidence tended to show that juror Kennedy was enrolled in a graduate level educational psychology class. He had previously taken several standard psychology classes and was generally familiar with schizophrenia. During the 2 November 1994 class, Kennedy's professor lectured on schizophre-

nia, delusions, and hallucinations. A student asked if schizophrenics commit violent acts, to which the professor responded in the negative. Juror Kennedy then asked if paranoid schizophrenics commit violent acts, to which the professor again replied in the negative. Kennedy asked no further questions, nor did he mention this defendant or this case. The incident occurred before either defense expert testified on the matter at the sentencing proceeding. At the motion hearing Kennedy testified that the basis for the question was a research paper he was doing for a class dealing with teenagers and violence. Kennedy's question was a logical, generic one arising from the natural sequence of class events. It did not deal with defendant or with any events arising from this sentencing proceeding, nor did juror Kennedy mention the incident to other jurors. Under these circumstances, defendant is not entitled to relief under Rule 606(b).

We likewise conclude that N.C.G.S. § 15A-1240 affords defendant no relief. Juror Kennedy's conduct was not tantamount to the kind of external influence which ordinarily implicates a defendant's Sixth Amendment right to confront witnesses against him. *Compare, e.g., State v. Lyles*, 94 N.C. App. 240, 380 S.E.2d 390 (1989) (jurors peeled back tape on a photograph introduced into evidence, revealing a time of arrest notation which directly contradicted defendant's alibi; exposure to information on photograph held prejudicial and violative of the defendant's constitutional right of confrontation). As noted, Kennedy's question did not deal with defendant or the case, and Kennedy did not discuss it with other jurors. Further, Dr. Rollins testified for the State that paranoid schizophrenics are not classically violent. Dr. Royal, defendant's psychiatric expert witness, never testified to the contrary. Hence, defendant had the opportunity to present and challenge precisely the information conveyed in the exchange between juror Kennedy and his professor. The incident therefore cannot be considered a matter not in evidence within the contemplation of N.C.G.S. § 15A-1240. Defendant's assignment of error on these grounds is accordingly overruled.

[2] Defendant next contends the trial court erred in failing to grant him a new sentencing proceeding based on the State's purported violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Dr. Rollins, a forensic psychiatrist at Dorothea Dix Hospital, examined defendant on numerous occasions. Dr. Rollins informed defendant's previous counsel that his examinations did not reveal the existence of any mitigating circumstances. He personally so informed defendant's present counsel. However, at the sentencing proceeding Dr. Rollins

testified for the State, on rebuttal, that in his opinion defendant's mental condition supported the existence of two mitigating circumstances. He testified that defendant suffered from antisocial personality disorder and that this condition impaired his capacity to conform his conduct to the law and constituted mental or emotional disturbance which influenced defendant's behavior. N.C.G.S. § 15A-2000(f)(2), (6) (1988) (amended 1994). Based on this evidence, defendant now argues that the State withheld evidence of mitigating circumstances in violation of *Brady* and that the failure to divulge information concerning Dr. Rollins' diagnoses rendered defense counsel ineffective during cross-examination, thereby prejudicing defendant. We disagree.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. 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." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). Here, although the record is silent as to when the State actually became aware of Dr. Rollins' change in opinion, it is clear that the State did not intentionally suppress the evidence. To the contrary, the State elicited Dr. Rollins' testimony in support of the mitigating circumstances and in effect helped defendant sustain his burden of persuading the jury of their existence.

Even assuming *arguendo* that the State was attempting to suppress evidence, defendant nonetheless cannot show prejudice. The evidence was before the jury and available for defendant to utilize as support for any arguments concerning mitigation. In fact, counsel for defendant argued to the jury that

> Dr. Rollins himself said that mental illness was a basis for his opinion that on that day [defendant] was under the influence of a mental disturbance and his capacity was impaired. Dr. Rollins himself, the State's own witness, says that the answer to mitigating circumstances 1 and 2 is yes.

Under these circumstances, it is unlikely that the result of the sentencing proceeding would have been different had the information in question been disclosed to defendant sooner. This assignment of error is overruled.

[3] Similarly, by his next assignment of error, defendant contends that the trial court abused its discretion in not ordering a new sentencing proceeding based on the State's failure to provide defense counsel with statements defendant made to his sister. Defendant again rests his argument on *Brady*, as well as on N.C.G.S. § 15A-903(a)(2).

Defense counsel called Cindy Anderson, defendant's sister, to testify concerning defendant's alleged mental illness. During cross-examination the prosecutor asked Anderson if she recalled defendant saying he "needed a good [lawyer] to beat this thing." Anderson was also asked if she recalled telling her brother he had killed two people and defendant responding, "Says who? Nobody has proved anything." Anderson was interviewed by an assistant district attorney shortly after the murders, and these statements were in the form of handwritten notes. Anderson said she did not remember the details of the conversation with the assistant district attorney but indicated that she probably said those things.

Defendant did not object to the testimony and did not mention it until the following day when he requested a copy of the transcript of the conversation between Anderson and the assistant district attorney. The State explained that there was no transcript but only some notes made of the conversation. The trial court immediately ordered the material turned over and further ordered the State to turn over any other notes it possessed containing statements defendant made. The State objected on the ground that the notes merely constituted work product, but it nonetheless immediately complied with the court's order. Defendant made no further objection or motion at that time. It was only at the conclusion of the sentencing proceeding, after a sentence of death had been imposed, that defendant filed a motion for appropriate relief asserting that he had been prejudiced by the cross-examination of Anderson and by the State's failure to provide him with a copy of the conversation between Anderson and the assistant district attorney.

Upon a motion by a defendant, the State must divulge the substance of any oral statements a defendant made which the State intends to offer into evidence. N.C.G.S. § 15A-903(a)(2) (1988). Whether a party has complied with discovery, however, and what sanctions, if any, to impose are questions addressed to the sound discretion of the trial court. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). "[D]iscretionary rulings of the trial court will not be

disturbed on the issue of failure to make discovery absent a showing of bad faith by the [S]tate in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). "The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

Here, upon notification of the potential discovery violation, the trial court immediately ordered the State to disclose to defendant the notes concerning Cindy Anderson's testimony and any other oral statements defendant made which the State had in its possession. The State promptly complied. Defendant requested no further action by the trial court at that time, and the trial court ordered no further sanctions against the State. We conclude that the trial court's order of disclosure was a proper exercise of its discretion.

Following defendant's motion for appropriate relief, wherein he alleged prejudice and ineffective assistance of counsel as a result of the State's actions, the trial court made the following relevant findings of fact:

> [T]hat the statements made by Mr. Heatwole were statements that would have been prejudicial had they been made in respect to the first phase of the trial, the guilt/innocence phase. That they as such were not. That these matters had been admitted by the defendant's pleas . . . and . . . were really not at issue . . . and these statements were . . . not prejudicial to the defendant from the standpoint of mitigation because the defense did in fact go into the mitigating value of these statements that he was not in touch with reality when he made these statements to his sister, and his sister was cross examined by both the State and defendant in regards to the reality.
>
> . . . .
>
> That the witness Cindy Anderson remained in the courtroom, was available for redirect or recross by both the Defense and the State, and that the statements made by Mr. Heatwole were more of a mitigating nature, and were not prejudicial to him because they were in fact inquired to as to whether or not those statements were statements made by someone in touch with reality.
>
> . . . .

> . . . [T]hat the State made a substantial effort to comply with all discovery requests due to the number of documents that were provided to the Defense, and [that] there has been no showing of bad faith on the part of the State with regards to [these notes.]
>
> . . . .
>
> . . . [T]hat the statements made by Mr. Heatwole were not prejudicial to him because he has in fact admitted guilt as to both murders, and they were not an issue for the jury. These statements were more of a mitigating nature and which [sic] the Defense had every opportunity to cross examine the witness and place him in part in context with two expert witnesses who later testified as to his mental state.

The evidence supports the trial court's finding and conclusion that the State's failure to divulge the notes containing defendant's statements to Anderson was neither prejudicial nor in bad faith. We therefore hold that the trial court did not abuse its discretion by denying defendant's motion for appropriate relief. This assignment of error is overruled.

[4] By another assignment of error, defendant argues that the trial court erred in denying his motion to set aside his guilty pleas because there was no written waiver of counsel signed by defendant. On 20 February 1989, prior to defendant's initial guilt determination proceeding, a hearing was held before the Honorable William H. Freeman to inquire whether defendant could represent himself. Following the hearing, Judge Freeman entered an order that defendant knowingly, intelligently, and voluntarily waived his right to court-appointed counsel and that he could proceed *pro se*. However, the transcript of the hearing does not indicate that defendant was ever requested to sign a written waiver of counsel, nor do the court records contain a signed waiver. Six years and two sentencing proceedings later, defendant now argues that his written waiver is required pursuant to N.C.G.S. § 7A-457, as well as by the state and federal Constitutions.

Assuming *arguendo* that this assignment of error is not procedurally barred, our review of the transcripts indicates that Judge Freeman complied with the mandate of N.C.G.S. § 15A-1242, which sets forth the prerequisites for a defendant's waiver of his right to counsel and his election to represent himself. The court must make a thorough inquiry and be satisfied that the defendant was clearly

advised of his right to assistance of counsel, that he understood and appreciated the consequences of his decision to represent himself, and that he comprehended the nature of the charges and the range of possible punishments. N.C.G.S § 15A-1242 (1988). The waiver of counsel must be voluntary and knowing, and " 'the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.' " *State v. Gerald*, 304 N.C. 511, 518-19, 284 S.E.2d 312, 317 (1981) (quoting *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980)). The inquiry required by N.C.G.S. § 15A-1242, if properly conducted, fully satisfies constitutional requirements. *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 263 (1995).

Here, Judge Freeman repeatedly asked defendant whether he understood the nature of all the charges against him and the possible punishments for each, whether he understood that he was entitled to assistance of counsel, whether he was under the influence of any intoxicants, whether he was literate, whether he understood that he must abide by court and evidentiary rules, whether he understood that standby counsel would be appointed, and whether he fully understood and appreciated the consequences of his decision to represent himself. In each instance defendant answered in the affirmative and expressed without equivocation that he wished to proceed *pro se*. We conclude that Judge Freeman's inquiry fully satisfied the requirements of N.C.G.S. § 15A-1242 that waiver of counsel must be knowing and voluntary.

The fact that there is no written record of the waiver neither alters this conclusion nor invalidates the waiver. While N.C.G.S. § 7A-457(a) provides for a written waiver of counsel from an indigent defendant, *see State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992), this section has been construed as directory, not mandatory, so long as the provisions of the statute have otherwise been followed. *State v. Smith*, 24 N.C. App. 498, 501, 211 S.E.2d 539, 541 (1975), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989). Section 7A-457 requires that the trial court find of record that at the time of waiver, the defendant acted with full awareness of his rights and of the consequences of the waiver. N.C.G.S. § 7A-457(a) (1995). This is similar to the inquiry required under N.C.G.S. § 15A-1242 and may be satisfied in a like manner. As we held above, it is clear from the record that Judge Freeman complied with the constitutional requirements codified in section

15A-1242; we likewise conclude that he adhered to the spirit, if not the letter, of section 7A-457. We therefore find no merit to defendant's arguments.

[5] Defendant next contends that the trial court erred in permitting the State to introduce extensive evidence to prove the existence of the aggravating circumstance that defendant had previously been convicted of a felony involving violence or the threat of violence to another person. N.C.G.S. § 15A-2000(e)(3). He argues that as a result of allowing three witnesses to testify to circumstances surrounding a 1976 crime spree which culminated in defendant's attempt to shoot a North Carolina law enforcement officer, the sentencing proceeding turned into a "mini-trial" of the prior offenses. Defendant asserts that duly authenticated court records of his previous convictions should have sufficed to show the existence of the aggravating circumstance, especially since defendant conceded to having engaged in significant prior criminal activity. We disagree.

This Court has repeatedly held that the prosecution may introduce the testimony of witnesses to establish the defendant's involvement in the use or threat of violence to a person in the commission of a prior felony, notwithstanding the defendant's stipulation to the record of conviction. *See State v. McDougall*, 308 N.C. 1, 20-23, 301 S.E.2d 308, 320-22, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). The better rule is "to allow both sides to introduce evidence in support of aggravating and mitigating circumstances. . . . If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed." *Id.* The prosecution "must be permitted to present *any* competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty so as to avoid an arbitrary or erratic imposition of the death penalty." *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). We reaffirm these principles and, applying them here, conclude that the trial court correctly admitted the evidence concerning the circumstances of defendant's 1976 convictions.

[6] By his next assignment of error, defendant contends the trial court committed plain error by declining to intervene, *ex mero motu*,

during the State's cross-examination of Beth McAllister. McAllister, a "mitigation specialist," testified at length about defendant's social history. On cross-examination the prosecutor asked her whether a document from the Texas Department of Corrections indicated that defendant was a recidivist serving a five-year sentence for assaulting a police officer. Defendant argues that this offense is only a misdemeanor in North Carolina, and therefore the trial court erred in allowing the State to introduce this evidence.

"Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f)." N.C.G.S. § 15A-2000(a)(3). The State submitted as an aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3). We have stated that this aggravating circumstance reflects upon a defendant's long-term course of violent conduct. *State v. Brown*, 320 N.C. 179, 224, 358 S.E.2d 1, 30, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). Further, evidence of an individual's prior record is generally a relevant sentencing issue. *Zant v. Stephens*, 462 U.S. 862, 879, 77 L. Ed. 2d 235, 251 (1983). The Texas incident, which occurred after the North Carolina conviction for assault on a police officer, is relevant to the (e)(3) aggravating circumstance because it demonstrates defendant's apparent unwillingness or inability to learn from prior attempts at correction for violent crimes. The trial court properly declined to intervene *ex mero motu* in this instance. This assignment of error is overruled.

[7] Defendant next argues that the trial court erred in allowing the prosecutor to elicit testimony from psychiatric expert Dr. Bob Rollins that there is no connection between schizophrenia and murder. Defendant further asserts that the trial court erred in denying defendant's motion *in limine* to prohibit the prosecutor from arguing that most people with a mental illness do not commit crimes. Defendant rests his arguments on *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989), where the United States Supreme Court held that there is a nexus between a defendant's mental health and his moral culpability for an offense. *Id.* at 319, 106 L. Ed. 2d at 278. Because the thrust of defendant's case was that he was a paranoid schizophrenic and that this influenced his conduct at the time of the murders, he contends the State should not have been allowed to nullify the relevance of any evidence offered to that effect.

Defendant presented evidence through Dr. Royal, his psychiatric expert, that he suffered from schizophrenia and that he was under a mental disturbance at the time of the murders. In response, the State presented the testimony of Dr. Rollins, who conceded that defendant has a serious mental condition but diagnosed it as antisocial personality disorder rather than schizophrenia. Dr. Rollins further opined that there was no connection between schizophrenia and murder.

The State may offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence. *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981). Here, once defendant offered evidence in support of the mitigating circumstances that the murders were committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2), and that his capacity to appreciate his criminality or to conform his conduct to the law was impaired, N.C.G.S. § 15A-2000(f)(6), the State was entitled to present evidence rebutting or explaining the proffered circumstances. To this end, the State properly questioned the nexus between suffering from schizophrenia and the tendency to kill. Such an inquiry is clearly relevant to whether the claimed mental disorder contributed to defendant's ability to appreciate his criminality or to conform to the law, and ultimately to defendant's moral culpability for the murders.

[8] Defendant also challenges the prosecutor's comment, "You may find the defendant suffers from a serious mental illness. So what." Prosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance. *State v. Basden*, 339 N.C. 288, 305, 451 S.E.2d 238, 247 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995). This comment constituted a proper argument on the weight of defendant's evidence and did not amount to gross impropriety. These assignments of error are overruled.

[9] Defendant next argues that the trial court erred in denying his motion to declare the death penalty unconstitutional as applied in the Twentieth Judicial District. The trial court held a hearing on the motion, wherein defendant argued that the State permitted another defendant, Victor Patterson, to plead guilty to first-degree murder and receive a life sentence even though there allegedly was evidence of aggravating circumstances. Based on these events, defendant contends that the death penalty is administered arbitrarily and with unguided discretion in the Twentieth Judicial District and that there-

fore his death sentences must be stricken and sentences of life imprisonment imposed.

In its order denying defendant's motion, the trial court found as fact that the presiding judge in Patterson's case reviewed all eleven statutory aggravating circumstances. It further found that Patterson was sentenced to life imprisonment only after the court made factual findings as to the nonexistence of aggravating circumstances and ruled that the case was to be tried noncapitally. These findings are supported by the evidence presented at the hearing and are binding on appeal. *State v. Barnett*, 307 N.C. 608, 614, 300 S.E.2d 340, 343 (1983).

Defendant correctly notes that the decision whether to try a first-degree murder case as a capital case is not within the district attorney's discretion. *State v. Britt*, 320 N.C. 705, 710, 360 S.E.2d 660, 662 (1987). However, where there is no evidence of any aggravating circumstance, such as in the Patterson case, the trial court need not conduct the sentencing proceeding set forth in N.C.G.S. § 15A-2000 but may pronounce a sentence of life imprisonment. *Id.* This is not tantamount to an improper discretionary sentencing decision because under the capital punishment statute, the death penalty cannot be imposed absent the existence of one or more aggravating circumstances. Here, however, the decision to try defendant capitally was supported by sufficient evidence of the existence of aggravating circumstances. Further, defendant has not shown that the decision was improperly based on an unjustifiable standard such as race, religion, or other arbitrary classification. *See Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604 (1978); *Oyler v. Boles*, 368 U.S. 448, 7 L. Ed. 2d 446 (1962). We therefore conclude that the trial court properly denied defendant's motion.

[10] In a related assignment, defendant contends the trial court erred by sealing the district attorney's file from the Patterson case and not allowing defendant access to its contents. He requests that this Court review the file to determine whether there are photographs in the file which support the existence of an aggravating circumstance. We decline to do so.

The common law recognizes no right to discovery in criminal cases. *State v. Davis*, 282 N.C. 107, 110, 191 S.E.2d 664, 666 (1972). The rules of discovery contained in the Criminal Procedure Act must therefore be viewed as in derogation of the common law. The purpose of the discovery procedures is to protect the defendant from unfair

surprise and to grant him access to any evidence which he could legitimately offer in his defense. *State v. Stevens*, 295 N.C. 21, 37, 243 S.E.2d 771, 781 (1978). These statutory provisions do not, however, alter the general rule that the work product or investigative files of the district attorney, law enforcement agencies, or others assisting in the preparation of the case are not open to discovery. *State v. Brewer*, 325 N.C. 550, 574, 386 S.E.2d 569, 582 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). A defendant is not entitled to the granting of his motion "for a fishing expedition." *Davis*, 282 N.C. at 111-12, 191 S.E.2d at 667.

Here, defendant requested discovery of documents pertaining not to his own case, but to a wholly unrelated case and defendant. It would strain the reading of the discovery statutes, N.C.G.S. § 15A-903 in particular, to grant such a request and to suggest that the trial court abused its discretion in denying it. Even assuming *arguendo* that these documents did not constitute work product and that defendant possessed the requisite statutory authority to request production of the Patterson files, he nevertheless can make no showing of unfair surprise since the evidence is merely collateral to his case, nor can he demonstrate any legitimate assistance to his defense in view of our holding above that the death penalty is not arbitrarily applied in the Twentieth Judicial District. In sum, we hold that the file defendant sought was neither relevant nor necessary to his defense and that the trial court did not abuse its discretion in withholding it from him and sealing it for appellate review.

[11] Defendant next argues that the trial court erred in allowing the State to introduce two documents, one an "affidavit" sent by defendant to a police officer admitting to the murders and explaining the details, and the other a letter defendant wrote to his father expressing his lack of remorse for killing victim Heatwole. Defendant argues that since the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel was not submitted at either sentencing proceeding, the letters were irrelevant and unduly prejudicial to any issue the jury decided.

Defendant did not challenge the admission of these materials on his direct appeal from the first trial and sentencing proceeding. In *State v. McLaughlin*, this Court stated that N.C.G.S. § 15A-2000(a)(3) expressly provides that evidence presented during the guilt-innocence determination phase of a capital case is admissible and competent as a matter of law during a capital sentencing proceeding

in the same case. *McLaughlin*, 341 N.C. 426, 458, 462 S.E.2d 1, 18 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996); *see* N.C.G.S. § 15A-2000(a)(3). Whether the evidence was properly admitted in the first instance is not controlling in a subsequent resentencing proceeding. *McLaughlin*, 341 N.C. at 458, 462 S.E.2d at 18.

Defendant nevertheless asserts that *McLaughlin* does not constitute binding precedent on this issue because in that case, we emphasized the presence of counsel to cross-examine; here, defendant had no counsel because he elected to appear *pro se* and obviously lacked the legal experience to lodge an objection to the admissibility of the materials. The distinction, however, goes to the nature of the challenged evidence. *McLaughlin* addressed the question of whether the admission of recorded prior testimony violated the defendant's confrontation rights under the federal and state Constitutions. *Id.* Here, the evidence consisted of materials reflecting defendant's own words, not those of a witness whom defendant was entitled to cross-examine. Hence, the constitutional concerns of *McLaughlin* are not present here. Further, nothing in *McLaughlin* suggests that evidence admitted during the guilt-innocence phase of a trial is competent at a sentencing proceeding only where the defendant was previously represented by counsel. We therefore conclude that the evidence was properly admitted.

[12] Defendant next argues that the trial court erred in not instructing the jury *sua sponte* that an honorable military discharge has mitigating value *per se*. The crux of defendant's argument is that under the North Carolina Fair Sentencing Act, an honorable discharge is deemed to have mitigating value. N.C.G.S. § 15A-1340.16(e)(14) (Supp. 1995). Therefore, according to defendant, it should have mitigating value in a capital sentencing proceeding as well, and the trial court should be required to so instruct. Defendant neither requested such an instruction nor objected to its absence, but he now contends the trial court committed plain error in not so instructing.

By including specific mitigating circumstances in the death penalty statute, the legislature has determined that those circumstances have mitigating value. *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). It is, however, for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value. *Id.* An honorable discharge is not listed in N.C.G.S. § 15A-2000(f) as a mitigating circumstance. Thus, for purposes of cap-

ital sentencing, it is a nonstatutory mitigating circumstance that the jury may consider but need not find to be mitigating. Therefore, the trial court did not err in not instructing *sua sponte* that an honorable discharge has mitigating value.

[13] By his next assignment of error, defendant argues that the trial court erred by admitting into evidence a number of autopsy photographs. He asserts that the photographs were unduly prejudicial and not relevant to any sentencing issue. We disagree.

Any evidence that the trial court "deems relevant to sentenc[ing]" may be introduced in the sentencing proceeding, *State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996); N.C.G.S. § 15A-2000(a)(3), and the State must be permitted to present any competent evidence supporting the imposition of the death penalty, *Brown*, 315 N.C. at 61, 337 S.E.2d at 824. Photographs of the victim depicting injuries to the body and the manner of death are relevant to sentencing issues and may be used to illustrate the witness' testimony in this regard. *Daughtry*, 340 N.C. at 518, 459 S.E.2d at 762.

Here, the photographs were used strictly to illustrate the testimony of the medical examiner, Dr. Butts. Each illustrated either a distinct gunshot wound or the extent of the injuries the victims suffered. None were repetitive or inordinately prejudicial. Further, with one exception, all had previously been admitted during the guilt-innocence phase. As noted, N.C.G.S. § 15A-2000(a)(3) provides that evidence presented during the guilt-innocence phase of a capital case is competent and admissible as a matter of law during a sentencing proceeding for that case. *McLaughlin*, 341 N.C. at 458, 462 S.E.2d at 18; *see* N.C.G.S. § 15A-2000(a)(3).

Whether photographic evidence is more probative than prejudicial is a matter within the trial court's discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant has failed to show that the trial court abused its discretion by admitting the autopsy photographs at sentencing. This assignment of error is overruled.

[14] Defendant next argues that the trial court improperly permitted the State, on redirect examination and over objection, to question its psychiatric expert, Dr. Rollins, about whether defendant was able to understand and appreciate the nature of his actions when he killed his stepmother and Garrison. Defendant contends that his compe-

tency at the time of the crimes was not an issue at the sentencing proceeding and that Dr. Rollins' testimony on the matter was therefore irrelevant. Defendant seemingly misunderstands the purpose and direction of the State's inquiry.

Defendant offered evidence in support of the mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the murders. N.C.G.S. § 15A-2000(f)(6). As noted, the State is entitled to present evidence tending to rebut matters proffered in mitigation. *Silhan*, 302 N.C. at 273, 275 S.E.2d at 484. Here, the State could properly present evidence through Dr. Rollins' testimony refuting defendant's claims of diminished capacity and mental impairment at the time of the crimes. Dr. Rollins' testimony had no relation to defendant's competency during the resentencing proceeding. Accordingly, the trial court did not err in overruling defendant's objections.

[15] By his next assignment, defendant contends the trial court erred in denying his request to view notes the prosecutor took during an interview with Gary Brookshire. Brookshire, defendant's stepbrother and the son of victim Heatwole, testified for the State. After the State's direct examination of Brookshire, defendant made a motion, pursuant to N.C.G.S. § 15A-903(f)(2) and *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977), to obtain copies of the prosecutor's interview notes. Defendant sought the notes for the specific purpose of discovering potentially mitigating information. The trial court denied the motion but ordered the notes sealed for appellate review. We have reviewed the notes and find them devoid of information beneficial to defendant. Accordingly, defendant was not prejudiced by the trial court's denial of his motion, and this assignment of error is overruled.

[16] Defendant next contends that the prosecutor improperly argued facts not in evidence when he stated that defendant's witness, Beth McAllister, admitted that defendant was convicted of assaulting a sailor while serving in the Marine Corps. In fact, McAllister denied any knowledge of the incident. Defendant did not object to the statement at trial; instead, he contends that the trial court should have intervened *ex mero motu* and that its failure to do so constitutes prejudicial error. We disagree.

Prosecutors are allowed wide latitude in the scope of jury argument. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). A trial court must inter-

vene absent an objection only where the prosecutor's argument affects the defendant's right to a fair trial. *Id.* We must therefore determine whether the argument complained of was "so prejudicial and grossly improper as to require corrective action by the trial [court] ex mero motu." *State v. James*, 322 N.C. 320, 324, 367 S.E.2d 669, 672 (1988).

Here, the jury heard evidence of defendant's assaults on a Texas correctional officer and a Texas police officer; of his destruction of his stepmother's property as well as numerous threats he communicated to her; and of his assaultive behavior on other prison inmates, guards, and a physician. Given these repeated examples of defendant's violent nature, the prosecutor's misstatement cannot be construed as so grossly improper that the trial court should have intervened *ex mero motu*. This assignment of error is overruled.

[17] By another assignment of error, defendant argues that the cumulative misconduct of the prosecution deprived him of a fair trial. Defendant cites, *inter alia*, the State's purported failure to divulge mitigating evidence, the "mini-trial" conducted in an effort to prove aggravating circumstances, and a line of questioning conducted by the prosecutor concerning defendant's future dangerousness. Relying on *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994), defendant contends that these instances, taken as a whole, deprived him of a fair sentencing proceeding.

With the exception of the issue of defendant's future dangerousness, we have rejected each of these arguments individually. Thus, absent some further showing of prosecutorial misconduct, there is no basis for now finding them to constitute error collectively. Further, the circumstances surrounding the prosecutorial misconduct in *Sanderson* were far more egregious than the incidental occasions alleged here and thus are not comparable. In *Sanderson* the prosecutor repeatedly badgered defense counsel in the presence of the jury, reducing one defense attorney to tears. He would not allow defense counsel to complete sentences and in several instances turned objections into personal denunciations or expressions of exaggerated incredulity. He verbally abused an expert witness, and in his closing remarks, he argued matters not in evidence and insinuated personal knowledge of other murders the defendant had committed. This persistent pattern of uncorrected and prejudicial abuse before the jury clearly prevented the defendant there from receiving the fair sentencing proceeding that due process requires. Here, by contrast, the

prosecutor's conduct, viewed in the context of his role as a zealous advocate for criminal convictions, was within permissible parameters of professionalism. We conclude that defendant received a fair sentencing proceeding.

Defendant next argues that he was not sentenced before an impartial judge. He asserts that the transcript as a whole demonstrates multiple examples of the judge's bias in favor of the State and against him. Having reviewed the portions of the transcript defendant assigns as error, we conclude that the trial court conducted defendant's sentencing proceeding in an impartial manner and made every effort to ensure that defendant received a fair proceeding. This assignment of error is overruled.

PRESERVATION ISSUES

Next, defendant raises, but does not argue, several assignments of error he asserts are "preservation issues": (1) the trial court erred in finding defendant competent to stand for resentencing, (2) the trial court erred in denying defendant's request to inform the jury of his calculated release date, and (3) the trial court erred in sustaining the State's objection to the introduction of Defense Exhibit "OO." As we stated in *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 478 (1996):

> [T]hese issues are not proper preservation issues because they are not determined solely by principles of law upon which this Court has previously ruled. Rather, these assignments of error are fact specific requiring review of the transcript and record to determine if the assignment has merit. Where counsel determines that an issue of this nature does not have merit, counsel should "omit it entirely from his or her argument on appeal." *State v. Barton*, 335 N.C. 696, 712, 441 S.E.2d 295, 303 (1994).

Gregory, 340 N.C. at 429, 459 S.E.2d at 675. Nevertheless, we have examined the record and transcript pertinent to these assignments and find them without merit.

Defendant raises seven additional issues which he has properly denominated as preservation issues and which he concedes this Court has decided against his position: (1) the trial court erred in permitting the State to argue defendant's future dangerousness; (2) the trial court erred in allowing the State to argue specific deterrence; (3) the trial court erred in permitting the State to assert that defendant wrote his own death warrant by virtue of his prior conduct; (4) the

trial court erred in refusing to allow defense counsel to inform the jury of the length of defendant's present sentence and that if defendant received two life sentences, they could be served consecutively; (5) the trial court erred in denying defendant's motion to inform the jury of the consequences of a failure to reach a unanimous decision; (6) the trial court erred in denying defendant's motion to declare the death penalty unconstitutional; and (7) the procedure for the imposition of the death penalty is beyond the comprehension of the average juror. Defendant has presented no compelling reason to reconsider our position on these issues. Accordingly, these assignments of error are overruled.

PROPORTIONALITY

[18] Having concluded that defendant's capital sentencing 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).

As to both murders, the jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that the murder was part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). After thoroughly examining the record, transcripts, and briefs, we conclude that the record fully supports the two aggravating circumstances the jury found. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We turn then to our final statutory duty of proportionality review.

In 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; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

This case is distinguishable from those cases. First, defendant here was convicted of two murders. "We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim." *State v. Price*, 326 N.C. 56, 96, 388 S.E.2d 84, 107, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). Further, 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). As noted, the (e)(3) aggravating circumstance reflects upon the defendant's character as a recidivist. *Brown*, 320 N.C. at 224, 358 S.E.2d at 30. Finally, 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), *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 jury found both murders were committed as part of course of conduct involving violence against another), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). It suffices to say that we conclude that the present case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

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.

STATE OF NORTH CAROLINA v. LEANDER TAYLOR AND BENNIE LEE TAYLOR, JR.

No. 498A93

(Filed 31 July 1996)

1. Criminal Law § 375 (NCI4th)— noncapital first-degree murder—remarks of court—not an expression of opinion—not a disparagement of attorneys

There was no error during a noncapital first-degree murder prosecution where defendants contended that the court continually expressed opinions on the evidence and disparaged defendants' attorneys. The remarks were made when the jury was not present, or were not an expression of an opinion or a disparagement of an attorney, the admonitions to the attorney were not error, one statement was a *lapsus linguae* rather than a Freudian slip showing bias, saying "sustained, sustained" rather than "sustained" did not emphasize the objection, the sustaining of an objection does not indicate that the court agrees with a statement made in connection with the objection, and sustaining objections on the court's own motion did not show that the court had abandoned its position of neutrality.

Am Jur 2d, Trial §§ 282-284.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal. 62 ALR2d 166.

2. Criminal Law § 468 (NCI4th)— noncapital first-degree murder—prosecutor's argument—no error

There was no prosecutorial misconduct in a noncapital first-degree murder prosecution where defendants contended that the prosecutor argued that on several points the State's case was uncontradicted and, with other prosecutorial misconduct, gave the jury a substantial reason to wonder why defendants did not testify. A comment that defendants had not proved what they said they would prove in their opening statements is proper when defendant does not testify; arguing that there were witnesses whom defendant could have called but did not was not a comment on defendants' failure to testify; the State may argue from the evidence that a defendant has a bad character without violating N.C.G.S. § 8C-1, Rule 404(a); an argument which defend-

ants contended stated that they would disparage the Father and Son if given the chance was not so grossly improper that the court should have intervened *ex mero motu;* and there was no prejudice from a question to which the trial court sustained an objection.

Am Jur 2d, Trial §§ 682, 683.

Propriety and effect of attack on opposing counsel during trial of a criminal case. 99 ALR2d 508.

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.

3. Evidence and Witnesses § 2909 (NCI4th)— noncapital first-degree murder—character of victim and defendants—questions on redirect in response to cross-examination

There was no error in a noncapital first-degree murder prosecution where evidence of the character of the victim and the two defendants was introduced on redirect examination in response to questions asked on cross-examination. The State, during redirect examination, is entitled to clarify and rebut issues raised during cross-examination.

Am Jur 2d, Witnesses §§ 737-742.

4. Evidence and Witnesses § 2084 (NCI4th)— noncapital first-degree murder—one defendant neater than the other—not character evidence

There was no prejudicial error in a noncapital first-degree murder prosecution where testimony was allowed that defendant Bennie Taylor was neater than his brother, defendant Leander Taylor. The testimony was merely the witness's description of how the two brothers looked and how he distinguished them and was not character evidence.

Am Jur 2d, Expert and Opinion Evidence §§ 26, 31, 278.

5. Evidence and Witnesses § 665— noncapital first-degree murder—objection sustained—no motion to strike

There was no error in a noncapital first-degree murder prosecution where the court failed to strike testimony that "they will

shoot you." The trial court sustained defendants' objections, but they did not request that the testimony be struck.

Am Jur 2d, Trial §§ 461-482.

6. Homicide § 250 (NCI4th)— noncapital first-degree murder—killing during scuffle—premeditation and deliberation

The trial court did not err in a noncapital first-degree murder prosecution by not granting defendants' motion to dismiss based on insufficient evidence of premeditation and deliberation. Although defendants asserted that the killing took place during a quarrel or scuffle while defendants were under the influence or provocation of the quarrel or scuffle, the State's evidence showed that Leander Taylor had threatened the victim weeks prior to the murder; he had told numerous people that he was going to kill the victim; he said to the victim and his friends before the fight began, "We're going to show y'all little young punks something tonight"; he said to his brother, "Shoot him, Bro. Shoot him"; defendant Bennie Lee, the brother, pulled his revolver from his pocket before the scuffle began; he pointed it first at someone else, then at the victim as Leander grabbed and punched him; and Bennie fired three successive shots, all of which hit the victim. Premeditation and deliberation may easily be inferred from this evidence.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

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

7. Criminal Law §§ 793, 796 (NCI4th)— noncapital first-degree murder—two defendants—instructions as to one on aiding and abetting and acting in concert

The trial court did not err in a noncapital first-degree murder prosecution as to either defendant by charging on aiding and abetting and acting in concert as to defendant Leander. Although

defendant Bennie Lee contends that there was no evidence that he premeditated or deliberated the killing and that the jury was allowed to impute the premeditation and deliberation of Leander to him, there was plenary evidence for the jury to find that he killed the victim with premeditation and deliberation. And, although Leander says that he was either guilty as a principal or not guilty, the evidence was that Leander was struggling with the victim and told his brother to shoot him.

Am Jur 2d, Homicide §§ 437 et seq.; Trial § 723.

8. Evidence and Witnesses § 3191 (NCI4th)— noncapital first-degree murder—testimony by officer as to statement by witness

The trial court did not err in a noncapital first-degree murder prosecution by allowing a police officer to testify that a friend of the victim had said that defendant Bennie Lee had shot the victim. The testimony was properly admitted to corroborate the testimony of the friend, who had testified that Bennie Lee had shot the victim. Defendants did not ask for a limiting instruction. *Bruton v. United States*, 391 U.S. 123, does not apply because the friend is not a codefendant.

Am Jur 2d, Witnesses §§ 1010-1029.

Admissibility of impeached witness' prior consistent statement—modern state criminal cases. 58 ALR4th 1014

9. Evidence and Witnesses § 928 (NCI4th)— noncapital first-degree murder—testimony as to what another told the witness—present sense impression

There was no error in a noncapital first-degree murder prosecution where the court admitted testimony that a witness saw defendant Leander Taylor in the yard of her daughter with a sawed-off shotgun, the witness called her daughter, and the daughter said, "He's not after me. He's after Bryan [the victim] and Jermaine." The testimony as to what the daughter told the witness was admissible as a present sense impression.

Am Jur 2d, Evidence §§ 659, 864; Homicide § 330.

10. Evidence and Witnesses § 761 (NCI4th)— noncapital first-degree murder—hearsay concerning prior incident—substantial other evidence

There was no prejudicial error in a first-degree murder sentencing hearing where the victim's mother testified that the vic-

tim's grandmother had told her about an incident at a phone booth in which someone had hung up the phone on the victim and been looking for him with a gun. There was substantial other evidence of the incident at the telephone booth and of several threats; this evidence was cumulative and its admission could not have prejudiced defendants.

Am Jur 2d, Appellate Review §§ 752-755.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

11. Evidence and Witnesses § 3191 (NCI4th)— noncapital first-degree murder—conversation between deputy and victim's friend—admissible to corroborate friend's testimony

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence that a deputy was approached by a friend of the victim at the hospital after the shooting and told that defendant Bennie Lee had been fighting with the victim. The friend testified at length about the fight and the testimony of the deputy was admissible to corroborate the testimony at trial.

Am Jur 2d, Witnesses §§ 1010-1029.

12. Evidence and Witnesses § 761 (NCI4th)— noncapital first-degree murder—testimony of conversation between sheriff and police chief—other evidence of guilt—not prejudicial

There was no prejudicial error in a noncapital first-degree murder prosecution where the court admitted testimony from the chief of police in Garysburg that the Sheriff of Northampton County had asked him if he knew a male living in Garysburg named Pluck (defendant Bennie Lee's nickname), who may have been involved in a shooting. There was other strong evidence of defendants' guilt. Assuming this was hearsay, it added virtually nothing to the evidence against defendants.

Am Jur 2d, Appellate Review §§ 752-755.

13. Evidence and Witnesses § 3199 (NCI4th)— noncapital first-degree murder—interview notes of officer with witnesses—admissible to corroborate witnesses

There was no error in a noncapital first-degree murder prosecution in allowing the State to introduce the notes an officer

made of interviews with several of the witnesses where the notes were consistent with the witnesses' testimony and were introduced to corroborate the testimony of the witnesses. North Carolina has been liberal in allowing prior consistent statements in corroboration of witnesses and there is no reason under this liberal policy why notes taken of conversations should not be allowed to corroborate the testimony of witnesses.

Am Jur 2d, Evidence §§ 675-677, 1316; Witnesses §§ 1010-1029.

14. Evidence and Witnesses § 1216 (NCI4th)— noncapital first-degree murder—statement by codefendant to officer—other defendant not implicated—admissible

There was no error as to defendant Leander Taylor in a noncapital first-degree murder prosecution where an officer was allowed to testify that when defendant Bennie Lee was advised about the shooting, he said he "didn't know anything about it, that he had been home all night." The *Bruton* rule prohibits the introduction of a statement by defendant if the statement implicates a codefendant; the testimony of the officer here as to what defendant Bennie Lee said did not implicate defendant Leander in any way.

Am Jur 2d, Evidence §§ 793-795.

15. Evidence and Witnesses § 1674 (NCI4th)— noncapital first-degree murder—autopsy photographs—unique features—chain of custody not necessary

There was no error in a noncapital first-degree murder prosecution in the introduction into evidence of a picture which the pathologist testified appeared to be a picture of the person upon whose body she performed an autopsy. If an item to be introduced has unique features so it is readily identifiable, no chain of custody evidence is necessary.

Am Jur 2d, Evidence §§ 961-968.

16. Evidence and Witnesses § 920 (NCI4th)— noncapital first-degree murder—questions as to what deputy told sheriff—motion in limine granted

There was no error in a first-degree murder prosecution where a motion *in limine* was allowed to prevent defendants from asking questions on cross-examination of the sheriff as to

what one of his deputies had told him. Although defendants contend that N.C.G.S. § 8C-1, Rules 803 and 804 allow exceptions for hearsay in this case, they do not say how these two rules allow such testimony.

Am Jur 2d, Evidence §§ 659, 669.

17. Evidence and Witnesses § 920 (NCI4th)— noncapital first-degree murder—what someone told deputy—no hearsay exception to show knowledge as a result of investigation

The trial court did not err in a noncapital first-degree murder prosecution in granting a motion *in limine* precluding defendants from asking a deputy sheriff on cross-examination what someone told him. Defendants contend that the evidence should have been admitted because it would show the officer's knowledge as a result of the investigation, but there is no such exception to the hearsay rule. Additionally, the record does not show what the deputy sheriff's answer would have been.

Am Jur 2d, Evidence §§ 659, 669.

18. Evidence and Witnesses §§ 2903, 3210 (NCI4th)— noncapital first-degree murder—questions on redirect—clarification of cross-examination—explanation of witness's demeanor

The trial court did not err in a noncapital first-degree murder prosecution by allowing testimony from the victim's uncle that he was scared for his nephew and that his nephew was worried, and testimony from the victim's friend that the death of the victim had affected his ability to sleep. The statements by the uncle were made on redirect in order to clarify questions asked on cross-examination regarding the witness's conversation with defendant Leander Taylor; during redirect examination, the State is entitled to clarify and rebut issues raised during cross-examination. The testimony of the friend was admitted for the limited purpose of explaining his demeanor on the witness stand and the trial court properly instructed the jury. Moreover, the defendants fail to show prejudice; reasonable jurors would most likely conclude without testimony that the loss of a friend would be difficult for anyone and that most uncles would be concerned for their nephew.

Am Jur 2d, Witnesses §§ 737-742.

19. Criminal Law § 112 (NCI4th)— noncapital first-degree murder—officer's notes—provided during rather than before trial—no Brady violation

The prosection in a noncapital first-degree murder prosecution did not fail to comply with *Brady v. Maryland*, 373 U.S. 83, by giving defendants an officer's notes during trial instead of before trial. Due process and *Brady* are satisfied by the disclosure of the evidence at trial so long as disclosure is made in time for the defendants to make effective use of the evidence. Here the State provided defendants with the notes four days before the State rested, the State also provided defendants with telephone numbers by which the defendant could contact the witness, and defendants did not ask for a continuance or in any way indicate that they were having trouble locating the witness.

Am Jur 2d, Depositions and Discovery §§ 418, 423, 428-429.

20. Evidence and Witnesses § 179 (NCI4th)— noncapital first-degree murder—evidence of motive—relevant and competent

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence of a fight between the victim and defendant Leander Taylor's cousin as furnishing a motive for the shooting. The evidence of motive is relevant and competent.

Am Jur 2d, Evidence §§ 307, 315, 435, 437.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentences of life imprisonment entered by Sumner, J., at the 27 September 1993 Criminal Session of Superior Court, Northampton County, upon jury verdicts of guilty of first-degree murder. Heard in the Supreme Court 13 September 1995.

The two defendants were indicted for the first-degree murder of Bryan Handsome, and their cases were joined for trial. The evidence tended to show that Leander Taylor had made numerous threats toward Bryan Handsome for several weeks prior to Mr. Handsome's death. Leander attempted to fight Bryan beside a telephone booth on one occasion. After Bryan walked away from the telephone booth, Leander called an unidentified person and asked that person to bring him his gun because he intended to kill Bryan. Elnora Lynch testified Leander had come to her daughter's house with a sawed-off shotgun

looking for Bryan. Marvin Handsome, who was Bryan's uncle, also testified Leander had relayed threats to Bryan through him.

On 16 October 1992 at midnight, Bryan and two of his friends, Jermaine Artis and Len Manley, went to Nick's Club. As they approached the club, they were accosted by Leander and his brother, Bennie Lee Taylor. Leander said, "We're going to show y'all little young punks something tonight." Leander then said to Bennie Lee, "Shoot him, Bro. Shoot him." Bennie Lee then drew a revolver and pointed it at Artis. Artis and Manley ran behind cars in the parking lot, and Bryan and Leander struggled. Bennie Lee then shot Bryan three times, killing him.

The jury found both defendants guilty as charged. The State did not seek the death penalty, and each defendant was sentenced to life in prison.

The defendants appealed.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

Donnie R. Taylor for defendant-appellant Leander Taylor.

A. Jackson Warmack, Jr., for defendant-appellant Bennie Lee Taylor, Jr.

WEBB, Justice.

[1] Each defendant first assigns error to what he says is the trial court's continuous expressions of opinion on the evidence and its disparagement of the defendants' attorneys. They cite numerous incidents which they say prove this error.

At one point during the cross-examination of a witness, a dispute arose as to previous testimony by the witness. The court excused the jury and conducted a hearing as to what the witness had said. At the end of the hearing, the court apologized to Leander's attorney because the attorney was found to have remembered the testimony correctly. Any expression of opinion by the court or disparagement of Leander's attorney during this hearing could not have prejudiced the defendants with the jury because the jury was not present when the remarks were made.

During the cross-examination of Elnora Lynch, the following colloquy occurred:

Q. All right. I—looks like—

MR. BEARD: Objection.

THE COURT: Sustained.

Q. What did you say?

THE COURT: She didn't say anything. Ask your question, Mr. Harvey.

The defendants do not say how this exchange constitutes error, and we see none. The statement, "She didn't say anything," is not an expression of an opinion or a disparagement of an attorney.

At one point in the trial, the court told Leander's attorney while the jury was not in the courtroom that a question the attorney had asked of a witness was totally inappropriate. This could not have prejudiced the defendants with the jury because the jury was not in the courtroom.

During the cross-examination of Jermaine Artis, the following colloquy occurred:

Q. What is Elnora's house, a transportation point or something?

A. No, sir. I wouldn't say that.

Q. Everybody gets a ride from there, don't they?

THE COURT: Mr. Harvey, don't—don't—just ask the question. Don't editorialize.

The question asked of the witness was argumentative. The court did not err in this admonition to Leander's attorney.

Later in the cross-examination of Jermaine Artis, he testified he did not know how many people had been in Elnora Lynch's house at a certain time. The following colloquy then occurred:

Q. Um-hum. Who was staying there then?

A. I don't know who stays in her house, sir, right now.

Q. Then. Back then? You knew who was staying there then.

THE COURT: He said he didn't know.

Q. Did you know who was staying there last year in September when you had the little incident with the phone?

A. No, sir, I doesn't [sic].

The court in this exchange did not express any opinion on the truthfulness of the witness, but merely reminded the attorney of the witness' testimony. This was not error. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

At another point during the cross-examination of Jermaine Artis, he was asked whom he had seen in the crowd of fifty people who were standing in the parking lot after the shooting. The court then asked Leander's attorney whether he wanted the name of each person the witness recognized in the parking lot. This was not a comment on the evidence or a disparaging remark about Leander's attorney. It was an attempt by the court to clarify the question.

The court also stopped Leander's attorney from asking a witness how many people were in the parking lot after Bryan Handsome had been shot. The question had been asked in different forms several times. It was not error to exclude this repetitious question.

At one time during the cross-examination of a witness, the court, at the request of the district attorney, instructed the jury that questions asked by an attorney are not evidence. This ruling came after Leander's attorney had asked questions which implied that someone other than Bennie Lee Taylor had shot Bryan Handsome. The court's instruction was a correct statement of the law, and it was not error to give it.

At one point, the court said, "I'm going to allow the Court's motion—I mean, the State's motion in limine." Leander says this was a Freudian slip which showed the court's bias. We believe it was a *lapsus linguae*, which was not prejudicial to the defendants.

During the cross-examination of Elnora Lynch, she was asked several questions as to the chairs she had on her front porch. When she was asked how long she had had the chairs, the court on its own motion excluded the question. The number of chairs owned by Ms. Lynch had no relevance to any issue in this case. The court did not err in excluding this question.

Several times when ruling on the evidence, the court said "sustained[,] sustained" rather than using the word "sustained" only once.

The defendants say this put too much emphasis on the objections. We do not believe this emphasized the objections, and we do not see how the defendants were prejudiced by this action of the court.

The defendants cite several instances in which the prosecuting attorney objected to questions and said, "That's not what he said." The defendants contend that when the court sustained these objections, it expressed an opinion on the testimony. The sustaining of an objection does not indicate that the court agrees with a statement made in connection with the objection.

Bennie Lee Taylor also complains of what he contends was the court's sustaining objections to questions on its own motion. All three instances cited by Bennie Lee involved questions to prospective jurors during the jury selection. One of the prospective jurors was asked if his years of training were helpful in being an engineer. He was also asked if his wife supervised other people. The court told the prospective juror he did not have to answer either of the questions. On another occasion, the court told Leander's attorney to rephrase a question in order for a prospective juror to understand it. This action of the court did not show, as argued by Bennie Lee Taylor, that the court had abandoned its position of neutrality.

The assignment of error of each defendant is overruled.

[2] The defendants next assign error to what they contend was prosecutorial misconduct. To support this assignment of error, they rely principally on what they say were improper comments on the defendants' failure to testify. The prosecuting attorney argued on several points that the State's case was uncontradicted. The defendants concede that such an argument is ordinarily not an improper comment on a defendant's failure to testify. *State v. Young*, 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986). They say that with the other prosecutorial misconduct, this argument gave the jury a substantial reason to wonder why they did not testify. We can find no other prosecutorial misconduct. We find no error in this argument by the district attorney.

The prosecuting attorney argued on several points that the defendants had not proved what they said they would prove in their opening statements. We held in *State v. Harris*, 338 N.C. 211, 229, 449 S.E.2d 462, 471 (1994), that such a comment is proper when the defendant does not testify.

The prosecuting attorney also argued that there were certain witnesses the defendants could have called whom they did not. This

argument was not a comment on the defendants' failure to testify. It dealt with witnesses other than the defendants.

The prosecuting attorney argued further that all Leander would ever be is a bully who tried to "keep folks down." Leander says this put his character in evidence. The State may argue from the evidence that a defendant has a bad character without violating the rule of N.C.G.S. § 8C-1, Rule 404(a), that character evidence is not admissible to show the defendant acted in conformity therewith.

At one point in his jury argument, the prosecuting attorney said:

> [T]he Lord Himself could not have gotten on the witness stand and not have something bad asked about him. Jesus Christ couldn't have gotten on that witness stand and not had something bad, slandered, about him.

The defendants say this argument is that they would disparage the Father and the Son if given the chance, which could be very damaging to them. No objection to this argument was made at trial. It was not so grossly improper that the court should have intervened *ex mero motu*. *State v. King*, 299 N.C. 707, 713, 264 S.E.2d 40, 44 (1980).

Finally under this assignment of error, Leander Taylor argues that it was error for the prosecuting attorney to ask a police officer whether he had heard Bennie Lee's attorney say in his opening statement that Bennie Lee "wasn't there." The court sustained the objection to this question. The defendants were not prejudiced. *State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991).

The assignment of error of each defendant is overruled.

[3] In their third assignment of error, each defendant says error was committed when evidence of the character of the victim and the defendants was introduced. Marvin Handsome, Bryan Handsome's uncle, testified that the victim was a "good nephew," that he worked hard, and that he did not use drugs. We note that this testimony was elicited on redirect examination in response to questions asked on cross-examination.

The defendants had asked a State's witness on cross-examination if he knew what type of person the victim was. In response to this question, the State, on redirect, asked Mr. Handsome what type person the victim was. The witness responded as shown above. The defendants cross-examined another witness concerning all of the "nice things" the victim owned in an attempt to imply that he had got-

ten these things through questionable means. The State properly elicited testimony on redirect examination that the victim was employed and worked hard to get his "nice things." Finally, the defendants attempted to imply on cross-examination of other witnesses that the victim was a gang member and that he hung around a drug house. Therefore, the State presented evidence that the victim did not use drugs. The State, during redirect examination, is entitled to clarify and rebut issues raised during cross-examination. *Id.* at 26, 405 S.E.2d at 194; *State v. Weeks*, 322 N.C. 152, 169, 367 S.E.2d 895, 905 (1988). This testimony is not inadmissible evidence of the victim's good character.

[4] The defendants say it was improper to allow testimony about defendant Bennie Lee Taylor as follows:

> He [Bennie Lee Taylor] sometimes he keeps himself a little neater than "Shorty" [Leander Taylor]. "Shorty's" always been the ragged one. You know, I'm not trying to be a clown or nothing, but that's my opinion about it.

Testimony that Bennie Lee Taylor was neater than his brother is not prejudicial to either. The testimony was merely the witness' description of how the two brothers looked and how he distinguished between them. It was not character evidence.

[5] The defendants also contend that the court erred in failing to strike testimony that "they will shoot you." The defendants objected to the testimony, and the trial court sustained the objection. The defendants did not request that the testimony be struck. They have, therefore, waived their right to assert error. *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 302 (1994).

The assignment of error of each defendant is overruled.

[6] At the close of all the evidence, the defendants moved to dismiss the charges of first-degree murder because, they contended, the evidence did not support the element of premeditation and deliberation. They now argue that the trial court erred in denying their motions to dismiss and to set aside the verdict. The defendants rely on *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981), and assert that the killing took place during a quarrel or scuffle while the defendants were under the influence or provocation of the quarrel or scuffle. Therefore, say the defendants, there was no premeditation and deliberation.

When deciding a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 271 (1994).

> "Premeditation" means that the defendant formed the specific intent to kill " 'for some length of time, however short,' " before committing the murderous act. *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (quoting *State v. Biggs*, 292 N.C. 328, 337, 233 S.E.2d 512, 517 (1977)); *see also Carter*, 335 N.C. at 429, 440 S.E.2d at 272. "Deliberation" is defined as an intent to kill formed by defendant in a cool state of blood, and not as a result of a violent passion arising from legally sufficient provocation. *Carter*, 335 N.C. at 429, 440 S.E.2d at 272; *[State v.] McAvoy*, 331 N.C. [583,] 589, 417 S.E.2d [489,] 494 [(1992)].

State v. Ross, 338 N.C. 280, 287, 449 S.E.2d 556, 562 (1994). The instant case clearly supports the elements of premeditation and deliberation. The State's evidence showed that defendant Leander Taylor had threatened the victim weeks prior to the murder. He told numerous people that he was going to kill the victim. Before the fight even began, Leander stated to the victim and his friends, "We're going to show y'all little young punks something tonight." He then stated to his brother, Bennie Lee, "Shoot him, Bro. Shoot him." Bennie Lee pulled his revolver from his pocket before the scuffle began. He pointed it first at Jermaine Artis, then at the victim, Bryan Handsome, as Leander grabbed and punched him. Bennie Lee fired three successive shots, all of which hit the victim. The victim had said nothing to anger the defendants.

Premeditation and deliberation may easily be inferred from this evidence. Defendant Leander Taylor threatened the life of the victim numerous times prior to the "scuffle." Also, this Court has previously found that, in the case of numerous wounds, "the defendant has the opportunity to premeditate and deliberate from one shot to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). The defendants did not form the intent to kill simultaneously with the act of killing as required by *Misenheimer* to negate premeditation and deliberation. In the present case, there was evidence that the intent to kill was formed prior to the scuffle. As we noted in *Misenheimer*, "a killing committed during the course of a quarrel or scuffle may yet constitute first degree murder provided the defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing dur-

ing the quarrel was the product of this earlier formed intent." *Misenheimer*, 304 N.C. at 114, 282 S.E.2d at 795.

The evidence supports the jury's finding of premeditation and deliberation; the trial court did not abuse its discretion in denying the defendants' motions. These assignments of error are overruled.

[7] In their next assignments of error, the defendants contend the court should not have charged on aiding and abetting and acting in concert as to Leander. The court did not charge on either theory as to Bennie Lee, but he says it was error prejudicial to him when the court charged on these elements as to Leander. He says that there was no evidence that he premeditated or deliberated the killing of Bryan Handsome, and by charging on acting in concert as to Leander, the jury was allowed to impute the premeditation and deliberation of Leander to him.

We disagree with Bennie Lee. We have held there is plenary evidence for the jury to find he killed the victim with premeditation and deliberation.

Leander argues that it was error to charge on aiding and abetting. He says he is either guilty as a principal or not guilty. The evidence that Leander was struggling with Bryan Handsome and told Bennie Lee to shoot him is evidence that Leander was present at the time and place and that he encouraged Bennie Lee to commit the crime. This evidence supports a charge on aiding and abetting. *State v. Hargett*, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961).

The assignment of error of each defendant is overruled.

[8] Each defendant next argues what they say are several errors in the admission of evidence. A police officer was allowed to testify that Jermaine Artis had told him that Bennie Lee had shot Artis' friend. The defendants contend this was inadmissible hearsay testimony. Leander also contends the testimony violated the rule of *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968).

The testimony was properly admitted to corroborate the testimony of Jermaine Artis, who had testified Bennie Lee had shot Bryan Handsome. The defendants did not ask for a limiting instruction, and they cannot now complain. *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). *Bruton* deals with the introduction of out-of-court statements of codefendants. Artis is not a codefendant; thus, *Bruton* does not apply.

[9] The defendants next argue that certain testimony of Elnora Lynch should have been excluded as inadmissible hearsay. She testified that at some time prior to the shooting, she saw Leander Taylor across the street from her home and in the yard of her daughter, Velma Lynch. Leander was holding a sawed-off shotgun. Elnora called Velma, who came to Elnora's home. Elnora warned her that she had seen Leander with a gun. Elnora then testified that Velma said, "He's not after me. He's after Bryan and Jermaine."

This testimony by Elnora Lynch as to what her daughter told her was admissible as a present-sense impression exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(1) (1992). It was a statement explaining a condition made immediately after the declarant had perceived the condition. *State v. Maness*, 321 N.C. 454, 458, 364 S.E.2d 349, 351 (1988). It was admissible as an exception to the hearsay rule.

[10] The next testimony to which the defendants object involves a telephone conversation between Bryan Handsome's mother and grandmother. The mother testified that the grandmother said the following:

> She told me that I needed to talk to Bryan because Elnora had called her and told her something about somebody had hung the phone up on Bryan at the phone booth, and had been around there looking for Bryan with a gun.

Assuming this testimony should have been excluded pursuant to the hearsay rule, its admission was harmless. There was substantial other evidence of the incident at the telephone booth and that Leander had threatened Bryan on several occasions. This evidence was cumulative, and its admission could not have prejudiced the defendants.

[11] The defendants next contend that testimony by Deputy Sheriff M.T. Macon violated the hearsay rule. Deputy Sheriff Macon testified that he went to the emergency room of Halifax Memorial Hospital after the shooting. While he was there, Jermaine Artis approached him and said Bennie Lee had been fighting with Bryan. Artis testified at length about the fight. This testimony by Deputy Sheriff Macon was admissible to corroborate Artis' testimony at trial.

[12] The defendants next contend that the hearsay rule was violated when Raymond R. Vaughn, Chief of Police of Garysburg, was testifying. Chief Vaughn testified that the Sheriff of Northampton County

asked him if he knew a male living in Garysburg named Pluck, who may have been involved in a shooting. Pluck is Bennie Lee's nickname.

Again, assuming this was hearsay testimony, it was of slight importance. There was other strong evidence of the defendants' guilt. This statement by the chief that Bennie Lee may have been involved in a shooting added virtually nothing to the evidence against the defendants.

[13] The defendants next say it was error to allow the State to introduce the notes an officer made of interviews with several of the witnesses. These notes were consistent with the witnesses' testimony and were introduced to corroborate the testimony of the witnesses. In this state, we have been liberal in allowing the introduction of prior consistent statements in corroboration of witnesses. *See* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 165 (4th ed. 1993). There is no reason under this liberal policy why notes taken of conversations should not be allowed to corroborate the testimony of witnesses.

[14] Defendant Leander Taylor also says it was error to let an officer testify that when Bennie Lee was advised about the shooting, he said "he didn't know anything about it, that he had been home all night." Leander says this statement by the officer as to what his codefendant said violated the *Bruton* rule. The *Bruton* rule prohibits the introduction into evidence of a statement by a defendant if the statement implicates a codefendant. The testimony of the officer as to what Bennie Lee had said did not implicate Leander in any way.

The assignment of error of each defendant is overruled.

[15] The defendants next assign error to the introduction into evidence of a picture of Bryan Handsome which the pathologist testified appeared to be a picture of the person upon whose body she performed an autopsy. The defendants contend that a chain of custody was not established which would prove that the body on which the autopsy was performed was the body of Bryan Handsome. If an item to be introduced has unique features so it is readily identifiable, no chain of custody evidence is necessary. *State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983). The pathologist could identify the photograph and testify as to the results of the autopsy without showing a chain of custody.

The assignment of error of each defendant is overruled.

[16] The defendants next assign error to the allowing of a motion *in limine* to prevent them from asking any questions on cross-examination of the sheriff as to what one of his deputies had told him. The defendants concede such testimony would be hearsay but say N.C.G.S. § 8C-1, Rules 803 and 804 allow exceptions in this case. The defendants do not say how these two rules allow such testimony, and we can find no way that they do so. It was not error to grant this motion *in limine*.

The assignment of error of each defendant is overruled.

[17] The defendants next assign error to the court's granting of a motion *in limine* precluding them from asking a deputy sheriff on cross-examination what someone told him. This would have been hearsay evidence, but the defendants say it should have been admitted because it would show the officer's knowledge as a result of the investigation. We know of no such exception to the hearsay rule. In addition, the record does not show what the deputy sheriff's answer would have been, and we cannot determine whether the defendants were prejudiced by the granting of this motion. *See State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

The assignment of error of each defendant is overruled.

[18] The defendants next assign error to the allowance of testimony by two of the State's witnesses. Marvin Handsome, the victim's uncle, testified that he was scared for his nephew and that his nephew was worried. Jermaine Artis testified that the death of his friend had affected his ability to sleep. The defendants argue that these statements were inadmissible under N.C.G.S. § 8C-1, Rule 403 because of the prejudicial impact of the statements.

We first note that the statements by Marvin Handsome were made on redirect in order to clarify questions asked on cross-examination regarding the witness' conversation with Leander Taylor. During redirect examination, the State is entitled to clarify and rebut issues raised during cross-examination. *See Quick*, 329 N.C. at 26, 405 S.E.2d at 194; *Weeks*, 322 N.C. at 169, 367 S.E.2d at 905. Second, the testimony of Jermaine Artis that he could not sleep was admitted for the limited purpose of explaining his demeanor on the witness stand. The trial court properly instructed the jury as to the limited use of this evidence. Finally, the defendants fail to show prejudice from the admission of these statements. Reasonable jurors would most likely con-

clude without testimony to the fact that the loss of a friend would be difficult for anyone. Similarly, most uncles would be concerned for their nephew when someone threatens him.

The assignment of error of each defendant is overruled.

[19] In the defendants' final assignment of error, they contend that the State failed to comply with *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), by giving them Officer Blowe's notes during trial instead of before trial. They argue that this failure entitled them to a mistrial and that it was error not to grant it.

We have previously held that due process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence. *State v. Jackson*, 309 N.C. 26, 33, 305 S.E.2d 703, 710 (1983). In the present case, the State provided the defendants with Officer Blowe's notes on Thursday, four days before the State rested on Monday. The State also provided the defendants with telephone numbers by which the defendants could contact the witness. The defendants did not ask for a continuance or in any way indicate that they were having trouble locating the witness. Based on these facts, we find that the defendants were given ample opportunity to make use of this evidence, if they desired to do so.

The assignment of error of each defendant is overruled.

[20] Defendant Leander Taylor raises an additional assignment of error. He contends that the trial court erred in admitting evidence of a fight between the victim, Bryan Handsome, and Leander Taylor's cousin as furnishing a motive for the shooting. We note that evidence of motive is relevant and competent. *State v. Ruof*, 296 N.C. 623, 630, 252 S.E.2d 720, 725 (1979). This evidence was properly admitted.

This assignment of error is overruled.

NO ERROR.

FRED GAMMONS, GUARDIAN AD LITEM FOR TRAVIS GAMMONS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 311PA95

(Filed 31 July 1996)

State § 33 (NCI4th)— Tort Claims action—failure to provide child protective services—jurisdiction of Industrial Commission

Summary judgment for defendant on jurisdictional grounds was properly denied in an action in the Industrial Commission under the Tort Claims Act against the North Carolina Department of Human Resources for failure to properly supervise the Cleveland County Department of Social Services in the provision of child protective services to a child who was ultimately injured. Analysis of the statutory scheme for the provision of child protective services indicates that the Cleveland County Director of Social Services is the agent of the Social Services Commission of the North Carolina Department of Human Resources with respect to the investigation and reporting of child abuse and neglect and that the Social Services Commission is given the right to control and direct the manner in which the County Director is to provide protective services. Following the reasoning in *Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, there exists a sufficient agency relationship between the Department of Human Resources and the Cleveland County Director of Social Services and his staff that the doctrine of *respondeat superior* is implicated. Because the Department of Human Resources may be liable, the Industrial Commission has jurisdiction under the Tort Claims Act. N.C.G.S. § 143B-138; N.C.G.S. § 143B-153; N.C.G.S. § 108A-12(a); N.C.G.S. § 108A-14; N.C.G.S. § 7A-542; N.C.G.S. § 7A-544; N.C.G.S. § 7A-548; N.C.G.S. § 7A-552.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 184 et seq.

Liability of governmental entity to builder or developer for negligent issuance of building permit subsequently suspended or revoked. 41 ALR4th 99.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured. 68 ALR4th 266.

Municipal liability for negligent performance of building inspector's duties. 24 ALR5th 200.

On discretionary review pursuant to N.G.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 589, 459 S.E.2d 295 (1995), affirming the order of the North Carolina Industrial Commission entered 30 March 1994 in Docket No. 9410IC695. Heard in the Supreme Court 11 March 1996.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for plaintiff-appellee.

Michael F. Easley, Attorney General, by D. Sigsbee Miller, Assistant Attorney General, Gayl M. Manthei, Special Deputy Attorney General, and David Gordon, Assistant Attorney General, for defendant-appellant.

ORR, Justice.

This is an action for recovery of damages under the Tort Claims Act which was brought by the minor child, Travis Gammons, by and through his guardian *ad litem*, Fred Gammons ("the claimant") against defendant North Carolina Department of Human Resources, by and through its local agencies, the County of Cleveland and the Cleveland County Department of Social Services, for failure to properly supervise the Cleveland County Department of Social Services in the provision of child protective services. On 15 July 1991, the claimant commenced this action by filing an affidavit with the North Carolina Industrial Commission pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (Supp. 1995). In the affidavit, the claimant specifically alleges that Cleveland County Department of Social Services employees failed to properly respond to reports that the minor child was being physically abused by his stepfather. The record tends to show that on at least three occasions from February 1988 until August 1988, reports of physical abuse were made to the Cleveland County Department of Social Services, which took no action to protect the interest of the minor child or to remove him from the injurious environment in which he lived. After the injuries had been inflicted, the Cleveland County Department of Social Services took legal custody of the minor child and, in 1991, released custody of the minor child to Fred Gammons, who is the minor child's biological father.

On 25 October 1991, defendant Department of Human Resources moved to dismiss claimant's claim pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, specifically alleging that the claimant "failed to allege negligence by a named officer, agent, employee or involuntary servant of the State as required by G.S. § 143-291 and [§] 143-297" and that "[n]either Cleveland County nor Cleveland County Department of Social Services is an agent of the defendant North Carolina Department of Human Resources" with respect to providing child protective services. On 15 June 1993, the claimant moved to strike from consideration affidavits attached to defendant's motion to dismiss, which the deputy commissioner allowed, and then denied defendant's motion to dismiss. On 1 July 1993, defendant moved for reconsideration of the deputy commissioner's order allowing the claimant's motion to strike defendant's affidavits and its denial of defendant's motion to dismiss, and in the alternative, defendant moved for summary judgment on the same jurisdictional grounds as the motion to dismiss and requested consideration of the supporting affidavits. On 19 July 1993, defendant's motion for reconsideration was denied.

On 24 July 1993, the deputy commissioner denied defendant's motion to dismiss and ordered the claimant to file an amended affidavit (within thirty days of the date of the order), which "names an officer, agent, or employee of the State who is alleged to be negligent." On 28 July 1993, the claimant filed an amended affidavit naming as officers, employees, or agents of the State, Mary Deyampert, Director of the Department of Human Resources, and Lois Ray, Regional Director of the Department of Human Resources, as well as several Cleveland County Department of Social Services employees, including County Director Hal Smith.

On 5 August 1993, the deputy commissioner denied defendant's motion for summary judgment, and on 12 August 1993, defendant appealed to the full Commission. On 30 March 1994, the full Commission ordered that defendant's motion for summary judgment be denied, concluding that this case is controlled by *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. rev. denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). From this order, on 29 April 1994, defendant appealed to the Court of Appeals, which affirmed the decision of the full Commission. On 2 November 1995, we granted discretionary review.

The sole issue to be decided is whether, under principles of agency law as applied to the facts in this particular case, the

Cleveland County Director of Social Services and his staff are agents of the North Carolina Department of Human Resources for the purpose of providing child protective services so as to confer jurisdiction upon the Industrial Commission to hear and decide the tort claim at issue. The claimant contends that the Department of Human Resources is vicariously liable for the negligence of the Cleveland County Department of Social Services for failing to properly investigate the reports of abuse which resulted in the minor child being severely injured by his stepfather.

Generally, the State is immune from suit unless it expressly consents to be sued. By the 1951 enactment of the Tort Claims Act, the General Assembly partially waived the sovereign immunity of the State. The Tort Claims Act provides in pertinent part:

> (a) The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291(a) (Supp. 1995).

> The effect of the Tort Claims Act was twofold. First, the State partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment. Second, the Act provided that the forum for such direct actions would be the Industrial Commission, rather than the State courts.

Teachy v. Coble Dairies, Inc., 306 N.C. 324, 329, 293 S.E.2d 182, 185 (1982). "Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983).

In this case, we are asked to decide whether the State, through the North Carolina Department of Human Resources, is liable for the negligent acts of the Cleveland County Director of Social Services and his staff with respect to the delivery of child protective services so as to confer jurisdiction on the Industrial Commission to hear and decide the merits of this claim pursuant to the provisions of the Tort Claims Act. Application of the principles of agency law and *respondeat superior* to the statutory scheme for the provision of child protective services leads us to conclude that because, in this particular case, the Department of Human Resources may be liable for the negligence of the Cleveland County Director of Social Services and his staff, jurisdiction does reside with the Commission, which may therefore "hear and pass upon" the claimant's tort claim.

In the case at bar, the Court of Appeals concluded, as did the Commission, that this case is "controlled by *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577." In *Coleman*, the plaintiff, as administrator of the estates of her two minor daughters, filed an action against, among others, the Wake County Department of Social Services, seeking damages for the wrongful death of the decedents. The defendant had conducted a sexual abuse investigation of Melvin Coleman, the father/stepfather of the two girls, after the stepdaughter told a school nurse that she and her half-sister were involved in sexual relations with Coleman. During the investigation, Coleman was confronted by social worker Kathy Cooper, also a defendant, with the sexual abuse allegations. Despite denying the allegations, Coleman was subsequently told by his attorney that indictments had been handed down by the grand jury. Instead of turning himself in, Coleman broke into the trailer where the girls lived, stabbed and murdered them, and then fire-bombed the trailer. In *Coleman*, the plaintiff alleged that the liability of the Wake County Department of Social Services was " 'based upon respondeat superior for the negligence of defendant Cooper' " and the " 'failure of the Defendant Wake County to have appropriate safety procedures.' " *Id.* at 655, 403 S.E.2d at 580.

The trial court, after a series of motions and appeals, entered an order granting defendant Wake County Department of Social Services' motion to dismiss for lack of subject matter jurisdiction. On appeal to the Court of Appeals, the plaintiff contended that Wake County Superior Court was the proper forum to hear and decide the wrongful death claim and that the trial court erred in holding that the claim should be brought before the Industrial Commission. In decid-

ing the issue before it, the Court of Appeals held that the Industrial Commission was the proper forum for the claim. In making that determination, the Court of Appeals relied exclusively on *Vaughn v. N.C. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979).

In *Vaughn*, the claimant filed a negligence claim against the Department of Human Resources with the Industrial Commission pursuant to the provisions of the Tort Claims Act. The claimant alleged that the Durham County Director of Social Services and his staff negligently placed in her home a foster child who was a carrier of the cytomegalo virus with knowledge that the claimant was attempting to become pregnant. Claimant subsequently became pregnant and while pregnant contracted the cytomegalo virus. Upon the advice of her physician, the claimant was forced to abort her pregnancy because of the high risk of birth defects to the unborn child.

The Department of Human Resources moved to dismiss the claim for lack of jurisdiction, contending the "Durham County Department of Social Services is not a State department and the Director and employees thereof are not State employees within the meaning of G.S. 143-291." *Id.* at 684, 252 S.E.2d at 794. The deputy commissioner held that the Industrial Commission had jurisdiction to hear and decide the claim; the full Commission, and subsequently the Court of Appeals, affirmed the deputy commissioner's order.

On appeal to this Court, the issue was whether the Industrial Commission had jurisdiction to hear and determine the asserted tort claim. This Court stated:

> In order for the Commission to assert jurisdiction over this claim[,] there must be a showing that the Director of the Durham County Department of Social Services and his staff were acting as the "involuntary servants or agents" of a "State Department" under circumstances in which the State, if a private person, would be liable for the negligent acts of the named servants or agents. G.S. 143-291.

Vaughn, 296 N.C. at 685, 252 S.E.2d at 794.

The Court then analyzed in detail the statutory scheme for the delivery of foster care services and concluded that the

> County Director of Social Services is the agent of the Social Services Commission of the Department of Human Resources

> with respect to the placement of children in foster homes and that the Social Services Commission is given the right to control and direct the manner in which the County Director is to place children in foster homes.

Id. at 686, 252 S.E.2d at 795. We held that "the Department of Human Resources is liable for the negligent acts of its agents, the Durham County Director of Social Services and his subordinates, with respect to the placement of children in foster homes." *Id.* at 692, 252 S.E.2d at 798. Our holding was "narrowly premised on the ground that the Department of Human Resources through the Social Services Commission has the right to control the manner in which the County Director is to execute his obligation to place children in foster homes." *Id.* We specifically noted that we "express no opinion on whether the Department of Human Resources might also be liable for negligent acts of the County Director outside the scope of his obligation to place children in foster homes." *Id.*

Although *Vaughn* dealt with a different factual situation—the negligent placement of a child in a foster home—the legal analysis is applicable to the case *sub judice* in that the *Vaughn* Court analyzed in detail the statutory scheme and administrative regulations for the delivery of foster care services. Thus, we believe *Vaughn* is instructive in analyzing the issue presently under review with respect to the delivery of child protective services. "In every instance the liability of the Department of Human Resources depends upon application of the principles of agency and respondeat superior to the facts in the case under consideration." *Id.*

> Whenever the principal retains the right "to control and direct the manner in which the details of the work are to be executed" by his agent, the doctrine of respondeat superior operates to make the principal vicariously liable for the tortious acts committed by the agent within the scope of his employment. *Hayes v. [Board of Trustees of] Elon College*, 224 N.C. 11, [15,] 29 S.E.2d 137[, 139-140] (1944); *Harmon v. [Ferguson] Contracting Co.*, 159 N.C. 22, [27,] 74 S.E. 632[, 634] (1912)[; s]*ee also*[] *Scott v. [Waccamaw] Lumber Co.*, 232 N.C. 162, [165,] 59 S.E.2d 425[, 426] (1950). Conversely, a principal is not vicariously liable for the tortious acts of an agent who is not subject to the control and direction of the principal with respect to the details of the work and is subordinate only in *effecting a result* in accordance with the principal's wishes. *Harmon*[, 159 N.C. at 27, 74 S.E. at

> 634; s]*ee generally*[] Restatement (Second) of Agency § 2 (1957). In sum, a principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal over the details of the work as it is being performed. The controlling principle is that vicarious liability arises from the right of supervision and control. *Accord*[] *Hayes*[, 224 N.C. at 15, 29 S.E.2d at 140; s]*ee also*[] 8 N.C. Index 3d, Master and Servant, § 3 and cases collected therein.

Vaughn, 296 N.C. at 686, 252 S.E.2d at 795. Analysis of the statutory scheme adopted by the General Assembly for the provision of child protective services indicates that the Cleveland County Director of Social Services is the agent of the Social Services Commission of the North Carolina Department of Human Resources with respect to the investigation and reporting of child abuse and neglect and that the Social Services Commission is given the right to control and direct the manner in which the County Director is to provide protective services. "[T]he conclusions we reach with respect to the status of the County Director as an agent of the Department of Human Resources and with respect to the vicarious liability of the Department for the negligent acts of the County Director are equally applicable, under principles of subagency, to the . . . caseworkers named by claimant." *Id.* at 686-87, 252 S.E.2d at 795.

N.C.G.S. § 143B-138 of chapter 143B, article 3, entitled "Human Resources," provides in pertinent part that: "All functions, powers, duties, and obligations heretofore vested" in the North Carolina Division of Social Services and the North Carolina Social Services Commission are "vested in the Department of Human Resources." N.C.G.S. § 143B-138(b)(11), (12) (1993). Further, N.C.G.S. § 143B-153 provides in pertinent part:

> There is hereby created the Social Services Commission of the Department of Human Resources with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article. . . .
>
> (1) The Social Services Commission is authorized and empowered to adopt such rules and regulations that may be necessary and desirable for the programs admin-

> istered by the Department of Human Resources as provided in Chapter 108A of the General Statutes of the State of North Carolina.

N.C.G.S. § 143B-153 (Supp. 1995).

Next, article I, section 108A-1 of chapter 108A, entitled "Social Services," provides in pertinent part:

> Every county shall have a board of social services which shall establish county policies for the programs established by this Chapter *in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Human Resources.*

N.C.G.S. § 108A-1 (1994) (emphasis added). "The board of social services of every county shall appoint a director of social services in accordance with the merit system rules of the State Personnel Commission . . . ." N.C.G.S. § 108A-12(a) (1994). The county director of social services shall "act as agent of the Social Services Commission and Department of Human Resources in relation to work required by the Social Services Commission and Department of Human Resources in the county." N.C.G.S. § 108A-14(a)(5) (Supp. 1995). Pursuant to N.C.G.S. § 108A-14(a)(11), the "work required" of the Cleveland County Director of Social Services in the instant case includes in relevant part that he "investigate reports of child abuse and neglect and . . . take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 44 of Chapter 7A." N.C.G.S. § 108A-14(a)(11).

Article 44 of chapter 7A, entitled "Screening of Abuse and Neglect Complaints," sets forth the requirements for the delivery of protective services in county social services departments. N.C.G.S. § 7A-542 provides in pertinent part:

> The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.
>
> Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more

adequate parents or caretakers, and to preserve and stabilize family life.

N.C.G.S. § 7A-542 (1995). N.C.G.S. § 7A-544 provides in pertinent part:

> When a report of abuse, neglect, or dependency is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition.

N.C.G.S. § 7A-544 (1995). N.C.G.S. § 7A-548 provides in pertinent part:

> (a) If the Director finds evidence that a juvenile may have been abused as defined by G.S. 7A-517(1), the Director shall make an immediate oral and subsequent written report of the findings to the district attorney or the district attorney's designee and the appropriate local law enforcement agency within 48 hours after receipt of the report. . . .
>
> If the Director receives information that a juvenile may have been physically harmed in violation of any criminal statute by any person other than the juvenile's parent, guardian, custodian, or caretaker, the Director shall make an immediate oral and subsequent written report of that information to the district attorney or the district attorney's designee and to the appropriate local law enforcement agency within 48 hours after receipt of the information. . . .
>
> If the report received pursuant to G.S. 7A-543 involves abuse or neglect of a juvenile in day care, either in a day care facility or a day care home, the Director shall notify the Department of Human Resources within 24 hours or on the next working day of receipt of the report.
>
> (a1) If the Director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7A-517 in a day care facility or day care home, he shall immediately so notify the Department of Human Resources and, in the case of child sexual abuse, the State Bureau of Investigation . . . .
>
> (a2) Upon completion of the investigation, the Director shall give the Department written notification of the results of the

investigation required by G.S. 7A-544. Upon completion of an investigation of child sexual abuse in a day care facility or day care home, the Director shall also make written notification of the results of the investigation to the State Bureau of Investigation.

The Director of the Department of Social Services shall submit a report of alleged abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment to the central registry under the policies adopted by the Social Services Commission.

N.C.G.S. § 7A-548(a), (a1), (a2) (1995).

The Department of Human Resources shall maintain a central registry of abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Human Resources and shall be confidential, subject to the policies adopted by the Social Services Commission providing for its use for study and research and for other appropriate disclosure.

N.C.G.S. § 7A-552 (1995).

Therefore, N.C.G.S. § 7A-548(a2) requires county directors to notify the Department of Human Resources upon completion of any investigation executed pursuant to N.C.G.S. § 7A-544. Notification is required only upon completion of the investigation unless the case involves abuse or neglect in the day care setting, in which case notification is required within 24 hours of the receipt of a report of abuse by the county director. N.C.G.S. § 7A-548(a). The instant case did not involve the day care setting, so notification was required only after the investigation was complete. Such notification after the fact does not demonstrate the level of supervision or control required to employ the doctrine of *respondeat superior*. However, following the analysis used in *Vaughn*, we must also review any enacted administrative guidelines for the provision of child protective services to determine whether the Department of Human Resources retains a right of control over the manner in which child protective services are provided by a local agency. Our review of the record reveals that,

pursuant to the mandate of N.C.G.S. § 143B-153, the North Carolina Social Services Commission has adopted comprehensive mandatory administrative regulations which detail the manner in which a county director and his staff are to supervise the delivery of child protective services, including the investigation and reporting of alleged child abuse and neglect. These mandatory standards on protective services instruct county directors of social services on virtually every aspect of providing child protective services. Specifically, regulation .0101 of title 10, subchapter 41I of the North Carolina Administrative Code, entitled "Protective Services," provides:

> Rules in this Subchapter govern the provision of protective services for children with funds administered by the Division of Social Services. Included are requirements for the management of the central registry of neglect and abuse cases, and requirements which *must* be met by county departments of social services in carrying out their responsibilities for the protection of children under Chapter 7A of the General Statutes.

10 NCAC 41I .0101 (January 1986) (emphasis added).

In addition, the North Carolina Division of Social Services, a subdivision of the Department of Human Resources, has written comprehensive guidelines contained in its *Family Services Manual*, which "is intended to guide supervisors and social workers providing protective services for children to do good casework with those who become known to an agency as a result of a report of child abuse or neglect." I *Family Services Manual* ch. VIII, sec. 1450, at 2 (N.C. Div. of Social Servs. Jan. 1, 1980). Specifically contained in the *Family Services Manual* is a section entitled "Statement of Philosophy and Purpose." This section provides:

> The legal mandate of protective services is the *state's discharging its responsibility* to assure that its citizens are properly protected and minimally cared for when those citizens are dependent upon others. A child depends on parents or other caretakers to feed, cloth[e], provide shelter, give supervision, protect from physical harm and danger. When the parents or other caretakers fail in their responsibilities to care for the children, *the state intervenes through the local department of social services.*

I *Family Services Manual* ch. VIII, sec. 1450, at 1 (N.C. Div. of Social Servs. Jan. 1, 1980) (emphasis added). Another section, entitled "Role of the State Division of Social Services," provides as follows:

A. The Division of Social Services carries the *primary* responsibility for statewide program development and coordination of child protective services. This includes:

. . . .

2. Program planning and development with county departments and other state agencies.

3. *Development and distribution of standards, policies and procedures for the delivery of protective services by county departments of social services.*

. . . .

B. The Protective Services Unit within the Division carries its supervisory and consultation responsibilities in cooperation with the services staff in the regional offices. The central office staff provides support and assistance to the regional staff in working with county departments to strengthen the local service delivery system.

I *Family Services Manual* ch. VIII, sec. 1467, at 8 (N.C. Div. of Social Servs. Oct. 1, 1980) (emphasis added).

Clearly, the above statutory scheme along with the mandatory administrative regulations and the Division of Social Services' *Family Services Manual* demonstrate the extent of the "degree of control retained by the [Department of Human Resources] over the details of the [provision of child protective services at the local level] as it is being performed." *Vaughn*, 296 N.C. at 686, 252 S.E.2d at 795. "[I]n defining the duties of the County Director of Social Services[,] the General Assembly envisaged that he would be the agent responsible for executing whatever work was required by the Social Services Commission in his county." *Id.* at 690, 252 S.E.2d at 797.

As we have previously stated, the "functions, powers, duties, and obligations heretofore vested" in the North Carolina Division of Social Services and the North Carolina Social Services Commission "continue to be vested in the Department of Human Resources." N.C.G.S. § 143B-138(b)(11), (12). Further, county directors of social services are "agent[s] of the Social Services Commission and Department of Human Resources in relation to *work required* by the Social Services Commission and Department of Human Resources in the county." N.C.G.S. § 108A-14(a)(5) (emphasis added). Under

N.C.G.S. § 108A-14(a)(11), the General Assembly made clear its intent to include as work required by the Social Services Commission and the Department of Human Resources of a county director of social services the investigation of reports of child abuse and neglect.

Based on the plain language of our statutory law governing social services and the provision of child protective services, the Department of Human Resources has substantial and official control over the provision of child protective services and designates the county director as the person responsible for carrying out the policies formulated by the Department, through the Social Services Commission and the Division of Social Services. "Thus, in practice, as well as in name, the role of the County Director in the delivery of [child protective] services is that of an agent. Like the agent, the County Director acts on behalf of the Department of Human Resources and is subject to its control with respect to the actions he takes on its behalf." *Vaughn*, 296 N.C. at 690, 252 S.E.2d at 797.

Thus, following the reasoning in *Vaughn*, as correctly applied in *Coleman*, we hold that in the instant case, regarding the provision of child protective services, there exists a sufficient agency relationship between the Department of Human Resources and the Cleveland County Director of Social Services and his staff such that the doctrine of *respondeat superior* is implicated. It follows therefore that because the Department of Human Resources may be liable, the Industrial Commission has jurisdiction under the Tort Claims Act to determine the Department of Human Resources' liability for alleged negligence of the Cleveland County Director of Social Services and his staff while acting within the scope of their obligation to assure that the county's citizens are "properly protected and minimally cared for when those citizens are dependent upon others" as mandated by the Department of Human Resources. I *Family Services Manual* ch. VIII, sec. 1450, at 1 (N.C. Div. of Social Servs. Jan. 1, 1980).

The Court of Appeals was correct in affirming the Industrial Commission's denial of defendant's motion for summary judgment.

AFFIRMED.

STATE OF NORTH CAROLINA v. DARYL FREDRICK CRAWFORD

No. 483A94

(Filed 31 July 1996)

1. Homicide § 250 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of circumstantial evidence

The circumstantial evidence in this case was sufficient to permit the jury to infer that defendant killed his wife with premeditation and deliberation so as to support his conviction of first-degree murder where it tended to show that the victim's body was found in bed; she died from a stab wound to her chest which punctured her heart; defendant was in bed beside her but could not be roused because he had attempted suicide by overdosing on a prescription medication; the marriage between defendant and the victim had been pervaded by marital problems for years, and the victim was going to divorce defendant; there was evidence of threats, ill will, and previous difficulties between defendant and the victim; defendant had stated on several occasions that he would kill the victim before he would allow the court to tell him when he could see his children or his wife; defendant had threatened to kill the victim on several prior occasions; defendant paid the premium on life insurance policies on the day before the victim's death; defendant stayed home from work to accomplish his purpose; defendant wrote a note shortly before killing the victim; a note written by defendant in which he shifted the blame for the problems in their marriage to the victim and stated that the victim had abused him was discovered near the victim's body; and the victim had a defensive wound that extended across three of her fingers, but defendant had no knife wounds when he was examined.

Am Jur 2d, Homicide § 439.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

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

2. Evidence and Witnesses § 876 (NCI4th)— hearsay statements by murder victim—state of mind exception

Testimony by four witnesses that a murder victim had told them that defendant had threatened to kill her, that he had physically abused her, that she sometimes separated from defendant, that defendant had followed or "stalked" her, and that she was becoming more afraid of defendant was admissible under the state of mind exception to the hearsay rule to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to her murder. Furthermore, the trial court did not abuse its discretion in finding that the probative value of the evidence was not outweighed by its tendency to prejudice the defendant.

Am Jur 2d, Evidence § 866.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

3. Homicide § 596 (NCI4th)— self-defense—instructions—belief in necessity to kill

The trial court did not err in instructing the jury that, in order to be entitled to the benefit of perfect or imperfect 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.

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.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

4. Homicide § 489 (NCI4th)— inference of premeditation and deliberation—examples in instructions—supporting evidence unnecessary

The trial court did not err by instructing the jury that premeditation and deliberation could be inferred from certain listed circumstances, including lack of provocation by the victim, even if the evidence did not support a finding of lack of provocation by the victim.

Am Jur 2d, Homicide § 501.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Thompson, J., at the 23 May 1994 Criminal Session of Superior Court, Durham 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 Mary D. Winstead, Associate Attorney General, for the State.

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

FRYE, Justice.

Defendant, Daryl Fredrick Crawford, was indicted on 21 September 1992 for the murder of his wife, Jeannetta Crawford. In a noncapital trial, the jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation. On 1 June 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 four arguments. After reviewing the record, transcript, briefs, and oral arguments of coun-

sel, 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: Jeannetta Crawford (the victim) and defendant were married in 1980. The victim's first husband had died, and she had one child, Charles Clark, who was born of that marriage. Defendant and the victim had two children, Jennifer and Joshua. By 1990, both the victim and defendant were pastors at Solid Rock Full Gospel Church in Durham, North Carolina.

On 19 June 1991, the victim applied for an apartment at Lynn Haven Apartments. On the rental application, the victim stated as her reason for moving out of her present residence: "I have become separated from my husband because of abuse and violence in the home." The victim told defendant that she needed time to herself. On 3 July 1991, the victim filed a motion for a domestic violence protective order, stating that she had left defendant, that she had been receiving threats, that defendant was harassing her and following her, and that she needed protection. Following this incident, the victim moved into Lynn Haven Apartments. While the victim resided at Lynn Haven Apartments, defendant would visit her and the children daily. On 1 November 1991, the victim gave the apartment complex notice of her intent to vacate on 1 December 1991 because she and her husband were going to attempt reconciliation. The victim returned home and lived with defendant.

In May 1992, the victim completed cosmetology school and was working as an apprentice in a beauty salon. While the victim worked at the salon, defendant would call or come by the salon several times a day. His visits made some of the customers nervous. In June 1992, while discussing with her employer the customers' reaction to defendant's visits to the salon, the victim confided in her employer that she and defendant were having marital problems.

The victim's employer, Juliette Alston (Alston), testified at trial that the victim told her that defendant had beaten their youngest child, Joshua. The victim brought Joshua into the salon for a haircut and showed Alston the bruises. Joshua had one bruise on his leg and another on his arm. The victim told Alston that she was upset about defendant beating Joshua and that she had to "get away" from him. The victim also told Alston that she had called Lynn Haven Apartments and asked whether she could rent an apartment again on

an emergency basis because she needed to get out of her house and because she was afraid for herself and her children.

In July 1992, the victim told Alston that defendant had used funds from their checking account to purchase a gun. When the victim confronted defendant and asked him about the gun, defendant put his hands around her throat and said, "I don't need a gun to kill you." Defendant later returned the gun that he had purchased.

Alston further testified that the victim told her that defendant would come home from work at night while she was asleep, and when she awoke, he would be standing over her. At this time, defendant was working nights as a postal clerk. On one occasion, the victim asked, "Why you're [sic] standing over me, Daryl?" Defendant responded, "Because of immense anger. I'm just so angry."

In early August, while the victim was in Delaware on a speaking engagement, Alston had a conversation with defendant. Alston and her husband had taken their dog to defendant's house to breed it with defendant's dog. On that occasion, defendant asked Alston and her husband to pray for him because he and the victim were having marital problems. Defendant said, "Sometimes, I feel like if I had a gun, I would kill her." Alston and her husband talked with defendant and told him that a gun was not the way to handle the situation. Defendant then said that he felt like a fool putting the victim through cosmetology school, and now she was talking about divorcing him. Defendant also told the Alstons, "I don't think I could stand to see her with anybody else."

Yolanda Johnson (Johnson), an evangelist and friend of the victim, testified that she became aware of defendant's and the victim's marital problems in 1986 when defendant spoke with her about them. Defendant would talk to Johnson regarding his marital problems whenever the victim would leave him. On several occasions, the victim stayed with Johnson when she left defendant. Often, when the victim was separated from defendant, defendant would harass Johnson and the victim; threaten Johnson; make harassing telephone calls late at night to Johnson, Johnson's parents, or anyone else he thought knew the victim or her whereabouts; "stalk" Johnson's house; knock on Johnson's door; ask Johnson's neighbors for Johnson's or the victim's whereabouts; and follow the victim.

The victim and Johnson would sometimes go to other cities to preach and minister through music and song. On one occasion,

defendant followed the victim and Johnson to Fayetteville. While in Fayetteville, defendant told Johnson that he would "clip [her] wings" and that he had "bought a gun to do that very thing." Johnson testified that defendant purchased a gun on two occasions and that the victim's children had seen the guns. According to Johnson, the victim said that she was becoming more afraid or fearful of defendant.

Alice Crawford, the wife of defendant's first cousin, testified at trial that defendant had spoken with her about his marital problems and that she had been aware of those problems for about six years prior to the victim's death. She testified that defendant had accused her of interfering in his affairs and had threatened her. She further testified that the victim had told her about defendant's threats and physical abuse in the home and that the victim had decided to leave defendant during the summer of 1992 because he was still interfering in her ministry and in her friendships, even though he had said that he would stop when she moved back in with him.

Sherry Williams (Williams) also testified that defendant had accused her of interfering in his affairs and that defendant had threatened her. Williams testified that the victim had confided in her about the victim's marital problems. Several days after the victim's death, Williams found a note and an audiocassette in a bedside stand in Williams' home. She recognized the handwriting as that of the victim. The note described specific instances of defendant's conduct, including the purchase of a shotgun, harassment, false accusations, physical abuse of the victim and her youngest son, and knocking holes in a door. The victim wrote, "I was forced to leave my house because of his violent actions," and "He has become very abusive." The note consisted of dated entries from "July 4th" until "Friday, August 7th."

On 13 August 1992, both the victim and defendant spoke separately with James Blount (Blount), defendant's brother-in-law, about their marital problems. The victim and her children had gone to Blount's house. While there, the victim asked Blount to check her Volkswagen automobile to determine whether defendant had tampered with the brakes or the engine while defendant was checking the oil. While Blount was checking the automobile, the victim told him that defendant had been pressuring her about her whereabouts, her affiliation with her church, and their family situation. The victim then stated that she felt that she needed to get away again.

After checking the victim's automobile, Blount received a telephone call from defendant. The victim gestured for Blount not to tell

defendant that she was there. During the telephone conversation, defendant told Blount: "I just can't deal with this no more. I can't put up with it any more." Defendant said that the victim was thinking about leaving him again and that she had planned to go through the court this time. Defendant stated several times that, before he would have any court tell him what to do about seeing his children or his wife, he would kill the victim. Blount then attempted to convince defendant that the court may be the "best way to go," if defendant and the victim could not resolve the matter between themselves. Throughout their conversation, Blount reminded defendant about his ministry, his religion, his beliefs, and the fact that both he and the victim were ministers. Blount suggested that they use the situation as a "stepping stone" so they could "direct other couples that were having marital problems."

Defendant, sounding as though he was in tears, said that he was hurting inside and that he was thinking about their life together, how he helped put the victim through school, and how she seemed not to want to contribute to paying the bills. Blount spoke with defendant for some fifteen or twenty minutes, and before the conversation ended, defendant said, "I feel much better that we talked." Defendant then asked Blount whether the victim was there, and Blount responded in the affirmative and invited defendant to come see her. Defendant arrived shortly thereafter, and the victim spoke with defendant in Blount's front yard for approximately ten or fifteen minutes.

On 17 August 1992, the victim, accompanied by Yolanda Johnson, went to Lynn Haven Apartments to apply for an apartment. The property manager noticed defendant pacing around outside. When defendant entered the office, the victim looked surprised. Johnson placed the application in her purse. Defendant left the office, and then the victim and Johnson left. On 18 August 1992, the victim returned the completed application to Lynn Haven Apartments. As before, the victim's application stated that it was an emergency situation due to "domestic violence and harassment" from defendant.

During the month of August, the victim continued to work at Alston's beauty salon, and defendant continued to call and visit. The victim did not work on 19 August 1992, but she went to the salon around 1:30 p.m. to speak with Alston. However, Alston was unable to speak privately with the victim because she was with a customer at the time. The victim told Alston, "[D]efendant went off last night. He

just went wild and stuff." The victim went on to say, "I'm going to call my sister in Charlotte and see if we can come and stay with her because we have to get away." Since Alston could not converse with the victim at that time, Alston suggested that the victim go to the victim's mother's house. Alston testified that the victim seemed very nervous and that the victim had said that defendant had threatened to kill her. Sometime after leaving the salon, the victim went to her mother's house. While there, defendant telephoned and asked the victim, "What you doing, telling your momma that I said I'm going to kill you?"

On that same day, defendant went to his insurance agent to pay the premium on life insurance policies. Defendant did not go to work on the night of 19 August. At some point during that night, while going to the bathroom, the victim's oldest son, Clark, noticed defendant sitting in the living room writing. He also noticed that no one was in his mother's bedroom. On the morning of 20 August 1992, one of the children found his mother's body in the bedroom; the bedroom door had been locked. The victim had a knife wound to her chest. Defendant was in the bed beside her, but he could not be roused. Defendant had attempted suicide by overdosing on his prescription medication, and he was drooling and foaming from his mouth. A suicide note was found near the bed.

Defendant was taken to the emergency room at Duke Medical Center, where he was treated and transferred to the intensive care unit. The treating physician examined defendant to determine whether he had any lacerations on his body. During this examination, the physician noticed blood on both of defendant's hands and on his feet. However, he found no lacerations on defendant's body.

An autopsy of the victim's body revealed that the victim had a stab wound located on the anterior of her chest. This wound punctured the right ventricle of the victim's heart. The medical examiner testified that the stab wound to the heart would have caused the victim to lose consciousness in a minute or less and to be brain dead within an additional two or three minutes. The victim also had an incised wound on the fingers of her left hand, across the ends of her third, fourth, and fifth digits. The medical examiner testified that the wound on the victim's fingers was a defensive wound.

Defendant testified at trial that during the night of 19 August 1992 and the morning of 20 August 1992, he and the victim sat together on the couch in their living room and discussed a separation agreement.

After discussing the custody of the children, the victim became angry. After some more discussion, the victim got up and went into the kitchen. When the victim returned from the kitchen to the living room, she attacked defendant with a knife. During the struggle for the knife, both defendant and the victim fell onto the couch. The victim grunted. When defendant raised up, he noticed that the knife was in the victim's chest. Defendant pulled the knife from the victim's chest, picked her up, and carried her into the bedroom. Defendant then attempted to overdose on his prescription medication.

[1] 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. In his first argument, defendant contends that the trial court erroneously denied his motion to dismiss because the evidence was insufficient to convict him of any culpable homicide. Defendant claimed self-defense and accident at trial and now argues that the evidence was not sufficient to overcome these claims. We disagree.

On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* "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 considering a motion to dismiss, the trial court is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight. *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986). "The trial court's function is to determine whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crimes charged." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61. The determination of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383.

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 from that evidence."

State v. Saunders, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986). "Defendant's evidence rebutting the inference of guilt may be considered only insofar as it explains or clarifies evidence offered by the state or is not inconsistent with the state's evidence." *State v. Furr*, 292 N.C. 711, 715, 235 S.E.2d 193, 196, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977).

We recently defined first-degree murder as follows:

> First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Premeditation means that defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation means that defendant carried out the intent to kill in a cool state of blood, "not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842-43 (1984).

State v. Arrington, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994). "Ordinarily, premeditation and deliberation must be proved by circumstantial evidence." *Saunders*, 317 N.C. at 312, 345 S.E.2d at 215. Circumstantial evidence is "evidence that is applied indirectly 'by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred.' " *State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 313 (1990) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 76 (3d ed. 1988)).

Circumstances to be considered in determining whether a killing was done with premeditation and deliberation include: " '(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner.' " *Saunders*, 317 N.C. at 313, 345 S.E.2d at 215 (quoting *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982)).

Taken in the light most favorable to the State, the evidence in the instant case tended to show the following: The marriage between defendant and the victim had been pervaded by marital problems for years, and the victim was going to divorce defendant. There was evi-

dence of threats, ill will, and previous difficulties between defendant and the victim. Defendant had stated on several occasions that he would kill the victim before he would allow the court to tell him when he could see his children or his wife. Also, defendant had threatened to kill the victim on several prior occasions. Defendant paid the premium on the life insurance policies on the day before the victim's death. Defendant stayed home from work to accomplish his purpose. Defendant wrote a note shortly before killing the victim. A note, written by defendant, was discovered near the victim's body. In the note found near the victim's body, defendant shifted the blame for the problems in their marriage to the victim and stated that the victim had abused him. The victim had a defensive wound that extended across three of her fingers, but defendant had no knife wounds when he was examined.

We conclude that the circumstantial evidence in this case, taken as a whole, was sufficient to permit the jury reasonably to infer that defendant murdered the victim with premeditation and deliberation. The other elements of murder being clearly present, the judge did not err in denying defendant's motion to dismiss the charge of murder in the first degree based on malice, premeditation, and deliberation made at the close of all the evidence.

[2] In his next argument, defendant contends that the trial court erred by overruling his objections to the introduction of inadmissible hearsay statements of the victim and other declarants made to several of the State's witnesses. Defense counsel made a continuing objection to any hearsay statements of the victim to persons regarding defendant's past abuse. Defendant argues that the statements seriously damaged his self-defense and accident claims by portraying him as an aggressor without giving him a fair opportunity to test the credibility of the statements. Defendant further contends that any probative value of the statements was substantially outweighed by the danger of unfair prejudice.

Defendant specifically challenges the testimony from four of the State's witnesses: Juliette Alston, Yolanda Johnson, Alice Crawford, and Sherry Williams. The testimony of these witnesses was that the victim had told them that defendant had threatened to kill her, that he had physically abused her, that she sometimes separated from defendant, that defendant followed or "stalked" her, and that she was becoming more afraid of defendant. Defendant argues that these statements were not admissible under N.C.G.S. § 8C-1, Rule 803(3)

because the victim's "state of mind does not explain any facet of her relationship with defendant that would tend to refute defendant's case." We conclude, however, that the victim's state of mind was relevant to the issues involved in the instant case, including explaining and refuting defendant's claims of self-defense and accident.

Prior to trial, the State gave defendant written notice of hearsay statements that the State might seek to introduce at trial. However, this issue first arose at trial during the testimony of Juliette Alston. Outside the presence of the jury, the trial court and counsel discussed whether Alston and any other witnesses could testify regarding the statements of the victim and other declarants. Defense counsel objected to "the eliciting of any and all hearsay testimony from this or any other witness." The trial court overruled defendant's objection to the specific statement to which defendant had objected, finding it admissible under the catchall exception of N.C.G.S. § 8C-1, Rule 804(b)(5). Defense counsel then asked the trial court to permit a "continuing objection to any of the testimony here offered." The trial court granted defendant's continuing objection to all of the victim's hearsay statements. *See* N.C.G.S. § 15A-1446(d)(10) (1993); *Duke Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980) (authorizing the use of line objections). We will first consider the hearsay statements made by the victim.

"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. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996); *see 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 the victim and the 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) (the defendant's threats to the victim shortly before the murder admissible to show the victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (the victim's statements regarding the defendant's threats relevant to the issue of her relationship with the defendant).

After a thorough review of the record, we conclude that the conversations between the victim and the four witnesses related directly to the victim's fear of defendant and that the victim's statements were properly admitted pursuant to the state of mind exception to the

hearsay rule to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind prior to her murder. *See Alston*, 341 N.C. at 231, 461 S.E.2d at 704.

Defendant alternatively contends that, even if the statements were relevant to show the victim's state of mind, the prejudicial effect of the statements substantially outweighs any probative value. The responsibility to determine whether the probative value of relevant evidence is substantially outweighed by its tendency to prejudice the defendant is left to the sound discretion of the trial court. *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). In the instant case, defendant has not demonstrated any abuse of discretion by the trial court, and therefore, the court's ruling will not be disturbed on appeal.

We need not decide whether the trial court erred in the admissibility of any hearsay statements of declarants other than the victim. We note that defense counsel's continuing objection, which the trial court granted, was only to statements made by the victim to these witnesses. "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).

[3] In his next argument, defendant contends that the trial court erred in instructing the jury that, in order to be entitled to the benefit of perfect or imperfect 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 instructions given in the instant case. *State v. Richardson*, 341 N.C. 585, 597, 461 S.E.2d 724, 731 (1995). Defendant has given no compelling reason for this Court to depart from its precedent. Accordingly, we reject defendant's argument.

[4] In his final argument, defendant contends that the trial court erred by instructing the jury that premeditation and deliberation

could be inferred from the absence of provocation by the victim. Defendant argues that the only relevant evidence in the record showed that the victim did provoke defendant and that the prejudice he suffered due to the trial court's instruction entitles him to a new trial.

The trial court instructed the jury on premeditation and deliberation as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as a lack of provocation by the victim, conduct of the defendant before, during and after the killing, threats and declarations of the defendant, or the manner or means by which the killing was done.

This instruction is based upon the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 206.10 (1989).

This Court recently found no error in a jury instruction on premeditation and deliberation that is essentially the same as the one given in the instant case and rejected a very similar argument. In *State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995), we said: "The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred." *Id.* at 241-42, 456 S.E.2d at 789. Thus, we held that "the trial court did not err by giving the instruction at issue here, even in the absence of evidence to support each of the circumstances listed." *Id.* In the instant case, defendant has given no compelling reason for this Court to depart from this precedent.

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

NO ERROR.

STATE OF NORTH CAROLINA v. LEVERNE BURRUS

No. 183A95

(Filed 31 July 1996)

1. Jury § 110 (NCI4th)— first-degree murder—jury selection—individual voir dire denied

The trial court did not abuse its discretion in a prosecution arising from a murder and robbery by denying defendant's motion for individual voir dire of prospective jurors where three prospective jurors made statements that they were predisposed to convict defendant, there is no indication that any other juror was influenced by their comments and all three were summarily dismissed or excused for cause.

Am Jur 2d, Jury § 198.

2. Jury § 115 (NCI4th)— first-degree murder—jury selection—rehabilitation of certain jurors denied—speculation as to rehabilitation—no error

There was no abuse of discretion in a first-degree murder prosecution in not allowing defendant to rehabilitate certain prospective jurors where defendant, at most, speculated that by further examination he might have rehabilitated the jurors.

Am Jur 2d, Jury §§ 201, 202.

3. Criminal Law § 76 (NCI4th)— first-degree murder—change of venue denied—no error

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for a change of venue based on pretrial publicity where the trial court stated, after ten jurors had been selected, that only one had indicated that he had some opinion at a former time and that the rest did not have an opinion, and several had expressed only the vaguest knowledge of the case. Moreover, defense counsel expressly admitted in his argument to the trial court that his motion was not based on pretrial publicity. Defendant failed to identify a single juror objectionable to him who sat on the jury and did not carry his burden of showing a specific and identifiable prejudice requiring a change of venue.

Am Jur 2d, Criminal Law §§ 361 et seq.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

Change of venue by state in criminal case. 46 ALR3d 295.

4. Jury § 203 (NCI4th)— first-degree murder—jury selection—former deputy sheriff—prior discussions of case—challenge for cause denied

The trial court did not err during jury selection for a first-degree murder prosecution by denying defendant's motion to excuse a prospective juror for cause where the juror stated that he was a former deputy sheriff, that he had discussed the case on several occasions, and that if one fact he was aware of became an aspect in the case it would have a strong impact on him and substantially impair his ability to make a fair and impartial decision, but upon further questioning stated clearly and unequivocally that he could put out of his mind what he had heard before and decide the case solely on what he heard in the courtroom.

Am Jur 2d, Jury §§ 289, 291-294, 308.

Former law enforcement officers as qualified jurors in criminal cases. 72 ALR3d 958.

5. Evidence and Witnesses § 2817 (NCI4th)— first-degree murder—leading questions—directing attention toward matter being addressed

The trial court did not err in a first-degree murder prosecution in allowing the State to ask questions which defendant contends were leading. Defendant did not object at trial to the majority of the questions; reviewed under the plain error standard with the overwhelming evidence against defendant, it cannot reasonably be believed that the questions resulted in error so fundamental that justice cannot have been done. The two questions to which defendant objected at trial merely directed the witness toward the specific matter being addressed without suggesting the desired answer. However, assuming that the questions were leading, there was no abuse of discretion in allowing the questions to be asked and answered.

Am Jur 2d, Witnesses §§ 752-756.

6. Evidence and Witnesses § 850 (NCI4th)— first-degree murder—testimony not hearsay—not prejudicial

The trial court did not err in a first-degree murder prosecution by overruling objections to testimony which defendant con-

tended was impermissible hearsay. The specific statements complained of either were not hearsay or were admissible under a recognized exception to the hearsay rule. Furthermore, even assuming that any statements were hearsay and not admissible under any recognizable exception, admission of the statements was harmless error because they could not have influenced the jury's decision.

Am Jur 2d, Evidence §§ 668-703; Homicide §§ 329 et seq.

7. Evidence and Witnesses § 1242 (NCI4th)— first-degree murder—voluntarily showing officers the murder weapon—in custody—warnings given—no error

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his inculpatory statement where an SBI agent and a deputy sheriff spoke with defendant at his home while defendant was under arrest; defendant was advised of his *Miranda* rights and indicated that he understood those rights; defendant subsequently indicated during questioning that he thought he could show the officers where the gun was located and agreed to do so; defendant appeared to be in control of his faculties and did not appear to be under the influence of any substance; no threats, promises, or other coercion or inducements were made to defendant; the sheriff testified that he was sitting on the porch when the deputy came out and told him that defendant was volunteering to locate the gun; defendant was not then handcuffed, was not questioned in the vehicle, and appeared to be acting voluntarily; and the sheriff stopped the car when defendant said to pull over. The testimony shows that defendant was fully informed of his rights, that he understood them, and that he voluntarily accompanied the sheriff to locate the gun.

Am Jur 2d, Criminal Law §§ 785, 788 et seq.; Evidence §§ 643, 644.

8. Evidence and Witnesses § 1356 (NCI4th)— first-degree murder—inculpatory statements—electronic recording not required

There was no error in a first-degree murder prosecution in the admission of inculpatory statements which were not electronically recorded. The North Carolina Supreme Court has ruled

against requiring the recordation of in-custody interrogation; thus, there is no presumption in North Carolina against the admissibility of statements obtained during in-custody interrogations.

Am Jur 2d, Evidence § 718.

9. Homicide § 230 (NCI4th)— first-degree murder—evidence sufficient

The trial court did not err in a first-degree murder prosecution by denying defendant's motions to dismiss and for a directed verdict based on insufficient evidence. There was overwhelming evidence of defendant's guilt; two of three accomplices provided detailed eyewitness testimony, various witnesses placed the murder weapon in defendant's hand during and after the killings, scientific evidence showed conclusively that the bullets recovered from the bodies were fired from that weapon, and long-time friends of defendant testified that defendant confessed to them that he had committed the murders.

Am Jur 2d, Homicide §§ 425 et seq.

10. Criminal Law § 439 (NCI4th)— first-degree murder—prosecutor's argument—credibility of State's witnesses

There was no gross impropriety in a first-degree murder prosecution where the trial court did not intervene *ex mero motu* during the prosecutor's closing argument regarding the credibility of the State's witnesses. The comments were more in the nature of giving the jury reason to believe the State's evidence than vouching for the credibility of the State's witnesses.

Am Jur 2d, Trial §§ 692-704.

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

11. Criminal Law § 460 (NCI4th)— first-degree murder—prosecutor's argument—permissible inferences

There was no gross impropriety in a first-degree murder prosecution where the prosecutor in his argument commented that an accomplice who testified against defendant had not attempted to cut a victim's throat with a razor. The pathologist testified that the victim had some scratches on his neck that might have been

caused by a dull tool; it is therefore a permissible inference that the marks were not made by a razor.

Am Jur 2d, Trial §§ 632-639.

12. Criminal Law § 425 (NCI4th)— first-degree murder—prosecutor's argument—defendant's failure to introduce letter

There was no gross impropriety in a first-degree murder prosecution where the prosecutor argued that a letter would have been read from the witness stand if it was exculpatory. A prosecutor may comment on a defendant's failure to produce exculpatory evidence to contradict or refute evidence presented by the State.

Am Jur 2d, Trial §§ 605, 606.

13. Criminal Law § 461 (NCI4th)— first-degree murder—prosecutor's argument—matters outside record—no prejudice

There was no gross impropriety in a first-degree murder prosecution where defendant contended that the prosecutor injected matters outside the record in repeating statements about the victims being robbed; however, the jury found defendant not guilty as to the robbery charges and any such comments could not possibly have prejudiced defendant.

Am Jur 2d, Trial §§ 609 et seq.

14. Criminal Law § 465 (NCI4th)— first-degree murder—prosecutor's argument—misstatement of law—no prejudice

There was no prejudice in a first-degree murder prosecution where defendant complained that the prosecutor misstated the law regarding acting in concert, but the jury rejected that theory and found defendant guilty of murder based on premeditation and deliberation. These comments could not have prejudiced defendant.

Am Jur 2d, Trial §§ 640 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing consecutive sentences of life imprisonment entered by Griffin, J., on 21 September 1994 in Superior Court, Hyde County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his appeal from his conviction for conspiracy to commit robbery

with a dangerous weapon was allowed 8 September 1995. Heard in the Supreme Court on 9 April 1996.

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

Margaret Creasy Ciardella for defendant-appellant.

MITCHELL, Chief Justice.

On 7 June 1993, defendant Leverne Burrus was indicted for two counts of first-degree murder, one count of conspiracy to commit robbery with a dangerous weapon, and two counts of robbery with a dangerous weapon. Defendant was tried capitally at the 12 September 1994 Criminal Session of Superior Court, Hyde County. The jury found defendant guilty of both counts of first-degree murder on the basis of premeditation and deliberation, guilty of conspiracy to commit robbery, and not guilty of either robbery with a dangerous weapon charge. After a capital sentencing proceeding, the jury recommended sentences of life imprisonment for each of the murder convictions, and the trial court sentenced defendant accordingly. In addition, the trial court imposed a ten-year sentence of imprisonment for the conspiracy to commit robbery conviction, the sentences to run consecutively.

The State's evidence tended to show *inter alia* that the victims, John Darby Wood, Jr., and Steven Swindell, were shot and killed while sitting in Wood's car as it was stopped along a rural road in Hyde County on 28 December 1992.

Gwendolyn Spencer testified that she had entered pleas of guilty to two counts of second-degree murder and one count of armed robbery in connection with these crimes. She further testified that on 28 December 1992, she saw Wood and Swindell at Midgett's Trailer Park. She saw defendant approach Wood's car with a gun in his pants. Defendant talked to Swindell about money and a gun. It appeared that defendant was demanding $300.00 for the return of the gun. Defendant later made comments that he thought Wood was an "undercover." Defendant stated that he would get rid of Wood and devised a plan. As part of the plan, Gwendolyn Spencer and Marsha Gibbs were to search the car. Gwendolyn Spencer, Marsha Gibbs, defendant, and Kerry Spencer drove to Saint Lydia, where they stopped at Kerry Spencer's mother's house to get gloves to be used in the search of the car. As they returned, they saw Wood's car approach

an intersection. They stopped the car, and defendant and Kerry Spencer got out and walked to the passenger side of the car. Gwendolyn Spencer testified that she heard gunshots and saw Steven Swindell open the driver's door, speak to defendant, and then fall out of the car and to the ground. She then saw Kerry Spencer attempt to cut Wood's throat.

Kerry Spencer testified that he had also entered guilty pleas to two counts of second-degree murder and one count of armed robbery. He testified that on 28 December 1992, he saw Wood and Swindell in a brown Toyota. Defendant told Marsha Gibbs, who was driving, to back up. Kerry and defendant got out and walked over to the brown Toyota. A conversation ensued between defendant and Wood, then Kerry heard shots being fired. He saw defendant shooting into the passenger side of the car. Kerry grabbed the gun from defendant, looked at it, and then gave it back to him. The women searched the car. Kerry made cutting motions at Wood's throat with a box cutter, but he did not actually cut him. After the group returned to the trailer park, Kerry heard Gwendolyn Spencer tell Victor Spencer that defendant had shot and killed "those two white guys."

[1] By his first assignment of error, defendant contends that the trial court erred by denying his motion for individual *voir dire* of prospective jurors. Defendant argues that a review of the jury *voir dire* reveals that numerous prejudicial statements were made by some prospective jurors in the presence of the others, which denied his right to be tried by an impartial jury and his right to due process.

Whether to allow a motion for individual *voir dire* is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed absent 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 points to certain statements made by three of the prospective jurors—Modlin, Clark, and Carlin—as support for his argument that the trial court erred in its ruling.

Although the three prospective jurors in question did make statements indicating that they were predisposed to convict defendant, we find that there was nothing so unusual or outrageous about their comments as to render the jury selection process unfair to defendant. There is no indication that any other juror was influenced by their comments. Furthermore, potential jurors Modlin and Clark were dismissed summarily by the trial court, and the trial court allowed defendant to excuse Carlin for cause. Because defendant has failed to

show an abuse of the trial court's discretion, this assignment of error is overruled.

[2] In a related assignment of error, defendant contends that the trial court erred by failing to give him an opportunity to question certain prospective jurors. Defendant argues that he was not allowed the opportunity to "rehabilitate" certain prospective jurors who stated, for one reason or another, that they would not be able to render a fair and impartial verdict in this case.

"The extent and manner of a party's inquiry into a potential juror's fitness to serve is within the trial court's discretion." *State v. White*, 340 N.C. 264, 280, 457 S.E.2d 841, 850, *cert. denied*, — U.S. —, 133 L. Ed. 2d 436 (1995). Defendant here has failed to show that the trial court abused its discretion in not allowing him to question prospective jurors. At most, defendant speculates that by further examination of a prospective juror, he might possibly have "rehabilitated" that juror to the point that the court would not have summarily dismissed him. Accordingly, this assignment of error is overruled.

[3] By another assignment of error, defendant contends that the trial court erred in denying his motion for a change of venue. Defendant argues that his motion should have been granted because of the extensive publicity this case received and the fact that a large number of prospective jurors had formed an opinion about the guilt or innocence of defendant.

The test for determining whether a change of venue should be granted is whether "there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983). The burden is on the defendant to show a reasonable likelihood that the prospective jurors will base their decision in the case upon pretrial information rather than the evidence presented at trial and will be unable to remove from their minds any preconceived impressions they might have formed. *Id.* at 255, 307 S.E.2d at 347. This determination rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Alston*, 341 N.C. 198, 225, 461 S.E.2d 687, 701 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 100 (1996).

Furthermore, we have held that for a defendant to meet his burden of showing that pretrial publicity prevented him from receiving a fair trial, he must show that jurors have prior knowledge concerning the case, that he exhausted his peremptory challenges, and that a

juror objectionable to him sat on the jury. *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347-48. Generally, in determining whether a defendant has met his burden of showing prejudice, it is relevant to consider whether the chosen jurors stated that they could ignore any prior knowledge or earlier held opinions and decide the case solely on the evidence presented at trial. *Id.* "The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 34 (1991).

After reviewing the record, we conclude that defendant has failed to show that the trial court abused its discretion in denying his motion for a change of venue. During the jury selection process, after ten jurors had been selected, the trial court stated:

> You got only one person, Mr. Berry, at this point that indicated former time he had some opinion. As I understand it, the rest of the jurors in the box at this time have been passed haven't had an opinion and don't have one now as I understand it. Several of them expressed only the vaguest knowledge of the case.

We also find it significant that after the jury had been selected, counsel for defendant expressly admitted in his argument to the trial court that his motion was not based on pretrial publicity:

> MR. HARRELL: Yes, Sir. The, the motion is not founded or based upon pre-trial publicity. It's based upon comments that were made by individual jurors.
>
> THE COURT: I understand. I want to rule on your motion to change venue, and based upon the fact that I haven't heard anything indicate [sic] these selected jurors would base a decision upon pre-trial information.
>
> MR. HARRELL: Your Honor, quite candidly, I've heard nothing from the sitting jurors that indicates that any pre-trial information would play a part in their decision.

Instead, defendant again relies on his earlier argument that certain statements of prospective jurors elicited during the *voir dire* must have prejudiced the jurors who were actually seated. We have previously addressed those statements and need not do so again here. Because defendant has failed to identify a single juror objectionable to him who sat on the jury, we conclude that he has not carried his

burden of showing specific and identifiable prejudice requiring a change of venue. This assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred in denying his motion to excuse prospective juror Cutler for cause. Defendant argues the prospective juror had indicated that he could not be fair and impartial.

During *voir dire*, Mr. Cutler stated at one point that he was a former deputy sheriff of Hyde County and that he had discussed defendant's case on several occasions. He said if one fact that he was aware of became an aspect in the case, it would have a strong impact on him and substantially impair his ability to make a fair and impartial decision. Defendant challenged Cutler for cause, and the trial court denied that challenge. Defendant then peremptorily excused Cutler. Later, after defendant had exhausted his peremptory challenges, he attempted to renew his challenge for cause. The challenge was again denied.

N.C.G.S. § 15A-1212 provides in part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (9) For any other cause is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1212(9) (1988).

This Court has recently held that the granting of a challenge for cause under N.C.G.S. § 15A-1212(9) rests in the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. *State v. Jaynes*, 342 N.C. 249, 270, 464 S.E.2d 448, 461 (1995), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3855 (1996). "Where the trial court can reasonably conclude from the *voir dire* . . . that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory." *Id.*

Here, upon further questioning, prospective juror Cutler stated clearly and unequivocally that he could put out of his mind what he had heard before and decide this case solely on what he heard in the courtroom. Therefore, we conclude that the trial court did not

err in denying the challenge for cause. This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred in allowing the State to ask leading questions of its witnesses. Defendant maintains that the crux of the State's case was the testimony of Gwendolyn Spencer and Kerry Spencer, who agreed to testify against defendant in exchange for pleading guilty to two counts of second-degree murder and one count of armed robbery. Defendant argues that throughout the trial, the State impermissibly posed leading questions to these two witnesses and to members of their families.

At the outset, we note that defendant provides numerous examples of what he contends were leading questions by the prosecutor. However, defendant objected on only two occasions. Therefore, with respect to the majority of the questions complained of, we review them under the plain error standard, which requires defendant to make a showing "that the error was so fundamental that the result would probably have been different absent the error." *State v. Kandies*, 342 N.C. 419, 452, 467 S.E.2d 67, 85 (1996).

The evidence against defendant in this case was overwhelming. Therefore, it cannot reasonably be believed that the questions of which defendant now complains, but to which he failed to object at the trial, resulted in error so fundamental " 'that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

We turn now to those two instances where defendant did object to the prosecutor's questions. The first occurred during the prosecutor's direct examination of Gwendolyn Spencer:

Q. Did the defendant ever say anything about the passenger's name?

A. Yes. He said that he, the guy didn't tell him Darby. He had told him something else.

Q. Did that concern the defendant? Did it worry the defendant?

MR. HARRELL: Objection.

THE COURT: Overruled.

A. I guess.

The second objection also occurred during the prosecutor's direct examination of Ms. Spencer:

> Q. At the time or just after the shooting occurred when you were out of the car getting the gloves were you scared of Leverne Burrus?
>
> MR. HARRELL: Objection.
>
> THE COURT: Overruled.

A leading question has been defined as one which suggests the desired response and may frequently be answered "yes" or "no." However, a question is not always considered leading merely because it may be answered "yes" or "no." *State v. Mitchell*, 342 N.C. 797, 805, 467 S.E.2d 416, 421 (1996). We have said that a ruling on the admissibility of a leading question is in the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion. *Id.* at 806, 467 S.E.2d at 421.

We conclude that the two questions to which defendant objected at trial merely directed the witness toward the specific matter being addressed without suggesting the desired answer. Assuming *arguendo* that they were leading, however, a trial court may be reversed for an abuse of discretion only upon a showing that its ruling could not have been the result of a reasoned decision. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). We do not find such an abuse of discretion by the trial court here in allowing the questions to be asked and answered. This assignment of error is overruled.

[6] By another assignment of error, defendant contends that the trial court erred in overruling his objections to impermissible hearsay testimony. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). After a thorough review of the specific statements complained of, we conclude either that they were not hearsay or that they were admissible under a recognized exception to the hearsay rule. Further, even assuming *arguendo* that any of the statements complained of were hearsay and not admissible under any recognized exception, we conclude the admission of those statements was harmless error in that they could not have influenced the jury's decision.

For example, defendant assigns error to Gwendolyn Spencer's testimony that when the brown Toyota was parked in the trailer park, the passenger in the car told her his name was "Darby." Assuming *arguendo* that this statement was hearsay, we conclude that it could not have been prejudicial to defendant since there was sufficient other evidence that Darby Wood was the passenger in the vehicle.

Defendant next assigns error to Ms. Spencer's testimony that she heard Swindell say that "[h]e didn't have any money" and that Wood "told Steve [Swindell] to speak up for his gun because he knew that was his father's gun." We conclude these statements were not hearsay in that they were not introduced to prove the truth of the matter asserted. Even assuming *arguendo* that these statements were hearsay, they were exceptionally admissible as evidence of the plan or design of Swindell and Wood. *See* N.C.G.S. § 8C-1, Rule 803(3) (1992). The statements tend to show that the purpose of their visit to the trailer park was to negotiate with defendant for the return of the gun.

Defendant also assigns error to Kerry Spencer's testimony that when he passed by the brown Toyota, the driver asked him if he had seen "BoLo" and if he knew where he was. Kerry Spencer also testified that the driver asked him if he had any "coke." Again, we conclude that these statements were not hearsay since they were not offered to prove the truth of the matter asserted.

Later, Mr. Spencer testified to a further conversation between defendant, Swindell, and Wood. According to Mr. Spencer's testimony, Swindell and Wood had come back to the trailer park to negotiate with defendant about the return of the gun. Swindell and Wood made statements to the effect that they had additional money, that the gun belonged to Wood's father, that Wood was not an undercover policeman, and that Wood would try to get some additional money. We conclude these statements by Swindell and Wood were not offered for the purpose of proving the matters asserted. Even assuming *arguendo* that they were hearsay, they were admissible under Rule 803(3) as statements of their "intent, plan, motive [or] design." This assignment of error is overruled.

[7] By another assignment of error, defendant contends that the trial court erred in denying his motion to suppress his inculpatory statement.

When a defendant is in custody at the time he confesses, the State must prove, by a preponderance of the evidence, that the procedural safeguards of *Miranda* have been followed and that the statement was voluntary. *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995).

The State's evidence on *voir dire* regarding defendant's confession consisted of the testimony of SBI Agent Varnell and Sheriff Mason. Varnell testified that on 29 December 1994, around 10:00 a.m., he and Deputy Sheriff Dees (who died before the trial) spoke with defendant, who was under arrest at that time, at his home. Varnell testified that he advised defendant of his *Miranda* rights and that defendant indicated he understood those rights. Subsequently, while defendant was being questioned, he indicated that he thought he could show the officers where the gun was located and agreed to do so. Agent Varnell stated that defendant appeared to be in control of his faculties and not to be under the influence of any substance. He further stated that no threats, promises, or other coercion or inducements were made to defendant.

Sheriff Mason testified that he was sitting on the porch when Deputy Dees came out and told him that defendant was volunteering to locate the gun. Sheriff Mason further testified that defendant was not handcuffed at the time, was not questioned in the vehicle, and appeared to be acting voluntarily. Sheriff Mason stopped the car when defendant said to "pull over."

A review of the *voir dire* testimony reveals that there was sufficient competent evidence before the trial court to support its findings, which compelled its conclusion that defendant's statement was voluntary. The testimony of both SBI Agent Varnell and Sheriff Mason shows that defendant was fully informed of his rights, that he understood them, and that he voluntarily accompanied Sheriff Mason to locate the gun.

[8] Defendant also argues that unless an in-custody interrogation is electronically recorded, it should be presumed that defendant's statements are not voluntary. This Court has ruled against requiring the recordation of in-custody interrogation; thus, there is no presumption in North Carolina against the admissibility of statements obtained during in-custody interrogations. *See State v. Thibodeaux*, 341 N.C. 53, 459 S.E.2d 501.

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

[9] By another assignment of error, defendant contends that the trial court erred in denying his motions to dismiss and for a directed verdict because of the insufficiency of the evidence. When considering a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991).

In the present case, there was overwhelming evidence of defendant's guilt of the crimes of which he was convicted. Two of his three accomplices provided detailed eyewitness testimony. Various witnesses also placed the murder weapon in defendant's hand before, during, and after the killings. The scientific evidence showed conclusively that the bullets recovered from the victims' bodies were fired from that weapon. Catherine Gibbs and Victor Spencer, longtime friends of defendant's, also testified that immediately upon returning to the trailer park with the others, defendant confessed to them that he had committed the murders. Thus, there was substantial evidence tending to show that defendant had committed the crimes charged. Accordingly, the trial court did not err in denying defendant's motions to dismiss and for a directed verdict. This assignment of error is overruled.

[10] By another assignment of error, defendant contends that the trial court erred when it failed to intervene *ex mero motu* during the prosecutor's closing arguments. Because defendant did not object to any of these arguments, we review them only for gross impropriety. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Defendant first says that the prosecutor made several improper comments regarding the credibility of the State's witnesses. Defendant argues that the following excerpts from the prosecutor's remarks demonstrate this error:

> Why not make up that he's the one that tried to cut Darby Wood's throat? Why not say that he's the one that threw the gun? She [Gwendolyn Spencer] could have done all of that, ladies and gentlemen, but she didn't because what she told you is what she

remembers, and that's the truth, and you'll have to judge that for yourself, ladies and gentlemen.

. . . .

Did she look like she was telling something that was not the truth? Just like what everybody else says, ladies and gentlemen, the same thing.

. . . .

. . . He [Kerry Spencer] tells you about cutting Darby Woods, ladies and gentlemen. If he's going to lie that is something to lie about, ladies and gentlemen.

We believe that these comments "were more in the nature of giving reason why the jury should believe the State's evidence than that the prosecuting attorney was vouching for the credibility of the State's witnesses." *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994). None of the statements complained of by defendant were so grossly improper that the trial court should have intervened *ex mero motu*.

[11] Defendant next says that the prosecutor's comments to the effect that Kerry Spencer had not attempted to cut Darby Wood's throat with a razor were improper. We disagree. The pathologist testified that Wood had some scratches on his neck that might have been caused by a dull tool. It is therefore a permissible inference from the evidence that the marks on Wood's neck were not made by a razor. Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences to be drawn therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986).

[12] Defendant also complains that the prosecutor injected his personal beliefs as to why defense counsel did not have Kerry Spencer read the contents of a letter into evidence:

If there was something in that letter that said [defendant] wasn't guilty of this crime that letter would have been read to you from the witness stand and you would have heard everything in it.

"It is well established that a prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994). Thus, we conclude it was not impermissible for the prosecutor to argue that if the contents of the

letter had been favorable to defendant, the witness would have been asked to read it.

[13] Defendant next complains that the prosecutor injected matters outside the record. Specifically, the prosecutor made repeated statements about the victims being robbed. Defendant was charged with the robbery of both Wood and Swindell; however, the jury found defendant not guilty as to these charges. Therefore, any such comments to the jury could not possibly have prejudiced defendant.

[14] Finally, defendant complains that the prosecutor misstated the law to the jury regarding the theory of acting in concert. The jury rejected the theory of acting in concert and found defendant guilty of murder based on premeditation and deliberation. Therefore, we conclude that these comments could not have prejudiced defendant.

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

Defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. LARRY SINGLETARY

No. 555A95

(Filed 31 July 1996)

1. Burglary and Unlawful Breakings § 10 (NCI4th)— premises in wife's possession—burglary by husband

Where the premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with the intent to commit a felony therein. The controlling question in burglary cases is one of possession or occupation rather than ownership or property interests.

Am Jur 2d, Burglary §§ 8 et seq., 39.

Occupant's absence from residential structure as affecting nature of offense as burglary or breaking entering. 20 ALR4th 349.

Maintainability of burglary charge, where entry into building is made with consent. 58 ALR4th 335.

Minor's entry into home of parent as sufficient to sustain burglary charge. 17 ALR5th 111.

2. Burglary and Unlawful Breakings § 57 (NCI4th)— apartment possessed by wife—burglary by husband

The State's evidence was sufficient to establish the element of first-degree burglary that defendant wrongfully entered the dwelling house "of another" where it tended to show that defendant's wife had left Winston-Salem, where she had been living with defendant, and obtained an apartment on her own in Greensboro; she was the sole lessee of the apartment; defendant moved in with his wife in the Greensboro apartment one month later; defendant thereafter moved out of the apartment following an argument, took all or most of his belongings, and returned his apartment key to his wife; and defendant's wife had exclusive possession of the apartment when defendant broke into and entered the apartment two days later.

Am Jur 2d, Burglary §§ 27, 45.

3. Burglary and Unlawful Breakings § 149 (NCI4th)— first-degree burglary—instruction on own home not required

The trial court did not err by failing specifically to instruct the jury that defendant could not be found guilty of burglary if the dwelling was his own home where the trial court's instructions substantially complied with the approved pattern jury instructions on burglary; defendant failed to request a special instruction; and the evidence did not support defendant's contention that the victim's apartment was his home at the time of the breaking or entering.

Am Jur 2d, Burglary § 69.

4. Burglary and Unlawful Breakings § 165 (NCI4th)— first-degree burglary—intent to commit felonious assault—instruction on misdemeanor breaking and entering not required

The State's evidence in a first-degree burglary prosecution relevant to the time before defendant broke and entered his estranged wife's apartment supports the inference that defendant

intended to commit a felonious assault at the time of the breaking or entering, and defendant's after-the-fact assertion that his intention to commit a felony was formed after he broke and entered the apartment did not negate the felonious intent shown by his actions so as to require the trial court to instruct on the lesser included offense of misdemeanor breaking or entering, where the evidence tended to show that defendant went to his wife's apartment with a gun sometime between 2:00 a.m. and 3:00 a.m; he parked his car on the far side of the apartment building; defendant covered the peephole of the apartment door as he attempted to use his son to get his wife to open the door; defendant yelled to his wife that he knew she had a male companion in the apartment; when his wife refused to let him in, defendant used a screwdriver to dismantle the doorknob, forced the door open, and drew his gun immediately after he stepped inside; and when the male companion ran out the door, defendant chased him and shot him in the back.

Am Jur 2d, Burglary §§ 27, 69.

Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.

5. Homicide § 257 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of first-degree murder based upon the theory of premeditation and deliberation where it tended to show that defendant parked his car in the parking lot on the far side from his estranged wife's apartment; he carried a gun and screwdriver with him to the door; when his wife refused to open the door of the apartment, he yelled at her, "I know you got that n----- in there"; he used the screwdriver to dismantle the doorknob, forced the door open, and drew his gun immediately after he stepped inside; he chased the victim as the victim fled from the apartment, yelled, "you want to f--- with me motherf------, take this," and shot the victim in the back; and he then "turned and walked away, as if he had done what he wanted to do."

Am Jur 2d, Homicide § 439.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2D 1435.

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

6. Homicide § 706 (NCI4th)— discovery of adultery—heat of passion—absence of special instruction—harmless error

Any error in the trial court's failure to give the jury a special instruction on heat of passion as it relates to discovering a spouse in the act of adultery was harmless where the jury was instructed on voluntary manslaughter in addition to first-degree and second-degree murder; the court instructed that voluntary manslaughter is "the unlawful killing of a human being, by an intentional act, done with malice, or done in the heat of passion, suddenly aroused by some adequate provocation"; and the jury rejected verdicts of voluntary manslaughter and second-degree murder and found defendant guilty of first-degree murder.

Am Jur 2d, Homicide § 527.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

Propriety of lesser-included-offense charge to jury in federal homicide prosecution. 101 ALR Fed. 615.

7. Evidence and Witnesses §§ 672, 770 (NCI4th)— waiver of objection—similar evidence—corroborative evidence—harmless error when became substantive

Defendant's objection to the admission for corroborative purposes of a burglary victim's statement to a detective that defendant told her to open the door "because I know you got that n----- in there" was waived when the detective gave similar testimony without objection. Furthermore, any error in the admission of this statement for corroborative purposes was rendered harmless when the victim testified that defendant made this statement to her and it then became substantive evidence.

Am Jur 2d, Appellate Review § 753; Trial §§ 411 et seq.

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

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed. 619.

Justice WEBB concurring.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Walker (Russell G., Jr.), J., at the 28 August 1995 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed 19 March 1996. Heard in the Supreme Court 10 April 1996.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant was tried noncapitally and found guilty of first-degree murder based on premeditation and deliberation and the felony murder rule. Defendant was also found guilty of first-degree burglary. The trial judge consolidated the two convictions for sentencing and sentenced defendant to life imprisonment.

The evidence at trial tended to show that on Saturday, 27 August 1994, defendant's wife, Garnett Jean Singletary, went out with her two sisters-in-law, Rachel and Schmora. The women met one of Garnett's co-workers, Samuel Learon Bailey IV, at a local nightclub. On the following Monday, 29 August, Garnett fought with her husband; he agreed to move out of the apartment they had been sharing in Greensboro, North Carolina. Defendant returned the apartment key to Garnett, took his clothing and VCR, and moved in with his mother in Winston-Salem.

On 31 August Garnett left her sons at her apartment with Rachel because one of the children had contracted chicken pox. When Garnett returned home Rachel and the children were not there. Garnett called Schmora to ask about the children's whereabouts. Schmora said she assumed that Rachel had taken the boys to the defendant's mother's house in Winston-Salem. Garnett did not expect her children to return that night. Schmora brought Garnett some money that afternoon, and Garnett told Schmora that she was going to have company that night.

At 10:30 p.m. on 31 August, Bailey visited Garnett at her apartment, and they had sexual intercourse. Sometime between 2:00 a.m. and 3:00 a.m. on 1 September, Garnett heard the doorbell ring. Garnett asked who was there, and one of her sons answered. Garnett asked her son who he was with, and he answered, "My Aunt Rachel." Garnett then asked her son whose finger was covering the peephole, and he answered that his father's was. Garnett told defendant to leave the children in the hallway. Defendant told Garnett that if she did not open the door, he would shoot it open. Defendant also stated, "Open the door because I know you got that n----- in there."

Defendant used a screwdriver to dismantle the doorknob. Garnett stood behind the door as defendant stepped inside, reached behind his back, and pulled out a gun. Garnett ran past defendant, out the door, and down the apartment steps to get help. Bailey also ran out the door, falling on the steps before getting up to run again. A neighbor testified that she saw two black men running across the parking lot; she heard one man yell, "You want to f--- with me, motherf-----, take this." The man raised his arm and shot the other man in the back; he then "turned and walked away, as if he had done what he wanted to do." Bailey died as the result of a gunshot wound to the back.

Defendant turned himself over to the police and gave a statement. Defendant told the police that he had taken his children to their mother's house and that he arrived at the apartment about 1:00 a.m.; parked the car; and got his gun out of the trunk because "if somebody was in the apartment, [he] wasn't going to get hurt." Defendant stated that the lights were off in the apartment and that he rang the doorbell for fifteen to twenty minutes. Defendant stated he then went back to his car to get a screwdriver. At this point defendant noticed that the bedroom light was on in the apartment. Defendant went back up the apartment steps; his wife was now at the door, but the door was still closed. Defendant's wife would not let him in the apartment, so

defendant "fumble[d] with the lock." Defendant stated that he thought his wife eventually unlocked the door. When defendant got inside the apartment, he saw a black man in the hallway. Defendant stated that he was upset because he assumed the man had "been in [his] bed." Defendant stated that the man pushed him and ran, so defendant pulled his gun and fired. Defendant stated that he was halfway or all the way down the apartment steps the first time he fired. Defendant thought he fired again as the man was running. The man then "ran into the dark," and defendant "never saw him fall." Defendant went to his car and headed back to Winston-Salem, where he turned himself in.

In defendant's first assignment of error, he contends the trial court committed reversible error in denying his motion to dismiss the burglary charge against him because "the uncontradicted evidence showed that the dwelling which defendant entered was his own residence." Defendant argues the State thus failed to prove a necessary element of the offense.

The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein. N.C.G.S. § 14-51 (1993); *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994); *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219 (1985). Defendant contends that the State failed to establish that he wrongfully entered the dwelling house "of another." As a basis for this contention, defendant maintains that he, his wife, and their children lived in the apartment as a family until approximately two days before the murder. Although defendant and Garnett argued and defendant left the residence, defendant maintains that his departure was merely for a "cooling off" period. Defendant points out that the parties had separated several times in the past and that neither party had taken steps toward obtaining a divorce. Defendant contends that he did not relinquish any rights or property interests stemming from his marital status and that he still had the right to enter the family residence.

[1] The law of burglary was designed "to protect the habitation of men, where they repose and sleep, from meditated harm." *State v. Surles*, 230 N.C. 272, 275, 52 S.E.2d 880, 882 (1949). In *State v. Cox*, 73 N.C. App. 432, 326 S.E.2d 100, *disc. rev. denied*, 313 N.C. 605, 330 S.E.2d 612 (1985), the Court of Appeals held that the marital relation-

ship, in and of itself, does not constitute a complete defense to the offense of burglary in the first degree. We agree. The Florida Supreme Court in *Cladd v. State*, 398 So. 2d 442 (Fla. 1981), held that "where premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with intent to commit an offense." *Id.* at 444. We adopt this position. Therefore, the controlling question in burglary cases is one of possession or occupation rather than ownership or property interests.

[2] In the instant case the evidence shows that at the time of the breaking and entering, the apartment was in the sole possession of Garnett. In April 1994 Garnett left Winston-Salem, where she had previously lived with defendant, and obtained the Greensboro apartment on her own. Garnett was the sole lessee of the apartment, and she owned all the furnishings in the home except for the television and VCR. Defendant moved in with Garnett in the Greensboro apartment approximately one month later. However, on 29 August defendant moved out of the apartment, took all or most of his belongings, and returned Garnett's key to her. As of 29 August Garnett had exclusive possession of the dwelling. Under these facts we reject defendant's argument. The trial court did not err in submitting the first-degree burglary charge to the jury. This assignment of error is overruled.

[3] In two related arguments defendant challenges the trial court's instructions to the jury. First, defendant argues that the trial court erred by failing to specifically instruct the jury that he could not be guilty of burglary if the dwelling involved was his own home. This contention has no merit. The trial court's instructions substantially conformed with the pattern jury instruction on burglary, N.C.P.I.—Crim. 214.10 (1989), which was approved by this Court in *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219. In addition, defendant failed to request a special instruction, and as discussed above, the evidence does not support defendant's contention that Garnett's apartment was his home at the time of the breaking and entering. This assignment of error is overruled.

Second, defendant contends the trial court erred by instructing the jury that it could consider that the murder was committed during the perpetration of the felony of burglary. Specifically, defendant argues that since he did not enter a dwelling house "of another," there was no burglary; thus, the offense of burglary could not provide the

underlying felony for felony murder. For the reasons previously stated, this assignment of error is overruled.

[4] In his next assignment of error, defendant contends the trial court erred in refusing to submit misdemeanor breaking or entering as a lesser-included offense of first-degree burglary. As stated above, first-degree burglary is the breaking and entering of an occupied dwelling of another in the nighttime with the intent to commit a felony therein. N.C.G.S. § 14-51; *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321; *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219. Misdemeanor breaking or entering does not require intent to commit a felony within the dwelling. N.C.G.S. § 14-54(b) (1993) (effective until 1 January 1995; effective date of change subsequently amended to 1 October 1994); *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985). Defendant argues that there was substantial evidence that he did not possess a felonious intent when he broke into the apartment.

A trial court is required to give instructions on a lesser-included offense only when there is evidence to support a verdict finding the defendant guilty of the lesser offense. *State v. Tucker*, 329 N.C. 709, 721, 407 S.E.2d 805, 812 (1991). " 'The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *State v. Peacock*, 313 N.C. at 558, 330 S.E.2d at 193 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

In the instant case the trial court instructed the jury that it could find defendant guilty of first-degree burglary if it found that defendant broke and entered into an occupied dwelling house during the nighttime without the tenant's consent and that at the time of the breaking and entering, the defendant "intended to commit assault with a deadly weapon, with intent to kill, inflicting serious injury, or intended to commit the felonious assault of assault with a deadly weapon, inflicting serious injury."

Defendant contends there was evidence showing that when he broke and entered the apartment, he did not intend to commit an assault. In support of this contention, defendant relies on his statement to the police that he carried his gun to the apartment because "if somebody was in the apartment, [he] wasn't going to get hurt." Defendant contends this statement shows that he brought the gun with him for protection, rather than to commit an assault. Defendant argues this statement was corroborated by the testimony of Garnett

that defendant often carried a gun in his car for protection and would bring the gun inside on occasions when he and his family returned home late at night. In addition, defendant relies on evidence that he did not have his weapon drawn when he entered the apartment, that he never threatened his wife, and that he did not know Bailey and had not seen or heard him inside. Defendant further relies on evidence that he was driving his sick children home in the middle of the night to see their mother and was justifiably upset when Garnett would not let them enter the apartment.

The State's evidence tended to show that defendant went to Garnett's apartment with a gun sometime between 2:00 a.m. and 3:00 a.m. Defendant parked his car on the far side of Garnett's apartment building. Defendant covered the peephole of Garnett's apartment door as he attempted to use his son to get Garnett to open the door. Defendant yelled to Garnett, "I know you got that n------ in there." When Garnett refused to let defendant in, he dismantled the doorknob, forced the door open, and drew his gun immediately after he stepped inside.

An after-the-fact assertion by the defendant that his intention to commit a felony was formed after he broke and entered is not enough to warrant an instruction on the lesser-included offense of misdemeanor breaking or entering unless there is some "before the fact evidence to which defendant's statements afterwards could lend credence." *State v. Gibbs*, 335 N.C. at 53-54, 436 S.E.2d at 351. The "before the fact evidence" relied on by defendant in this case is insufficient to warrant an instruction on misdemeanor breaking or entering.

On the night in question, defendant clearly was not concerned about his safety or the safety of his family when he dismantled the doorknob with a screwdriver and forced his way into the apartment. The evidence suggests that defendant drew his weapon immediately after entering the apartment and that defendant knew his wife had male company. Defendant's contention that he was taking his sick children home in the middle of the night does not explain the location where he parked his car; the purpose for covering the peephole; or the statement, "I know you got that n——- in there."

The record reveals no evidence which might convince a rational juror to convict the defendant of misdemeanor breaking or entering. The evidence relevant to the time before defendant broke and entered the apartment supports the inference that defendant possessed the

intent to commit an assault; defendant's contentions do not negate the felonious intent suggested by his actions. On this record we conclude the trial court did not err in refusing to instruct on the lesser-included offense of misdemeanor breaking or entering.

[5] Defendant contends in his next assignment of error that the evidence was insufficient to submit the first-degree murder charge to the jury on the theory of premeditation and deliberation. On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, or of a lesser-included offense, and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). To be "substantial," evidence must be "existing and real, not just seeming or imaginary." *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

Defendant argues that the evidence was insufficient to support a conviction of first-degree murder on the theory of premeditation and deliberation. In *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994), we defined premeditation and deliberation as follows:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

Id. at 635, 440 S.E.2d at 835-36 (citation omitted). A defendant's conduct before and after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation. *State v. Vaughn*, 324 N.C. 301, 305, 377 S.E.2d 738, 740 (1989).

In the instant case the State's evidence tended to show that defendant parked his car in the parking lot on the far side from his

wife's apartment; that he carried a gun and screwdriver with him to the door; that he used the screwdriver to completely dismantle the doorknob; that he yelled to his wife, "I know you got that n----- in there"; that he chased the victim as the victim fled; that he yelled, "you want to f--- with me motherf-----, take this"; that he shot the victim in the back; and that he then "turned and walked away, as if he had done what he wanted to do." When viewed in the light most favorable to the State, this evidence was clearly sufficient to support a finding of premeditated and deliberate first-degree murder. Accordingly, we overrule this assignment of error.

[6] Defendant next contends the trial court erred by refusing to instruct the jury in accordance with his proposed special instruction on heat of passion. Defendant made a written request that the jury be instructed on heat of passion as it relates to discovering a spouse in the act of adultery. Defendant's requested instruction read:

> [A] killing committed during the heat of passion is not murder but manslaughter. I further instruct you that the law recognizes that heat of passion may arise when a defendant discover [sic] a spouse in an act of adultery. Accordingly I charge you that when one spouse discovers the other and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act has just been completed, or was severely proximate, and the killing follows immediately, it is manslaughter.

The court did instruct the jury on voluntary manslaughter, but stated only that voluntary manslaughter consists of "the unlawful killing of a human being, by an intentional act, done without malice, or done in the heat of passion, suddenly aroused by some adequate provocation."

Where an instruction is requested by a party and the instruction is supported by the evidence and is a correct statement of the law, it is error for the trial court not to instruct in substantial conformity with the requested instruction. *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993). However, in the present case, even assuming *arguendo* that some evidence supported a special instruction on heat of passion, the trial court's failure to give such an instruction was harmless error.

In *State v. Shoemaker*, 334 N.C. 252, 432 S.E.2d 314 (1993), the trial court instructed the jury on first-degree and second-degree murder; and the jury returned a verdict of guilty of first-degree murder.

The defendant argued that the trial court erred by refusing to instruct the jury on voluntary manslaughter. Quoting *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969), this Court stated:

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

Id. at 271, 432 S.E.2d at 324 (quoting *State v. Freeman*, 275 N.C. at 668, 170 S.E.2d at 465). We have applied this rationale to cases where the defendant requested an instruction on voluntary manslaughter based on a heat of passion. *See State v. Bunnell*, 340 N.C. 74, 455 S.E.2d 426 (1995).

In the instant case, unlike *Shoemaker* and *Bunnell*, the jury was instructed on voluntary manslaughter in addition to first- and second-degree murder. The jury was instructed that voluntary manslaughter is "the unlawful killing of a human being, by an intentional act, done without malice, or done in the heat of passion, suddenly aroused by some adequate provocation." The jury nevertheless rejected the verdicts of voluntary manslaughter and second-degree murder and returned a verdict of guilty of first-degree murder. Accordingly, any error in the trial court's failure to give the jury a special instruction on heat of passion was harmless. This assignment of error is overruled.

[7] Finally, defendant contends the trial court erred in overruling his objection and allowing a portion of Garnett's pretrial statement to the police to be admitted as evidence against defendant. During Garnett's testimony the prosecutor asked her to read a statement she had given Detective Tim Parrish shortly after the shooting. Defendant requested that the trial court give an instruction that the statement was being offered for the limited purpose of corroborating Garnett's trial testimony, and the trial court did so. Defendant objected when Garnett read, "[Defendant] told me to open the door, because I know you got that n----- in there," on the grounds that this statement did not corroborate Garnett's trial testimony. The trial court overruled this objection.

To be admissible as corroborative evidence, prior consistent statements must corroborate the witness's testimony. *State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 794 (1987). Corroborative

testimony may contain new or additional information " 'when it tends to strengthen and add credibility to the testimony which it corroborates.' " *Id.* (quoting *State v. Kennedy*, 320 N.C. 20, 35, 357 S.E.2d 359, 368 (1987)). The State cannot, however, introduce prior statements that directly contradict sworn testimony. *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991).

In the instant case defendant waived any objection to this testimony; furthermore, any error in the admission of this statement as corroborative of Garnett's testimony was harmless. First, Detective Parrish also testified as to the statement given by Garnett. When the prosecutor asked Parrish what Garnett said defendant told her through the door, defense counsel again asked for, and received, a limiting instruction on corroboration. However, when Parrish responded that Garnett stated, "Larry told me to 'Open the door, because I know you got that n----- in there,' " defense counsel did not object. "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Therefore, the jury was entitled to consider this evidence to the extent it found that this evidence corroborated Garnett's testimony. *See State v. Rogers*, 299 N.C. 597, 264 S.E.2d 89 (1980).

Furthermore, Garnett was later recalled to the witness stand, and the following transpired:

> [PROSECUTOR]: Ms. Singletary, did you tell Detective Parrish, when you made your statement to him, that "Larry told me to 'Open the door, because I know you got that n----- in there' "?
>
> [GARNETT]: Yes.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: Did Larry Singletary say that through the door on the morning of September 1st?
>
> [GARNETT]: Yes.
>
> [PROSECUTOR]: Do you remember him saying that?
>
> [GARNETT]: Yes.

At this point the comment became substantive evidence, and any error as to the admission of the statement for corroborative purposes was harmless. This assignment of error is overruled.

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

NO ERROR.

Justice WEBB concurring.

I concur in the result reached by the majority, but I do not agree with all its reasons.

I do not believe it is harmless error if the court refuses to charge on heat of passion when there is evidence to support it and the jury finds the defendant guilty of first-degree murder. In this case, I would find no error because I do not believe there is evidence to support such a charge.

The evidence shows the defendant's passion was not suddenly aroused by finding his wife with a paramour. The defendant went to his wife's apartment with the intention of doing her or someone harm. His intent was formed before the apartment door was opened. I do not believe what happened afterward aroused his passion so that malice was eliminated.

STATE OF NORTH CAROLINA v. KJELLYN ORLANDO LEARY

No. 52A95

(Filed 31 July 1996)

1. Jury § 235 (NCI4th)— first-degree murder—death qualifying jury

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to seat jurors without regard to death-qualification and by denying his request for a separate sentencing jury. The North Carolina Supreme Court has previously ruled against defendant's position and defendant presents no compelling reason for the Court to reexamine this issue.

Am Jur 2d, Jury §§ 264-267, 279, 291, 334, 338.

2. Evidence and Witnesses § 1235 (NCI4th)— confession—standard for determining custody—objective rather than subjective

The North Carolina Supreme Court declined to adopt a subjective rather than objective state of mind test for determining whether a defendant was in custody when a statement was given.

Am Jur 2d, Evidence §§ 721, 722, 749, 750.

3. Evidence and Witnesses § 1235 (NCI4th)— confession—not custodial

The trial court did not err in a prosecution for murder, robbery, and kidnapping by denying defendant's motion to suppress his statements to a law enforcement officer where defendant asserted that the first statement occurred during an in-custody interrogation without *Miranda* warnings and that the second statement was tainted by the first. The evidence tended to show that defendant was twenty-two years old and had prior experience with the criminal justice system; the first interview with defendant began at approximately 10:25 a.m.; the officer testified that defendant acted normal, "knew everything that was going on," appeared calm, and exhibited no signs of alcohol or drug use; defendant was told that he was not under arrest and that he was free to leave and was not subjected to physical threats or shows of violence; defendant testified that he was not mistreated in any way; the initial interview concluded at approximately 12:47 p.m.; defendant was not given his *Miranda* warnings before or during this first interview; the second conversation with defendant began at approximately 11:15 p.m. and concluded at approximately 11:20 p.m.; the officer testified that during this interview defendant appeared "much as he was before," "knew what was going on," and communicated effectively; the officer testified that defendant was not threatened, coerced, or intimidated and that at the beginning of this conversation he gave defendant his *Miranda* warnings; defendant signed the waiver of rights form; and the judge specifically found that defendant was not in custody during the first interview and that he chose "knowingly and voluntarily to make a statement to the police." As to the second interview, Judge Bowen found that defendant "knowingly and voluntarily chose to waive [his] rights and make a statement to and provide assistance to the police."

Am Jur 2d, Evidence §§ 721, 722, 749, 750.

4. Evidence and Witnesses § 1230 (NCI4th)— constitutional rights—warnings—North Carolina Constitution

The North Carolina Constitution does not require all law enforcement officers to warn all criminal suspects, regardless of whether they are in custody, that they are free to walk away immediately, that they have a right to an attorney before answering any question, and that anything they say, orally or in writing, casually or formally, will be used against them in a court of law.

Am Jur 2d, Evidence §§ 749, 750.

5. Jury § 32 (NCI4th)— first-degree murder—jury selection—potential jurors excused before case called—outside presence of defendant

The trial court did not err in a prosecution for murder, kidnapping, and robbery by denying defendant's motion to dismiss the jury venire after the district court judge excused jurors outside the presence of defendant and his counsel where the trial court found and concluded that the chief district court judge excused or deferred some jurors prior to the case being called for trial, but no record exists of the reasons for such action; defendant failed to offer any evidence of corrupt intent or systematic discrimination in the compilation and composition of the jury venire; no evidence suggests that the jury was not a good cross representation of Wake County; and excusing or deferring the prospective jurors was not a critical phase of the trial and occurred some days before the case was called for trial.

Am Jur 2d, Jury §§ 183-185.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 ALR4th 429.

6. Criminal Law § 1298 (NCI4th)— first-degree murder—motion that defendant not eligible for death penalty—denied

The trial court did not err in a prosecution for murder, kidnapping, and robbery by refusing to grant defendant's motion to declare that he was not eligible for the death penalty. The State's evidence supported the inference that defendant was a major participant, that defendant acted with reckless indifference to

human life while participating in these events, and that these events resulted in two deaths; thus the culpability requirement set out in *Tison Arizona*, 481 U.S. 137, is satisfied. Additionally, the State's evidence supported the finding of aggravating circumstances.

Am Jur 2d, Criminal Law §§ 609 et seq.; Homicide §§ 552-556.

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

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

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

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

The trial court did not err by overruling defendant's objection to the submission to the jury of the charge of first-degree murder as to one victim on the theory of premeditation and deliberation where the State's evidence tended to show that defendant knew the victim had been kidnapped and was in the trunk of the car he was driving; defendant drove to the spot where the killing occurred and waited in the car while an accomplice took the victim out of the trunk, walked the victim into the woods, and then came back alone; and defendant then drove away with the accomplice.

Am Jur 2d, Homicide §§ 437 et seq.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two consecutive life sentences entered by Farmer, J., at the 18 April 1994 Criminal Session of Superior Court, Wake County, upon jury verdicts of guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 28 August 1995. Heard in the Supreme Court 14 March 1996.

Michael F. Easley, Attorney General, by William Dennis Worley, Associate Attorney General, and Joan H. Erwin, Assistant Attorney General, for the State.

Thomas H. Eagen for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally and found guilty of two counts of first-degree murder for the deaths of Emmanuel Oguayo and Donald Ray Bryant. Defendant was also found guilty of two counts of robbery with a firearm as to Emmanuel Oguayo and Lindanette Walker and guilty of first-degree kidnapping as to Donald Bryant. Following a capital sentencing proceeding, the jury recommended life sentences for each of the murder convictions. Judge Robert L. Farmer arrested judgment on the first-degree kidnapping, treated the kidnapping conviction as second-degree kidnapping, consolidated the Bryant kidnapping and murder convictions for judgment, and sentenced defendant to life imprisonment for the kidnapping and death of Bryant. Judge Farmer then consolidated for judgment the two convictions of robbery with a firearm with the first-degree murder conviction of Oguayo and sentenced defendant to a consecutive sentence of life imprisonment.

The evidence at trial tended to show that on the evening of 12 February 1993, Kjellyn Leary (defendant), Jerome Braxton, Christopher Braxton, and Robin Moore set out in a car driven by "Jennifer," with the intent to rob someone at Saint Augustine's College in Raleigh, North Carolina. Moore brought along his shotgun. Jennifer dropped the group off across the street from the college. Donald Bryant, one of the victims, pulled up in his car beside Jerome Braxton and Moore, got out, and asked Jerome Braxton if he had any

cocaine. Jerome responded that he did not have any cocaine, and Bryant started walking back to his car. Moore took out his shotgun and forced Bryant into the backseat of the car; all the men then left the area in Bryant's car. Jerome Braxton went through Bryant's pockets and found some money and marijuana. The group eventually stopped the car, and Moore forced Bryant into the trunk. At this point Christopher Braxton became scared and left the group.

The remaining three men, defendant, Jerome Braxton, and Robin Moore, went to the Fast Fare convenience store on East Millbrook Road. Defendant and Braxton went into the store, and Moore remained in the car. Braxton told the clerk, Emmanuel Oguayo, to get behind the counter. Braxton then walked toward Lindanette Walker, a patron of the store, and ordered her to get on the floor. Braxton took Walker's jacket, watch, wallet, and keys. Defendant went behind the front counter with the clerk and got the money out of the cash register. Oguayo began fighting with defendant, and defendant called out to Braxton. Oguayo ran to the store window and began banging on the window and screaming for help. Braxton then shot and killed Oguayo.

Braxton and defendant ran back to the car, and Moore drove away with the men. Moore drove to his home and left the group. Defendant then drove the car to the woods. Braxton took Bryant out of the trunk and into the woods in North Raleigh where he shot Bryant. Braxton returned to the car, and defendant drove away with Braxton.

[1] Defendant argues in his first two assignments of error that the trial court erred in denying his motion to seat jurors without regard to death-qualification and by denying his request for a separate sentencing jury. Defendant argues that the process of death-qualification results in a jury that is biased in favor of the prosecution and prone to find defendant guilty. Defendant contends that the trial court's actions denied him his state and federal constitutional rights to a fair trial, due process, and equal protection of the law. As defendant concedes, however, this Court has previously ruled against defendant's position on this issue. *See, e.g., State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994); *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987); *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980). Defendant has presented no compelling reason

why this Court should reexamine this issue, and these assignments of error are overruled.

[2] Defendant next contends the trial court erred by denying his motion to suppress statements made to a law enforcement officer and his motion to exclude involuntary admissions and confessions. Defendant made two recorded statements to Investigator John Howard prior to trial. Defendant asserts that the first statement occurred during an in-custody interrogation without his having been given *Miranda* warnings and was made involuntarily. Defendant contends that the second statement, given later the same day, was tainted by the first *Miranda* violation and was also involuntary.

We first note that defendant concedes that, under the current status of the law, there was sufficient evidence to support the trial court's finding that defendant was not in custody when he made the first statement. The test to determine whether a suspect is in custody is "an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will." *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982). Defendant argues, however, that a subjective state of mind should control and urges this Court to adopt such a standard. We decline to do so.

[3] While defendant concedes there is no error as to the custodial issue under the current status of the law, he argues that the first statement was made involuntarily and should thus have been excluded. In determining whether a defendant's confession is voluntarily made, this Court considers the totality of the circumstances. *State v. Hardy*, 339 N.C. 207, 451 S.E.2d 600 (1994). In *Hardy* this Court set out factors to be considered in this inquiry:

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. at 222, 451 S.E.2d at 608.

In the present case the evidence pertaining to the circumstances surrounding defendant's first statement tends to show the following.

Defendant was twenty-two years old at the time he made the statement and had prior experience with the criminal justice system. The first interview with defendant began at approximately 10:25 a.m. Investigator Howard testified that defendant acted normal, "knew everything that was going on," appeared calm, and exhibited no signs of alcohol or drug use. Defendant was told that he was not under arrest and that he was free to leave. Defendant was not subjected to physical threats or shows of violence. Defendant testified that he was not mistreated in any way. This initial interview concluded at approximately 12:47 p.m. Defendant was not given his *Miranda* warnings before or during this first interview.

Howard testified that during the first interview, he indicated to defendant that he had spoken with Robin Moore and that Moore had told him what happened. In fact, Howard had not spoken with Moore prior to the initial interview with defendant. Howard testified that he was using an interviewing "technique" that involved playing one defendant against another, "even though one may not have told you something."

Howard testified that his second conversation with defendant began at approximately 11:15 p.m. This interview concluded at approximately 11:20 p.m. Howard testified that during this interview, defendant appeared "much as he was before," "knew what was going on," and communicated effectively. Howard testified that defendant was not threatened, coerced, or intimidated. Howard also testified that at the beginning of this conversation, he gave defendant his *Miranda* warnings, and defendant signed the waiver of rights form.

Judge Wiley F. Bowen, the trial judge who heard and denied defendant's motions, made findings of fact essentially in accord with the evidence offered during the *voir dire*. Judge Bowen specifically found that defendant was not in custody during the first interview and that he chose "knowingly and voluntarily to make a statement to the police." As to the second interview, Judge Bowen found that defendant "knowingly and voluntarily chose to waive [his] rights and make a statement to and provide assistance to the police." Judge Bowen concluded that defendant's constitutional rights were not violated by "his interview, arrest, detention and subsequent interview"; that defendant was neither threatened nor offered rewards or inducements for his statements; and that under the totality of the circumstances, both statements made by defendant were made "freely, voluntarily and understandingly."

The trial court's findings of fact are binding if supported by competent evidence in the record. *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). The conclusion of voluntariness, however, is a legal question which is fully reviewable. *Davis*, 305 N.C. at 419-20, 290 S.E.2d at 586. Applying the foregoing principles to the instant case, we hold that the trial court did not err in concluding that defendant's statements were voluntary.

[4] Defendant also requests that this Court rule that the North Carolina Constitution goes beyond the United States Constitution and requires all law enforcement officers to warn all criminal suspects, regardless of whether they are in custody, "that they are free to walk away immediately, that they have a right to an attorney before answering any question, and that anything they say, orally or in writing, casually or formally, will be used against them in a court of law." We decline to depart from the well-established precedent in this area of constitutional law. This assignment of error is overruled.

[5] By his next assignment of error, defendant contends that the trial court committed error by denying his motion to dismiss the jury venire after the district court judge excused jurors outside the presence of defendant and his counsel. Both parties agree that these jurors were excused prior to defendant's case being called for trial. Defendant concedes that this Court has previously ruled that it was not error for the court to excuse prospective jurors prior to the commencement of a defendant's trial. *See, e.g., State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. Murdock*, 325 N.C. 522, 385 S.E.2d 325 (1989). Defendant argues, however, that these cases were wrongly decided in that they stand for the proposition that "a judge may excuse jurors for any noncorrupt reason or no reason at all" prior to the commencement of a defendant's trial. Defendant argues that our previous cases unfairly shift the burden of proving corrupt intent and systematic discrimination to the defendant when no records are kept of the excusal process, the process occurs before defendant's trial begins, and defense counsel is not present to oversee the procedure.

North Carolina General Statute section 9-6 provides, in part:

> (a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this

responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

(b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he . . . shall receive, hear, and pass on applications for excuses from jury duty. . . .

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a subsequent session of court.

N.C.G.S. § 9-6 (Supp. 1995).

After hearing defendant's motion to dismiss the jury venire, Judge Farmer entered the following findings and conclusions: The chief district court judge excused or deferred some jurors prior to this case being called for trial, but no record exists as to the reasons for such action; "defendant failed to offer any evidence of corrupt intent or systematic discrimination in the compilation and composition of the jury venire"; no evidence suggests that the jury was not a "good cross representation of Wake County"; and "excusing or deferring the prospective jurors was not a critical phase of the trial and occurred some days before the case was called for trial." Judge Farmer then denied defendant's motion.

Section 9-6 places the process of juror excusals within the discretion of the district court judge. In *State v. Murdock* we stated that a defendant is not entitled to a new trial for improper jury excusals in the absence of evidence of corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned. *Murdock*, 325 N.C. at 526, 385 S.E.2d at 327. Defendant presents us with no persuasive authority to depart from our previous holdings, which place the burden on the defendant to come forward with evidence that the district court judge abused his discretion in the excusal process. A review of the record reveals that defendant presented no evidence that the district court judge in this case acted with corrupt intent or systematic discrimination. Defendant having failed to meet his burden, this assignment of error is overruled.

[6] In defendant's next assignment of error, he contends that the trial court erred by refusing to grant his motion at the close of the State's case to declare that the defendant was not eligible for the death penalty. Defendant argues that the State's evidence was not sufficient to support a finding that defendant was a major participant who

demonstrated a reckless disregard for human life in the Fast Fare robberies and murder of Oguayo or in the kidnapping and murder of Bryant. Defendant contends that he would not have presented certain evidence during the guilt phase of his trial if this motion had been granted. Specifically, defendant contends that he would not have introduced the statements made by Jerome Braxton to police officers, which corroborated the State's case, "but for the need to ensure that the jury fully realized that [defendant] shot no one and to contrast him against [Braxton]." Assuming *arguendo* that this assignment of error is a proper issue for review, defendant's claim is meritless.

Defendant argues that *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987), precludes his eligibility for the death penalty. This Court has interpreted *Tison* as holding that "the death penalty could not be imposed upon a criminal defendant who did not actually kill, intend to kill, or participate in a major way in criminal conduct which resulted in death while acting with reckless indifference to human life." *State v. Howell*, 335 N.C. 457, 466, 439 S.E.2d 116, 121 (1994).

In the instant case the State's evidence supported the inference that defendant was a major participant in the events that occurred in the late hours of 12 February and early hours of 13 February, that defendant acted with reckless indifference to human life while participating in these events, and that these events resulted in two deaths. Thus, the culpability requirement set out in *Tison* for imposition of the death penalty is satisfied in this case.

Additionally, the State's evidence supported the finding of aggravating circumstances. When determining the sufficiency of the evidence to support the existence of an aggravating circumstance, the trial court must consider the evidence in the light most favorable to the State. *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). The State is entitled to every reasonable inference to be drawn from the evidence, contradictions and discrepancies are for the jury to resolve, and all evidence admitted that is favorable to the State is to be considered. *State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 356 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994). Applying these principles to the instant case, the evidence is sufficient to support the aggravating circumstances that the killing of Bryant occurred during the course of a kidnapping, N.C.G.S. § 15A-2000(e)(5) (Supp. 1995), and that it occurred as part of a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). Likewise, the evidence is sufficient to support the aggravating circumstances that the

killing of Oguayo occurred during the course of a robbery, N.C.G.S. § 15A-2000(e)(5), and that it occurred as part of a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). Thus, the trial court did not err in denying defendant's motion at the close of the State's case to declare that defendant was not eligible for the death penalty.

Defendant asserts in his next assignment of error that the trial court erred by failing to grant his motion to dismiss all charges for insufficiency of the evidence at the close of all evidence. However, defendant concedes in his brief that the evidence in this case was sufficient to justify submitting the charges to the jury. This assignment of error is overruled.

[7] Defendant also contends, in a separate assignment of error, that the trial court erred in overruling his objection to the submission to the jury of the charge of first-degree murder as to Bryant on the theory of premeditation and deliberation.

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. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). To be "substantial," evidence must be "existing and real, not just seeming or imaginary." *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

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 that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

Defendant contends that there was insufficient evidence to support a conviction of first-degree murder as to Bryant on the theory of premeditation and deliberation. "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. at 635, 440 S.E.2d at 835-36. "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish

an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. A defendant's conduct before and after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation. *State v. Vaughn*, 324 N.C. 301, 305, 377 S.E.2d 738, 740 (1989).

In the instant case the State's evidence tended to show that defendant knew Bryant had been kidnapped and was in the trunk of the car he was driving. Defendant drove to the spot where the killing occurred and waited in the car while Braxton took the victim out of the trunk, walked the victim into the woods, and then came back alone. Defendant then drove away with Braxton. Such evidence, taken in the light most favorable to the State, permits a reasonable inference that defendant premeditated and deliberated the killing; and the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. CLETIS EUGENE ROSEBOROUGH

No. 13A95

(Filed 31 July 1996)

1. Homicide § 44 (NCI4th)— murder in perpetration of kidnapping—continuous chain of events

A killing is committed in the perpetration of a kidnapping when there is no break in the chain of events so that the kidnapping and the homicide are part of the same series of events, forming one continuous transaction. The temporal order of the killing and the felony is immaterial where there is a continuous transaction, and it is immaterial whether the intent to commit the felony was formed before or after the killing provided the felony and the killing are aspects of a single transaction.

Am Jur 2d, Homicide §§ 46, 72, 166, 220.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

2. Homicide § 283 (NCI4th)— killing victim and kidnapping another—continuous chain of events—felony murder

The State's evidence was sufficient for the jury reasonably to infer that the killing of Rodriguez and the kidnapping of Celiz were part of one continuous chain of events so that the Celiz kidnapping was an appropriate predicate felony to support defendant's conviction of felony murder for the killing of Rodriguez where the evidence tended to show that defendant, Hunter, Peterson, and Noble sought out some Hispanics under a bridge and fired several warning shots; defendant and Hunter stopped two of the Hispanics who tried to come out from under the bridge; while defendant and Hunter were talking to these two Hispanics, Peterson fired the shots under the bridge which killed Rodriguez; Celiz came up out of the bushes and defendant asked him where he was going and whether he was trying to run away; defendant then asked Peterson for the gun and said he hadn't pistol whipped anybody in a long time; defendant then hit Celiz with the gun; defendant, Hunter, and Peterson continued the beating of Celiz, during which the first-degree kidnapping was committed; and when they heard sirens, defendant, Hunter, and Peterson ran away.

Am Jur 2d, Homicide §§ 46, 72, 166.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

3. Homicide § 374 (NCI4th)— kidnapping—acting in concert—killing by accomplice—felony murder

The evidence was sufficient to establish defendant's guilt of felony murder of Rodriguez under the principle of acting in concert where it tended to show that defendant, Hunter, and Peterson sought out some Hispanics who were under a bridge and fired several warning shots; while defendant and Hunter were talking to two Hispanics who tried to come out from under the bridge, Peterson fired shots under bridge which killed Rodriguez; defendant hit Celiz with a gun and knocked him down; defendant and Peterson began kicking Celiz; Hunter told them to move Celiz out of the street, and defendant and Peterson dragged him to the grass where all three men then participated in beating him; a rea-

sonable jury could have found that the kidnapping of Celiz and the killing of Rodriguez were part of a continuous transaction; and the killing of Rodriguez was thus committed in the perpetration of the kidnapping of Celiz. Because defendant acted in concert to commit the first-degree kidnapping of Celiz, and Rodriguez was killed in the perpetration of the kidnapping, defendant is guilty of felony murder for the killing of Rodriguez.

Am Jur 2d, Homicide §§ 37, 445.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 ALR3d 1341.

4. Homicide § 509 (NCI4th)— felony murder—kidnapping—acting in concert—theory of case not changed by instruction

Where the trial court's instructions as a whole correctly conveyed to the jury the law of felony murder based on the underlying felony of kidnapping and the principle of acting in concert, the fact that the trial court also gave an acting in concert instruction using the word "murder" did not improperly change the theory of the case to add a specific intent element to the felony murder charge.

Am Jur 2d, Homicide §§ 72-77.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 ALR3d 1341.

5. Criminal Law § 437 (NCI4th)— capital trial—plea to lesser offense warranted—jury argument not allowed

The trial court did not err by refusing to permit defense counsel to argue to the jury in a first-degree murder trial that defendant should be allowed to plead guilty to second-degree murder because two equally culpable codefendants had been permitted to plead guilty to second-degree murder since the decision as to whether to enter into a plea agreement with a defendant rests in the broad discretion of the district attorney, the trial court accepts the agreement if certain conditions are met, and the jury has no role in a plea agreement.

Am Jur 2d, Homicide § 470.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of life imprisonment entered by Freeman, J., on 2 June 1994, in Superior Court, Forsyth County, upon jury verdicts of guilty of two counts of first-degree murder. Heard in the Supreme Court 13 February 1996.

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

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

ORR, Justice.

Defendant was indicted on two counts of first-degree murder and one count of first-degree kidnapping. In a capital trial, the jury found defendant guilty of the first-degree kidnapping of Jose Celiz; guilty of the first-degree murder of Celiz on the basis of malice, premeditation, and deliberation, and under the felony murder rule; and guilty of the first-degree murder of Carlos Rodriguez under the felony murder rule using the kidnapping of Celiz as the predicate felony. In accordance with the jury's recommendation, the court imposed a sentence of life imprisonment for each of the murder convictions. The court also arrested judgment on the kidnapping conviction as the underlying felony in the felony murder of Rodriguez.

The evidence tended to show that on Saturday, 26 June 1993, defendant left work at about 11:00 p.m. and accompanied Jerome Peterson to the home of Jerome's brother, Tyrone Peterson. The three then went to the Broad Street bridge to talk to some Hispanic people who had "jumped" Jerome Peterson earlier. When the Hispanics ran away, defendant and the Peterson brothers returned home and went to bed.

The following night, after defendant got off work, he returned to his apartment complex, Skyline Village, and was talking to Jerome Peterson (hereinafter "Peterson") when he saw Fletcher Hunter and Kevin Noble drive up the street. Defendant flagged down the car to talk to Hunter. Peterson told Hunter that he had been "jumped" by four Hispanics the previous night. Hunter suggested they go to the bridge to find the Hispanics to "find out what's going on." Hunter testified that defendant then said, "let's go down there and get 'em."

Hunter drove defendant, Peterson, and Noble to the Broad Street bridge.

Hunter parked the car at a convenience store near the bridge. When they got out of the car, Hunter was carrying a .38-caliber semi-automatic handgun, and Noble was carrying a .25-caliber automatic handgun. Peterson led the way down a path beside the bridge. Defendant and Hunter followed him. They yelled for the Hispanics to come out from under the bridge. Defendant walked back to Noble and asked him to fire a warning shot to scare them. Noble testified that he did so and then gave the gun to defendant. Defendant walked back down the path. Someone under the bridge was talking in Spanish and laughing. Defendant told Hunter to fire the .38 "to let the people know we weren't playing." Hunter fired at a cooler on the ground.

Then defendant and Hunter returned to the street and stopped two of the Hispanics who tried to come out from under the other side of the bridge. Hunter pointed the .38 at the men and tried to talk to them in Spanish. Peterson then fired shots under the bridge using the .25-caliber handgun, which police believe killed Rodriguez. Defendant testified that Noble had given Peterson the gun, but Noble testified that he had given the gun to defendant. After he fired the shots, Peterson said, "you're not laughing now," and no one responded. The two Hispanic men that defendant and Hunter were talking to went back under the bridge. Hunter told Noble to take the car and leave, and Noble complied.

After the shots were fired, Peterson shouted that one of the Hispanic men was coming up through the bushes. Defendant testified that he had taken the gun away from Peterson, that the Hispanic ran at him, and that he (defendant) hit the Hispanic on the chin with the gun. Hunter testified that defendant asked Peterson for the gun, said he had not "pistol whipped" anybody in a long time, and hit the Hispanic on the side of the face with the gun. This Hispanic man was later identified as Jose Celiz. Celiz ran toward Hunter, and as he passed Hunter, Hunter hit Celiz on the back and knocked him to the ground.

Next, defendant and Peterson began kicking Celiz, and Hunter told them to move the man out of the street. Defendant and Peterson dragged Celiz to the grass. Hunter told them to stand the man up, they did so, and Hunter asked Celiz why they had "jumped on" Peterson. When Celiz did not answer, Hunter punched and kicked Celiz in the jaw, and Celiz fell down. Defendant, Peterson, and Hunter then con-

tinually kicked Celiz, and Peterson hit Celiz with a cane. Then, they heard sirens, and defendant, Peterson, and Hunter ran away.

Rodriguez and Celiz were both alive when they were taken to Baptist Hospital. They both died that morning, 28 June 1993, Rodriguez at 6:30 a.m., Celiz at 11:57 a.m. Later that day, defendant and Peterson were arrested at the Skyline Village apartment complex, and Hunter turned himself in. Noble gave a statement to police that evening.

Defendant first contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder of Carlos Rodriguez. Defendant claims that there was insufficient evidence presented at trial, as a matter of law, from which the jury properly could find defendant guilty beyond a reasonable doubt of the first-degree murder of Rodriguez under the felony murder rule. We disagree.

> A motion to dismiss is properly denied if substantial evidence of each essential element of the offense charged is presented at trial. 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 from that evidence.

State v. Quick, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989) (citation omitted).

The trial court submitted to the jury the issue of defendant's guilt or innocence of the first-degree murder of Rodriguez solely under the felony murder rule on the theory that the murder of Rodriguez was committed in the perpetration of the first-degree kidnapping of Jose Celiz. The court also submitted separately the issues of whether defendant was guilty of the first-degree kidnapping and first-degree murder of Celiz. The jury found defendant guilty of all three crimes.

[1] Defendant argues that the kidnapping of Celiz and the killing of Rodriguez were not sufficiently transactionally related to one another so as to make the Celiz kidnapping an appropriate predicate felony to support a felony murder charge for the killing of Rodriguez. N.C.G.S. § 14-17 provides: "A murder . . . committed in the perpetration or attempted perpetration of any . . . kidnapping . . . shall be deemed to be murder in the first degree." N.C.G.S. § 14-17 (Supp. 1995). The evidence is sufficient to support a charge of felony murder based on the underlying felony of kidnapping where the jury may reasonably infer that the killing and the kidnapping were part of one continuous chain of events. *See, e.g., State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545,

552 (1992). A killing is committed in the perpetration of a kidnapping when there is no break in the chain of events so that the kidnapping and the homicide are part of the same series of events, forming one continuous transaction. *See, e.g., id.*; *State v. Wooten*, 295 N.C. 378, 385-86, 245 S.E.2d 699, 704 (1978). The temporal order of the killing and the felony is immaterial where there is a continuous transaction, and it is immaterial whether the intent to commit the felony was formed before or after the killing, provided that the felony and the killing are aspects of a single transaction. *State v. Handy*, 331 N.C. at 529-30, 419 S.E.2d at 552-53.

[2] After thoroughly reviewing the transcript, we conclude that the evidence, viewed in the light most favorable to the State, was sufficient for the jury to reasonably infer that the killing and the kidnapping were part of one continuous chain of events. The evidence showed that defendant, Hunter, Peterson, and Noble sought out the Hispanics under the bridge and fired several warning shots. Then defendant and Hunter stopped two of the Hispanics who tried to come out from under the bridge. While defendant and Hunter were talking to these two Hispanics, Peterson fired the shots under the bridge which the police believe killed Rodriguez. Hunter testified that Peterson then shouted to defendant and Hunter that "one of the Mexican [sic] was coming up through the bushes," and defendant and Hunter "met the Mexican as he came up out of the bushes." The "Mexican" referred to was Celiz. Hunter testified that defendant asked the Mexican where he was going and whether he was trying to get away. Then, according to Hunter, Peterson walked up, and "[defendant] asked [Peterson] for the gun and said he hadn't pistol whipped nobody in a long time." Hunter testified that defendant then hit Celiz with the gun. Defendant, Hunter, and Peterson continued the beating of Celiz, which included the commission of the first-degree kidnapping. When they heard sirens, defendant, Hunter, and Peterson ran away.

From this evidence, the jury reasonably could have inferred that the kidnapping of Celiz and the killing of Rodriguez were part of the same series of events, forming one continuous transaction—a continuous assault on the persons under the bridge by the defendant and his companions—and thus that the killing of Rodriguez was committed in the perpetration of the kidnapping of Celiz. *See State v. Jaynes*, 342 N.C. 249, 274-75, 464 S.E.2d 448, 464 (1995) (where felony murder was predicated on an arson that was committed three and one-half hours after the murder and after defendant had left the site of the murder

and returned, the jury reasonably could find that the crimes were part of one continuous transaction), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 64 U.S.L.W. 3855 (1996); *State v. Moore*, 339 N.C. 456, 461-62, 451 S.E.2d 232, 234 (1994) (where felony murder was predicated on discharging a firearm into occupied property, the victim did not break the chain of events by going outside to defend his home).

[3] Defendant also argues that the evidence was insufficient to establish his guilt under the acting in concert principle. The prosecution of defendant for first-degree murder rests on both the felony murder rule and the principle of acting in concert. We addressed the relationship of these legal theories in *State v. Thomas*:

> Under the felony murder rule a homicide committed in the perpetration of one of the statutorily specified felonies is first degree murder. N.C.G.S. § 14-7. Discharging a firearm into an occupied structure is a felony which will support a first degree felony murder prosecution. Thus when persons act in concert to commit the felony of discharging a firearm into an occupied structure each person is guilty not only of that felony but for any homicide committed in its perpetration.

State v. Thomas, 325 N.C. 583, 595, 386 S.E.2d 555, 561-62 (1989) (citations omitted). Likewise, first-degree kidnapping is a felony which will support a first-degree felony murder prosecution. N.C.G.S. § 14-17. Thus, when persons act in concert to commit the felony of first-degree kidnapping, each person is guilty not only of first-degree kidnapping, but for any homicide committed in its perpetration.

The evidence is virtually uncontradicted that defendant, Peterson, and Hunter acted in concert to commit the continuous transaction of assault on the Hispanics as well as the kidnapping of Celiz. Hunter directed defendant and Peterson to move Celiz out of the road, and they did so. All three then participated in the beating of Celiz. Defendant does not challenge the sufficiency of the evidence to support any of the elements of first-degree kidnapping. As we held above, a reasonable jury could have found that the kidnapping of Celiz and the killing of Rodriguez were part of a continuous transaction; and that thus, the killing of Rodriguez was committed in the perpetration of the kidnapping of Celiz. Therefore, because defendant acted in concert to commit the first-degree kidnapping of Celiz, and Rodriguez was killed in the perpetration of the kidnapping, defendant is guilty of felony murder for the killing of Rodriguez.

[4] Defendant next claims that there was insufficient evidence from which the jury could find defendant guilty beyond a reasonable doubt of the first-degree murder of Rodriguez on the theory of guilt presented to the jury through the trial court's instructions. He argues that the trial court's instructions for the felony murder of Rodriguez required the jury to find that defendant and Peterson had a common purpose to commit murder and that the evidence did not support such a conclusion. Citing *Presnell v. Georgia*, 439 U.S. 14, 58 L. Ed. 2d 207 (1978), and *State v. Smith*, 65 N.C. App. 770, 310 S.E.2d 115, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984), defendant relies on the rule that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury. However, we conclude that this rule is inapplicable to the case at bar because the trial court's jury instructions did not present a theory of guilt different from that on which defendant was convicted.

"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973), *quoted in State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994).

A review of the entire set of instructions given to the jury reveals that the court instructed the jury on the murder of Rodriguez on the theory of felony murder based on the underlying felony of kidnapping, while applying the theory of acting in concert. The court correctly instructed the jury that "the defendant has also been accused of first degree murder in the perpetration of a felony which is the killing of a human being by a person who committed—committing or attempting to commit the kidnapping." The court also gave several instructions on acting in concert. Defendant's argument is based on the following instruction, to which he did not object:

> And then, as I told you earlier, for a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit murder, each of them is held responsible for the acts of the others done in the commission of that crime.

Defendant claims that this instruction changed the theory of guilt to require the jury to find that defendant possessed the specific intent to murder Rodriguez, something akin to premeditation and deliberation. We disagree.

We first note that this instruction is the same as the pattern jury instruction for acting in concert, N.C.P.I.—Crim. 202.10 (1994), with the word "murder" used to fill in the blank for the relevant crime. The court also instructed the jury that

> for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a kidnapping, each of them is held responsible for the acts of the others done in the commission of that crime.

This acting in concert instruction is more applicable to felony murder based on kidnapping. The court also gave the following charge relating to the felony murder of Rodriguez:

> So, members of the jury, I will charge that if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with others, unlawfully removed a person from one place to another and that the person did not consent to this removal and that this was done for the purpose of doing serious bodily injury to the person removed and that this removal was a separate and complete act separate and apart from the injury, and that the person removed had been seriously injured; and that while committing a kidnapping, the defendant, acting either by himself or acting together with others, killed the victim and that the defendant's act was a proximate cause of the victim's death, then it would be your duty to return a verdict of guilty of first degree murder.

This paragraph is the direct charge to the jury and requires the jury to find that while committing a kidnapping, defendant, acting either by himself or acting together with others, killed the victim. This charge does not require the jury to find that defendant possessed a specific intent to kill Rodriguez. Also, the court did not list intent as an element when it listed for the jury the elements of felony murder. This omission was contrasted in the jurors' minds with the court's charge on the first-degree murder of Celiz on the basis of malice, premeditation, and deliberation. The felony murder charge combined both with

the court's list of elements of felony murder and with the court's acting in concert instruction that "[i]f two or more persons act together with a common purpose to commit a kidnapping, each of them is held responsible for the acts of the others done in the commission of that crime" correctly conveyed to the jury the law of felony murder based on kidnapping and the acting in concert principle. The fact that the court also gave an acting in concert instruction using the word "murder" did not alter the theory of the case. This instruction was also a correct statement of the legal principle of acting in concert. It is simply inapplicable to felony murder, which has no element of intent.

We conclude that, when considered in light of the jury instructions as a whole, the court's inadvertent inclusion of the acting in concert instruction using the word "murder" failed to change the theory of the case such as to add a specific intent element to the felony murder of Rodriguez. Thus, the court instructed the jury on the murder of Rodriguez on the theory of felony murder based on the underlying felony of kidnapping, while applying the theory of acting in concert. We held above that there was sufficient evidence presented at trial, as a matter of law, from which the jury properly could find defendant guilty beyond a reasonable doubt of the first-degree murder of Rodriguez under this theory of guilt. This assignment of error is overruled.

[5] Defendant finally contends that the trial court erred during closing arguments by preventing the defense attorney from arguing to the jury that because equally culpable codefendants, Fletcher Hunter and Kevin Noble, had been permitted to plead guilty to lesser charges, defendant also should be allowed to plead guilty to a lesser charge. We disagree.

In accordance with N.C.G.S. § 15A-1055(b), defense counsel was allowed to make a full argument to the jury on the impact of the plea agreements of Hunter and Noble upon their credibility as witnesses. However, defense counsel next attempted to make the following argument:

> And all I'm asking is that Mr. Roseborough be treated fairly. If [Hunter and Noble are] allowed to plead to second degree murder and they are just as culpable or more culpable than Mr. Roseborough, then why shouldn't he be allowed—
>
> [PROSECUTOR]: Objection to that argument, Your Honor.
>
> THE COURT: Sustained.

[DEFENSE COUNSEL]: Why shouldn't he be allowed to plead to that?

[PROSECUTOR]: Ask the jury to disregard that argument, Your Honor.

THE COURT: Motion allowed.

The trial court properly sustained the prosecutor's objection to this argument.

The decision of whether to enter into a plea agreement with a defendant is in the broad discretion of the district attorney. The district attorney has broad discretion to determine whether to try a defendant for first-degree murder, or to try a defendant for a lesser offense, or to accept a plea to second-degree murder. *State v. Lineberger*, 342 N.C. 599, 605, 467 S.E.2d 24, 27 (1996). "Our Constitution expressly provides that: 'The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district . . . .' " *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991) (quoting N.C. Const. art. IV, § 18). "The clear mandate of this provision is that the authority to prosecute criminal actions is vested with the district attorney." *State v. Sturgill*, 121 N.C. App. 629, 638, 469 S.E.2d 557, 562 (1996) (citing *State v. Camacho*, 329 N.C. at 593, 406 S.E.2d at 871). This authority includes the discretion to enter into plea agreements. *Id.* After the district attorney and a defendant enter into a plea agreement, the trial court is informed of the substance of the plea agreement, and the trial court accepts the agreement if certain conditions are met. *See* N.C.G.S. § 15A-1023 (1988). Thus, a jury has no role in a plea agreement. Therefore, defendant's argument to the jury asking why he should not be allowed to plead guilty to second-degree murder was improper. The court did not err in sustaining the prosecutor's objection to this argument. This assignment of error is overruled.

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

NO ERROR.

DORIS R. HORTON v. CAROLINA MEDICORP, INC., FORSYTH COUNTY HOSPITAL AUTHORITY, INC., AND FORSYTH MEMORIAL HOSPITAL

No. 383PA95

(Filed 31 July 1996)

1. **Hospitals and Medical Facilities or Institutions § 62 (NCI4th)— medical malpractice claim against hospital — continuing course of treatment doctrine**

The continuing course of treatment doctrine is the law of North Carolina and tolls the running of the statute of limitations for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negligent act or omission. To benefit from this doctrine, a plaintiff must show both a continuous relationship with a physician and subsequent treatment from that physician. The subsequent treatment must consist of an affirmative act or an omission related to the original act, omission, or failure which gave rise to the claim.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.; Physicians, Surgeons, and Other Healers § 320.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 368.

When statute of limitations begins to run in dental malpractice suits. 3 ALR4th 318.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice. 70 ALR4th 600.

2. **Hospitals and Medical Facilities or Institutions § 62 (NCI4th)—continuing course of treatment doctrine— applicability to institutional defendants**

The continuing course of treatment doctrine applies to institutional defendants; the General Assembly, for definitional purposes, has treated hospitals and other specified institutional health care providers identically with other health care professionals. Neither legislative policy nor North Carolina case law provides a rationale for differential treatment of hospitals in applying the continuing course of treatment doctrine.

Am Jur 2d, Hospitals and Asylums §§ 14 et seq.; Physicians, Surgeons, and Other Healers § 320.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 368.

When statute of limitations begins to run in dental malpractice suits. 3 ALR4th 318.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice. 70 ALR4th 600.

3. Limitations, Repose, and Laches § 24 (NCI4th)— medical malpractice—continuing course of treatment—action not timely

The trial court properly granted defendant's Rule 12(b)(6) motion to dismiss where plaintiff was admitted to defendant-hospital for a hysterectomy on 15 November 1990, a catheter inserted during surgery was removed on 16 November 1990, complications developed and plaintiff underwent corrective surgery on 20 November 1990, plaintiff was in the intensive care unit before her discharge from defendant-hospital on 6 December 1990, and this action was filed on 6 December 1993. Plaintiff alleged negligence causing injury in the course of her treatment on 15-16 November 1990, a continuing relationship with defendant, and subsequent treatment relating to her injury caused by the original negligence, thus invoking the continuing course of treatment doctrine so as to toll the running of the statute of limitations. However, while plaintiff alleges complications associated with her recovery from the second procedures, she does not allege that defendant hospital should or could have taken further action to remedy the damage occasioned by its original negligence. The continuing course of treatment doctrine thus operates to toll the statute of limitations only from the time of the original negligence until the performance of the corrective surgery on 20 November. The last act of defendant thus occurred on 20 November 1990 and plaintiff's complaint, filed on 6 December 1993, was untimely.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 320.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner. 80 ALR2d 368.

Justice FYRE concurring in part and dissenting in part.

Chief Justice MITCHELL and Justice LAKE join in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 119 N.C. App. 777, 460 S.E.2d 567 (1995), reversing an order allowing defendants' motion to dismiss entered by Beaty, J., on 27 June 1994 in Superior Court, Forsyth County. Heard in the Supreme Court 11 March 1996.

Warren Sparrow, and Cranwell & Moore, by C. Richard Cranwell, for plaintiff-appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Tamura D. Coffey, for defendant-appellants.

WHICHARD, Justice.

On 6 December 1993 plaintiff Doris Horton filed a complaint against defendants Carolina Medicorp, Inc.; Forsyth County Hospital Authority, Inc.; and Forsyth Memorial Hospital (collectively, "defendant Hospital") seeking damages based on the alleged negligence of defendant Hospital's nursing staff. On 3 May 1994, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, defendant Hospital moved to dismiss the complaint, arguing that plaintiff's action was barred by the statute of limitations set forth in N.C.G.S. § 1-15(c). On 27 June 1994 the trial court entered an order dismissing plaintiff's complaint, ruling that the action was time-barred. Plaintiff appealed, and the Court of Appeals reversed. *Horton v. Carolina Medicorp, Inc.*, 119 N.C. App. 777, 460 S.E.2d 567 (1995). We now reverse the Court of Appeals and order the dismissal reinstated.

The complaint alleges that on 15 November 1990 plaintiff was admitted to defendant Hospital for a total abdominal hysterectomy. On 16 November 1990 a catheter inserted during the surgery was removed. After the removal plaintiff experienced difficulty urinating, and her bladder became distended. She was unable to void her bladder for a twenty-four-hour period, resulting in the tearing of the bladder wall and leakage of urine into the body. Hospital staff discovered this condition on 17 November 1990 and inserted a new catheter.

Plaintiff's condition did not improve, and on 20 November 1990 she underwent corrective surgery. After this second surgery plaintiff was in the intensive care unit before her discharge from defendant Hospital on 6 December 1990.

The question is whether plaintiff's action is barred by the statute of limitations. A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired. *See Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974).

The applicable statute is N.C.G.S. § 1-15(c), which provides that a claim for malpractice arising out of the performance of or failure to perform professional medical services accrues upon the occurrence of the last act of the defendant giving rise to the claim. Plaintiff has three years from that date within which to bring suit. N.C.G.S. § 1-15(c) (1983).

Applying this statute to the facts alleged, if the last act giving rise to the claim was the initial surgery on 15 November 1990 or the removal of the catheter on 16 November 1990, plaintiff's claim filed on 6 December 1993 cannot withstand defendant Hospital's plea of the statute of limitations. Plaintiff does not contend otherwise. Her argument is, rather, that the continuing course of treatment doctrine applies so as to render her discharge from defendant Hospital on 6 December 1990 the last act giving rise to the claim. The issue thus becomes whether this doctrine applies, and if so, which of two dates thereby becomes the occasion of the last act giving rise to the claim: 20 November 1990, the date of the corrective surgery; or 6 December 1990, the date of plaintiff's discharge from defendant Hospital.

[1] This Court has not heretofore decided the applicability of the continuing course of treatment doctrine in this jurisdiction. Our Court of Appeals, however, initially applied the doctrine to a physician malpractice claim in *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978), and has applied it in subsequent cases, *see Sidney v. Allen*, 114 N.C. App. 138, 441 S.E.2d 561 (1994); *Hensell v. Winslow*, 106 N.C. App. 285, 416 S.E.2d 426, *disc. rev. denied*, 332 N.C. 344, 421

S.E.2d 148 (1992); *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990); *Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988); *Mathis v. May*, 86 N.C. App. 436, 358 S.E.2d 94, *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987); *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E.2d 684, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979). The Court of Appeals noted in *Ballenger* that the doctrine rests on the theory that " 'so long as the relationship of surgeon and patient continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done.' " *Ballenger*, 38 N.C. App. at 58, 247 S.E.2d at 293 (quoting *DeLong v. Campbell*, 157 Ohio St. 22, 25, 104 N.E.2d 177, 178 (1952), *overruled on other grounds by Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983)). While the Court of Appeals has stated that the doctrine delays accrual of the claim until conclusion of the treatment—*e.g.*, *Stallings*, 99 N.C. App. at 714, 394 S.E.2d at 215—a more accurate statement would be that the doctrine tolls the running of the statute for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negligent act or omission.

To benefit from this doctrine, a plaintiff must show both a continuous relationship with a physician and subsequent treatment from that physician. The subsequent treatment must consist of an affirmative act or an omission related to the original act, omission, or failure which gave rise to the claim. *Id.* at 715, 394 S.E.2d at 216.

We now affirm that the continuing course of treatment doctrine, only as set forth above, is the law in this jurisdiction. We expressly decline in this case to pass upon other features of the doctrine as developed and applied in the above-cited Court of Appeals cases.

[2] Defendant Hospital contends that even if the doctrine is the law in this jurisdiction, it has not been, and should not be, applied to institutional defendants such as itself. For the reasons hereinafter stated, we disagree.

A medical malpractice action is any action for damages for personal injury or death arising out of the furnishing of or failure to furnish professional services by a health care provider as defined in N.C.G.S. § 90-21.11. *Watts v. Cumberland Co. Hosp. Sys.*, 75 N.C. App. 1, 9, 330 S.E.2d 242, 249 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). N.C.G.S. § 90-21.11 defines "health care provider" as:

> [A]ny person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or *a hospital* as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

N.C.G.S. § 90-21.11 (1993) (emphasis added). The General Assembly thus, for definitional purposes, has treated hospitals and other specified institutional health care providers identically with other health care professionals. Had it intended differential treatment for hospitals in the defense of medical malpractice claims, it could have so provided. It has not done so, and we thus find no basis in legislative policy for holding that the continuing course of treatment doctrine does not apply to hospitals in the same manner that it does to other health care providers.

Our case law suggests the same conclusion. This Court has long recognized that hospitals owe a duty of care to their patients. *Blanton v. Moses H. Cone Mem. Hosp.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457 (1987); *Rabon v. Rowan Mem. Hosp.*, 269 N.C. 1, 21, 152 S.E.2d 485, 498-99 (1967). They must exercise ordinary care in the selection of their agents. *Blanton*, 319 N.C. at 375, 354 S.E.2d at 458. They must make a reasonable effort to monitor and oversee the treatment their staffs provide to patients. *Campbell v. Pitt Co. Mem. Hosp.*, 84 N.C. App. 314, 325, 352 S.E.2d 902, 908, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds by Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283, 395 S.E.2d 85 (1990). They employ or grant privileges to numerous physicians, nurses, and interns, as well as administrative and other nonmedical staff, all for the purpose of providing medical care and treatment to patients. They charge for their services and may invoke the legal system to collect. The patient who avails himself of hospital facilities expects the institution, through its agents, to attempt to cure him and does not expect that its employees will act on their own responsibility. *See Rabon*, 269 N.C. at 11, 152 S.E.2d at 492. Upon a breach of a hospital's duty of

care, the affected patient is entitled to bring an action against it. *Blanton*, 319 N.C. at 374-76, 354 S.E.2d at 457-58. Thus, neither legislative policy nor North Carolina case law provides a rationale for differential treatment of hospitals in applying the continuing course of treatment doctrine.

Cases from other courts further bolster this approach. New York adopted the doctrine in a case in which a hospital was the defendant. *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). Michigan has codified the doctrine. Mich. Comp. Laws § 600.5838(1) (1987). The Michigan Court of Appeals has applied it to a hospital. *Sheldon v. Sisters of Mercy Health Corp.*, 102 Mich. App. 91, 300 N.W.2d 746 (1980). Other state courts have at least implicitly accepted the doctrine's applicability to hospitals without question. *See, e.g., Neureuther v. Calabrese*, 195 A.D.2d 1035, 600 N.Y.S.2d 526 (1993); *Robinson v. Mount Sinai Medical Ctr.*, 137 Wis. 2d 1, 402 N.W.2d 711 (1987); *Metzger v. Kalke*, 709 P.2d 414 (Wyo. 1985). The United States Court of Appeals for the Fourth Circuit, applying North Carolina law, has considered the doctrine in a case involving a hospital defendant. While it held the doctrine factually inapplicable in the particular case, it treated it as firmly established in North Carolina law by Court of Appeals decisions, and it evinced no doubt that the doctrine would apply to a hospital when the facts of a given case invoked it. *Conner v. St. Luke's Hosp., Inc.*, 996 F.2d 651 (4th Cir. 1993). Significantly, our research has disclosed no cases expressly refusing to apply the doctrine to hospitals.

Accordingly, we now hold not only that the continuing course of treatment doctrine, as hereinabove set forth, is the law in this jurisdiction, but also that it applies to hospitals in the same manner as it does to other health care providers. We turn, then, to its application to the facts alleged in plaintiff's complaint.

[3] Plaintiff alleged negligence causing injury in the course of her treatment at defendant Hospital on 15-16 November 1990. She further alleged a continuing relationship with defendant Hospital and subsequent treatment there relating to her injury caused by the original negligence. Her allegations, therefore, invoke application of the continuing course of treatment doctrine, as herein adopted, so as to toll the running of the statute of limitations contained in N.C.G.S. § 1-15(c).

Failure to repair the original damage provides the rationale for tolling the statute, however; the tolling thus continues only until such

damage is remedied. *Ballenger*, 38 N.C. App. at 58, 247 S.E.2d at 293. Plaintiff's allegations establish without contradiction that surgery was performed on 20 November 1990 to correct the damage the initial procedure caused. While plaintiff alleges complications associated with her recovery from these procedures, she does not allege that defendant Hospital should or could have taken further action to remedy the damage occasioned by its original negligence. The continuing course of treatment doctrine thus operates to toll the statute of limitations only from the time of the original negligence on 15-16 November 1990 until the performance of the corrective surgery on 20 November 1990. Plaintiff has failed to sustain her burden of alleging that further corrective action was required to remedy her original damage, thereby tolling the statute beyond the 20 November 1990 corrective surgery. The "last act of the defendant giving rise to the cause of action" within the meaning and intent of that phrase as used in N.C.G.S. § 1-15(c) thus occurred on 20 November 1990, and plaintiff's complaint filed on 6 December 1993 was untimely. Accordingly, the trial court properly granted defendant Hospital's Rule 12(b)(6) motion to dismiss.

For the reasons stated, the decision of the Court of Appeals is reversed, and the cause is remanded to that court for further remand to the Superior Court, Forsyth County, for reinstatement of the order of dismissal.

REVERSED AND REMANDED.

Justice FRYE concurring in part, dissenting in part.

I agree with the Court's conclusion that the continuing course of treatment doctrine applies to hospitals for the reasons set forth by the majority. However, I dissent from the portion of the Court's opinion which concludes that the trial court properly granted defendant Hospital's Rule 12(b)(6) motion to dismiss the complaint.

After determining that the continuous course of treatment doctrine is the law in this jurisdiction and that it applies to hospitals, the remaining issue in this case is whether the statute of limitations expired three years from the date of the corrective surgery on the plaintiff or three years from the date of plaintiff's discharge from the hospital. The majority concludes that the continuing course of treatment doctrine operated to toll the statute of limitations only from the time of the original negligence on 15-16 November 1990 until the per-

formance of the corrective surgery on 20 November 1990 because the plaintiff failed to allege that defendant Hospital should have taken further action to remedy the damage occasioned by its original negligence. I disagree.

This issue is one of first impression for this Court. I conclude that in *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990), our Court of Appeals correctly stated:

> It is not necessary under this doctrine that the treatment rendered subsequent to the negligent act itself be negligent, if the physician continued to treat the patient for the particular disease or condition created by the original act of negligence. *Callahan v. Rogers*, 89 N.C. App. 250, 255, 365 S.E.2d 717, 719 (1988) (treatment "after" the negligent act is within the 'continuing course of treatment' doctrine); *see Grubbs v. Rawls*, 235 Va. 607, 613, 369 S.E.2d 683, 687 (1988) (plaintiff could wait until the end of treatment "to complain of any negligence which occurred *during* that treatment") (emphasis in original); *see also Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1098 ([N.D.N.Y.] 1977) (the 'continuing course of treatment' doctrine is applicable "even if there are no further acts of malpractice in the continued treatment")[.]

Id. at 714-15, 394 S.E.2d at 215-16. Consistent with the majority's opinion, the statute is tolled until the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action.

In the instant case, applying these same rules to defendant Hospital, as a result of the alleged negligence of the hospital's nursing staff, plaintiff sufficiently alleged in her "More Definite Statement" ordered by the trial court:

> Failure of the nursing staff to not perceive that the plaintiff was not voiding and allowing her bladder to remain distended for a period of over 24 hours resulted in (i) plaintiff's second surgery and the complications associated therewith, (ii) plaintiff's extended hospital stay up through December 6, 1990, at which time she was discharged with the Foley catheter still in place, (iii) many complications thereafter as a result of the problems with her bladder, (iv) breathing problems from fluid overload and

mild Adult Respiratory Distress Syndrome, wound infection[,] and urinary tract infection.

Under our notice pleading, these allegations are sufficient to show that plaintiff's hospital treatment for the injuries which gave rise to the cause of action continued until 6 December 1990, the date of her discharge from the hospital, thus satisfying the continuous course of treatment pleading requirements. Thus, as to defendant Hospital, the continuing course of treatment doctrine operates to toll the statute of limitations from the time of the original negligence on 15-16 November 1990 until her discharge from the hospital on 6 December 1990. Therefore, I would hold that plaintiff's action was not time barred by the statute of limitations and would affirm the Court of Appeals' decision.

Chief Justice MITCHELL and Justice LAKE join in this concurring and dissenting opinion.

IN THE MATTER OF: DAVID GOLIA-PALADIN, APPELLANT, APPLICANT TO THE NORTH CAROLINA BAR BY COMITY

No. 61A96

(Filed 31 July 1996)

1. Attorneys at Law § 12 (NCI4th)— comity applicant denied—character grounds—notice of questions to be asked at hearing

A bar applicant whose application to the North Carolina Bar by comity was denied on character and fitness grounds was given adequate notice of the questions he was to be asked at his hearing before the Board of Law Examiners. The notice of hearing provided that the applicant had the burden of satisfying the Board that he had met all of the requirements of Section .0502 of the Rules Governing Admission to the Practice of Law in order to be licensed by comity and that inquiry could be made about the answers to any questions set out in the application.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

2. Attorneys at Law § 12 (NCI4th)— comity application denied on fitness grounds—prior denial on practice grounds

There was no error in the denial of an application to the North Carolina Bar by comity on character grounds where the applicant contented that the Board of Law Examiners' determination in an earlier application that this applicant failed to demonstrate the required character and fitness was upheld by the North Carolina Supreme Court. The Court specified in *In re Golia-Paladin*, 327 N.C. 132, that its decision was based solely on the applicant's failure to demonstrate that he met the practice requirements for comity admission and nothing in the Board's statement in this application suggests that the Court upheld the previous determination of bad character. Even if that had been suggested, the applicant has not indicated the relief to which he would be entitled.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

3. Attorneys at Law § 13 (NCI4th)—comity application to Bar—denied on character grounds—failure to disclose material matters

The Board of Law Examiners did not err in denying a comity application on character grounds by finding that the applicant

failed to fully disclose material matters and made numerous untruthful statements about the number of times he had sat for various bar examinations, and that these statements had the effect of misleading and deceiving the Board. The Board's determination that the applicant's omissions evidence a lack of fairness and candor in dealing with the Board was reasonable based on the evidence, and the applicant's cavalier attitude toward gathering the information it was his duty to supply to the Board constitutes additional evidence from which the Board could conclude that his misstatements and omissions were purposeful.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

4. Attorneys at Law § 12 (NCI4th)— comity application rejected—failure to provide documents relating to lawsuit by applicant

The Board of Law Examiners did not err in rejecting a comity application on character grounds by determining that the applicant willfully failed to provide to the Board material documents concerning a class action lawsuit applicant brought against the New York State Grievance Committee and its members. Although the applicant contends that the complaint, which was provided, was the only pleading of substance and that the other matters in no way reflect upon his character or fitness to practice law, it is for the Board to determine whether an applicant's omission from his bar application is purposeful and whether that omission is sufficiently substantial to rebut the applicant's *prima facie* showing of good character. Here, the failure to disclose additional documents relating to the federal court litigation falls squarely within the Rules and the Board properly relied upon the failure to supply copies of the federal proceedings in denying the applicant a license.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

5. Attorneys at Law § 12 (NCI4th)— comity application to Bar denied—lack of fairness and candor

The Board of Law Examiners did not err in denying a comity application on character grounds by concluding that the applicant's denial of the charge in a New York zoning action that he resided in the basement of his New York office displayed "a lack of fairness and candor with the Court and had a tendency to deceive." Residency is a material issue in a comity application and it was in applicant's best interest to represent to the Board that he had continuously maintained a New York residence; however, when sued for violating the zoning ordinance, the applicant denied that he used his New York property as a residence and subsequently amended his North Carolina Bar application to avoid the appearance of a conflict. The Board had the opportunity to observe the applicant's demeanor during the hearing and its conclusion appears reasonable from the evidence.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

6. Attorneys at Law § 12 (NCI4th)— comity application to Bar—denied on character grounds— action by applicant not illegal

The State Bar did not err by denying a comity application on character grounds where the applicant contends that he was per-

mitted to assert a temporary position as a defendant in a zoning case in order to improve his chances where the position asserted was not illegal. It has been held that an evidentiary showing rising to the level of a criminal offense or civil liability is not necessary in a Board proceeding to determine an applicant's moral fitness to practice law in North Carolina; material false statements can be sufficient to show that an applicant lacks the requisite character and general fitness for admission to practice law.

Am Jur 2d, Attorneys at Law § 15.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 4 ALR4th 436.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

Conditioning reinstatement of attorney upon reaffirmation of debt discharged in bankruptcy. 39 ALR4th 586.

Appeal of right pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order of Bullock, J., entered 27 July 1995 in Superior Court, Wake County, which affirmed the 25 January 1993 order of the Board of Law Examiners denying the applicant's application for admission to the North Carolina Bar by comity. Heard in the Supreme Court 15 May 1996.

Loflin & Loflin, by Thomas F. Loflin III, for applicant-appellant.

Michael F. Easley, Attorney General, by John F. Maddrey, Assistant Attorney General, for respondent-appellee The Board of Law Examiners of the State of North Carolina.

WHICHARD, Justice.

Applicant David Golia-Paladin, a 1973 graduate of Tulane School of Law, applied for admission to the North Carolina Bar by comity. He had been admitted to practice law in New York in 1978. A panel of the Board of Law Examiners of the State of North Carolina ("Board") denied the application on character and fitness grounds. Following applicant's unsuccessful appeal to the full Board, he appealed the

Board's determination to Superior Court, Wake County. On 27 July 1995, the Honorable Stafford Bullock entered an order affirming the Board's 25 January 1993 order. Applicant appeals to this Court, assigning as error several of the Board's findings of fact and conclusions of law. Having reviewed the entire record, we conclude that the Board's determination that applicant does not possess the requisite character and fitness to practice law in North Carolina was supported by competent evidence and is therefore affirmed.

The Board found as a fact that applicant failed to fully and completely disclose the number of times he had applied to take a bar examination in other states. Applicant had failed to disclose that he sat for the New Mexico Bar Examination in 1973. Further, although he had registered to take the California Bar Examination twenty-four times and had failed the examination eighteen times, applicant stated in his application that he had registered "at least fifteen or sixteen times" and actually took the examination "ten or twelve times more or less."

The Board additionally determined that applicant was named as the defendant in a civil action filed in December 1987 in New York. In that action, applicant was alleged to have allowed the cellar in his Mineola, New York, office to be used or occupied as a living or sleeping area in violation of the zoning code. In an affidavit and answer, applicant disclaimed his use of the premises as a residence. However, this disclaimer was inconsistent with his response to question 6 on his North Carolina Bar application, which indicated that he had maintained a residence from June 1978 to the present at his New York address. Applicant subsequently amended his Bar application to state that he had not resided at the Mineola address from 17 December 1987 to 14 March 1988. The Board found that this amendment displayed a lack of candor. Because applicant had preexisting plans to spend the holidays in North Carolina, his departure from New York on 17 December 1987 did not interrupt or terminate his New York residency. Rather, applicant's actions amounted to a "convenient adoption of a temporary position for self-serving purposes in a legal matter rather than a genuine intention to terminate permanently his New York residence."

Finally, the Board determined that applicant had not provided copies of all relevant and material documents from a lawsuit in which he was a party. For all these reasons, the Board denied applicant's application for a license to practice law in North Carolina by comity.

The trial court affirmed the Board's decision, concluding that the Board's findings of fact were supported by competent evidence and that its conclusions of law were supported by the findings of fact.

[1] Applicant initially argues that he was given inadequate notice about the nature of the questions he was to be asked at his hearing before the Board. He asserts that the notice of hearing he received failed to apprise him of the possibility that he would be accused of misleading and failing to be candid with the Board. He further contends that the notice of hearing was inadequate because it did not advise him in advance of "the specific statements the Board was alleging to be untruthful."

The notice of hearing provided that applicant had the burden of satisfying the Board that he had met all of the requirements of Section .0502 of the Rules Governing Admission to the Practice of Law ("Rules") in order to be licensed by comity. The notice further stated that applicant should "be advised that inquiry can also be made about the answers to any questions set out in the application." Therefore, applicant cannot assert that the Board failed to provide him with due process due to a purported inadequacy of notice concerning the matters addressed at his full Board hearing. This assignment of error is overruled.

[2] Applicant next contests the Board's assertion that its 1986 determination that applicant had failed to demonstrate he possessed the character and fitness required for admission to the Bar was upheld by this Court in *In re Golia-Paladin*, 327 N.C. 132, 393 S.E.2d 799 (1990). In its 25 January 1993 order, the Board noted that in 1986, it had found that applicant failed to prove (1) that he possessed the requisite character and fitness to be admitted to the practice of law in North Carolina, and (2) that he met the practice requirements for comity admission. The Board then noted that its 1986 order "denying the Applicant's 1985 comity admission application was ultimately affirmed on appeal." In affirming the Board's denial of applicant's admission, this Court specified that its decision was based solely on applicant's failure to demonstrate that he met the practice requirements for comity admission. *Id.* at 136, 393 S.E.2d. at 801. Contrary to applicant's assertion, nothing in the Board's statement in its 1993 order suggests that this Court upheld the Board's previous determination that applicant was of bad character. Even if the statement had so suggested, applicant has not indicated to what relief he would be entitled. This assignment of error is overruled.

[3] Applicant next contends that the Board erred in finding (1) that he "failed to fully disclose material matters" and "made numerous untruthful statements" about the number of times he sat for various bar examinations, and (2) that these statements had the effect of misleading and deceiving the Board. In his application for admission to the North Carolina Bar, applicant stated the number of times he had registered for and taken the California Bar Examination:

> Since I first signed up for it 17 years ago, to be on the safe side, I would have to guess I have signed up for it at least 15 or 16 times, and taken it maybe ten or twelve times more or less.

At applicant's request, the California Bar notified the Board that applicant had actually registered for the California Bar Examination on twenty-four occasions and sat for the examination eighteen times. Thus, applicant contends, the Board was fully apprised of the number of times he had registered for and taken the California examination, and his statements neither misled nor deceived the Board. Applicant additionally contends that the Board incorrectly determined that he lied in 1986 when he was asked when he had taken his first bar examination. Applicant had responded, "I sat in California, I think it was, I'm not sure, '74 or '75." He corrected this answer in his present application by disclosing that he sat for the New Mexico Bar Examination in 1973.

When reviewing decisions of the Board of Law Examiners, this Court employs the whole record test. *In re Legg*, 325 N.C. 658, 669, 386 S.E.2d 174, 180 (1989), *cert. denied*, 496 U.S. 906, 110 L. Ed. 2d 270 (1990). Under this test, there must be substantial evidence supporting the Board's findings of fact and conclusions of law. *Id.* "Substantial evidence" has been defined as relevant evidence which a reasonable mind, not necessarily our own, could accept as adequate to support a conclusion. *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 815-16 (1983).

Where an applicant fails to provide full and complete information on his bar examination application, the Board must first determine whether the applicant made these omissions purposefully. If the Board determines that the omissions were purposeful, it must then decide whether the omissions " 'so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character.' " *Legg*, 325 N.C. at 672, 386 S.E.2d at 182 (quoting *In re Moore*, 301 N.C. 634, 641, 272 S.E.2d 826, 831 (1981)). Here, the Board determined that applicant's omissions evidenced a lack of fairness

and candor in dealing with the Board. This determination was reasonable based on the evidence. Applicant is an attorney who had previously applied for admission to the North Carolina Bar by comity and was thus familiar with the application process and the need for accuracy and thoroughness in his responses. In his answer to question 30 concerning his bar examination history, applicant stated:

> So how many times have I signed up for the New York exam? Three to the best of my memory. As to dates I have no idea. The same is true for the California exam. . . . If information relating to this is critical to the North Carolina examiners, I invite you to make inquiry.

Applicant's cavalier attitude toward gathering the information it was his duty to supply to the Board constitutes additional evidence from which the Board could conclude that his misstatements and omissions were purposeful. Such misstatements and omissions are relevant to applicant's fitness to practice law in North Carolina, for "[a]n applicant who fails to exhibit care in the submission of a document essential to his admission to the practice of his chosen career is unlikely to exhibit any greater degree of care during the course of client representation." *Id.* at 673, 386 S.E.2d at 183. This assignment of error is overruled.

[4] Applicant next assigns as error the Board's determination that he willfully failed to provide to the Board material documents concerning a class action lawsuit applicant brought against the New York State Grievance Committee and its members. At the time he submitted his North Carolina Bar application, applicant listed, in response to question 17, all lawsuits in which he had been a party. Following the institution of his lawsuit against the Grievance Committee, applicant supplemented his response to question 17. However, applicant submitted to the Board only the complaint in that action; he did not provide copies of the defendants' motion to dismiss for improper venue, or the stipulation between applicant and the New York Office of the Attorney General that certain parties be dropped from the lawsuit, or the court order transferring the case from the United States District Court for the Southern District of New York to the Eastern District. Applicant contends that his complaint was the only pleading of substance in the case and that the other matters in no way reflect upon his character or fitness to practice law.

As noted above, it is for the Board to determine whether an applicant's omission from his bar application is purposeful and, if so,

whether that omission is sufficiently substantial to rebut the applicant's *prima facie* showing of good character. Applicant's failure to disclose additional documents relating to his federal court litigation falls squarely within Section .0603 of the Rules, which provides that no one shall be licensed to practice law in North Carolina

> who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

The Board properly relied upon applicant's failure to supply the Board with copies of the proceedings in his federal litigation as a basis for denying applicant a license to practice law. This assignment of error is overruled.

[5] Applicant next disputes the Board's conclusion of law that his denial of the charge that he resided in the basement of his New York office displayed "a lack of fairness and candor with the Court and had a tendency to deceive." Because the complaint in that action stated that applicant "uses or permits the use of" the cellar as living quarters, yet applicant did not reside there at the time he received the complaint, applicant argues that he had a right to deny that allegation and that such denial in fact amounted to "good lawyering."

Residency is a material issue in a comity application to the North Carolina Bar because the Rules require that an applicant prove an active and substantial legal practice while he or she is physically present in a state having reciprocity with North Carolina. It was thus in applicant's best interest to represent to the Board that he had continuously maintained a New York residence. However, when he was sued by the Village of Mineola for violating the zoning ordinance, applicant denied that he used his New York property as a residence and subsequently amended his North Carolina Bar application to avoid the appearance of a conflict. The Board specifically rejected applicant's argument that his denial of the Village's charges and his quibbling over verb tenses represented "good lawyering." As the Board had the opportunity to observe applicant's demeanor during the hearing and its conclusion appears reasonable from the evidence, that conclusion must stand. *See Moore*, 308 N.C. at 780-81, 303 S.E.2d at 816. This assignment of error is overruled.

[6] In his final assignment of error, applicant contends that in defending himself against the Village of Mineola, he was permitted to "assert a temporary position in order to improve his chances of winning a suit where the position asserted [was] not illegal." Further, because he has not committed any criminal offenses and because the Board's order did not specify which provisions of the Code of Professional Responsibility applicant violated, applicant argues that this Court should reverse the Board and direct it to grant applicant a comity license.

This Court has held that while an applicant's conversion of funds owed to a private investigator "did not necessarily rise to the level of a criminal offense or civil liability, such an evidentiary showing is not necessary in a Board proceeding to determine an applicant's moral fitness to practice law in North Carolina." *Legg*, 325 N.C. at 670, 386 S.E.2d at 181. Material false statements can be sufficient to show that an applicant lacks the requisite character and general fitness for admission to the practice of law. *Id.* at 672, 386 S.E.2d at 182. Here, the Board determined that applicant's statements regarding his New York residency were untruthful and misleading and had a significant bearing upon his character and fitness. The Board, as an instrument of the State, has "wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law," *In re Griffiths*, 413 U.S. 717, 725, 37 L. Ed. 2d 910, 917 (1973), and nothing in the record indicates that the Board's decision resulted from an arbitrary, capricious, or erroneous performance of its duties.

For the foregoing reasons, we affirm the Order of the Superior Court, Wake County, which affirmed the Board's 25 January 1993 decision denying applicant's application for admission to the North Carolina Bar by comity.

AFFIRMED.

LISA LEONARD ROSE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF VIRGIL LEE ROSE v. ISENHOUR BRICK & TILE CO., INC.

No. 448A95

(Filed 31 July 1996)

Workers' Compensation § 62 (NCI4th)— Woodson claim against employer—insufficient forecast of evidence

Plaintiff's forecast of evidence was insufficient to establish a *Woodson* claim for an employee's death when the carriage head of a brick-setting machine descended and crushed the decedent as he was leaning over the machine's spreader table where the forecast tended to show that, instead of putting the machine in manual to clear excess clay from the spreader table as contemplated by the designer, defendant's operators were trained by management to leave the machine in automatic and to hang weights on wires from certain toggle switches so that the machine could remain operational for production purposes and only selected machine functions would stop; the machine operated by decedent was in automatic at the time of the accident, but the evidence was conflicting as to whether the switch controlling the head was engaged with a weight and wire, and if so, whether the weight and wire had slipped off the switch so that power was restored to the carriage head; defendant employer was cited for OSHA violations after decedent's death but had not previously been cited for any violation with respect to the carriage head or the use of weights and wires on this machine; the designer testified that it was not unsafe to operate the machine by using weights and wires; no specific regulations existed prior to this fatal accident which required defendant to equip the carriage head with safety guards; although plaintiff's expert testified that there was a high probability that an operator would be injured by the carriage head, there was no evidence that defendant was aware of this probability, and defendant's accident history does not bear out the expert's probability calculations; defendant's employees had been operating brick-setting machines with weights and wires for six years prior to decedent's death, and no operator had previously suffered a serious injury or death due to an accident involving the carriage head; the head was painted reddish-orange and traveled slowly along a fixed path; and the head warned of its approach by making a noise and casting a shadow as it traveled. Plaintiff's forecast of evidence was insufficient to establish that defendant

employer knew its conduct was substantially certain to cause serious injury or death to its employee.

Am Jur 2d, Workers' Compensation §§ 75 et seq.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

Modern status: "dual capacity doctrine" as basis for employee's recovery from employer in tort. 23 ALR4th 1151.

Workers' compensation: injuries incurred during labor activity. 61 ALR4th 196.

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. 235, 461 S.E.2d 782 (1995), affirming an order granting defendant's motion for summary judgment entered by Helms (William H.), J., on 23 May 1994 in Superior Court, Rowan County. On 7 December 1995, the Supreme Court denied plaintiff's petition for discretionary review of an additional issue. Heard in the Supreme Court 9 April 1996.

Wallace and Whitley, by Mona Lisa Wallace, for plaintiff-appellant.

Dean & Gibson, by Rodney Dean and Brien D. Stockman; and Harrell Powell, Jr., for defendant-appellee.

Patterson, Harkavy & Lawrence, by Burton Craige; and Twiggs, Abrams, Strickland & Trehy, by Douglas B. Abrams, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

LAKE, Justice.

Virgil Lee Rose ("Rose"), an employee of Isenhour Brick & Tile Company ("defendant"), was killed while he was operating a brick-setting machine designated "machine number three" in defendant's brick manufacturing plant. Rose's wife, plaintiff Lisa Leonard Rose ("plaintiff"), individually and as the administratrix of Rose's estate, filed suit against defendant on 24 September 1991 seeking to recover compensatory and punitive damages for Rose's on-the-job death. Plaintiff's complaint included an allegation that Rose's death resulted from defendant's intentional training of its employees to bypass

safety mechanisms provided by the machine manufacturer on dangerous equipment which defendant knew or should have known was substantially certain to cause serious injury or death to its employees.

On 13 July 1993, plaintiff voluntarily dismissed her individual claim against defendant. Defendant moved for summary judgment on 8 April 1994, and the trial court denied this motion in an order entered 19 April 1994. Defendant moved for reconsideration of this order based upon *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994), *aff'd*, 342 N.C. 182, 463 S.E.2d 79 (1995) (per curiam). On 23 May 1994, the trial court vacated its previous order and granted the defendant's motion for summary judgment. Plaintiff appealed, and in a divided opinion, the Court of Appeals affirmed. *Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 461 S.E.2d 782 (1995). Plaintiff appeals to this Court from the dissent filed in the Court of Appeals.

The issue presented for this Court's review is whether the Court of Appeals erred in affirming the trial court's entry of summary judgment in favor of the defendant. For the reasons which follow, we hold summary judgment was properly entered for the defendant, and therefore, we affirm the Court of Appeals.

The Workers' Compensation Act ("the Act") has traditionally provided the exclusive remedy for an employee accidently injured in the workplace. N.C.G.S. §§ 97-9, -10.1 (1991). However, in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), this Court carved out an exception to the Act's exclusivity rule and held:

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

Id. at 340-41, 407 S.E.2d at 228. Thus, in order for a plaintiff to maintain an action based upon *Woodson*, plaintiff must establish that defendant knew its conduct was substantially certain to cause serious injury or death to the employee.

Summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). The moving party carries the burden of establishing the lack of any triable issue. *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 414 S.E.2d 339 (1992). This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Elec. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). All inferences of fact must be drawn against the movant and in favor of the nonmovant. *Id.*

In the present case, drawing all inferences of fact in favor of the plaintiff, as the nonmovant, the forecast of evidence tends to show the following facts and circumstances. Defendant manufactures and distributes brick and other related products. Rose was employed by defendant, and on 22 March 1990, Rose was asked by his foreman to operate brick-setting machine number three. Rose's regular job was to operate brick-making machine number three. However, he had been trained in the operation of brick-setting machine number three and had operated this particular setting machine before for a ten-week period. Rose had also operated this machine sporadically on other occasions as the need arose. At approximately 3:20 p.m., as Rose was leaning over the machine's spreader table attempting to clean excess clay from the table, the machine's head descended on Rose, crushing his head and shoulders. Rose died the next day from his injuries.

Brick-setting machine number three works in conjunction with brick-making machine number three. In this process, slugs, or uncut brick, are pushed through a very strong wire which cuts the slugs into individual bricks, at this point referred to as green brick. The green brick, through an automated process, is placed on the brick-setting machine's spreader table, and after the fourth row of green brick is in place, the spreader table spreads apart, causing the green brick to separate into rows. Once the spreader table is fully opened, the machine's head, which is attached to a carriage, descends by gravity onto the spreader table. The head has fingers which fit between the separated green brick. After air bags inflate to hold the green brick in place, the head ascends by power from the spreader table. The head travels approximately thirty feet along an overhead track, turns and

deposits the green brick onto a waiting kiln car. The head then travels back to its home position above the spreader table, and the cycle repeats itself. It is estimated that the entire cycle takes one and a half minutes and that it takes five seconds for the head to descend once it is in position over the spreader table. The carriage head weighs approximately 3,000 pounds and is painted reddish-orange. A blower mounted onto the carriage head makes discernible noise, and because of its size, the head casts a shadow as it travels along its track.

Brick-setting machine number three was designed to operate in two modes: automatic and manual. There is also an emergency stop button. The machine's automatic mode was designed for production purposes; in automatic, all the functions of the machine operate continuously. The machine's manual mode was designed as a safety function; in manual, none of the machine's functions are continuously operational. The manual mode allows the operators to stop the machine functions so that such tasks as cleaning excess clay from the spreader table can be safely performed. In manual, the machine functions can be controlled individually through the use of two-position toggle switches located on the machine's control panel. Engaging a toggle switch while the machine is in manual allows that particular machine function to operate as necessary while the rest of the machine remains nonoperational. In automatic, however, engaging a toggle switch stops that particular function while the other functions remain operational. Because the toggle switches are spring-loaded, the toggle switch controlling a particular function of the machine must be held down in order to engage or disengage it.

Rather than putting the machine in manual to clean excess clay from the spreader table as contemplated by the designer, defendant's operators discovered that it was possible to leave the machine in automatic and hang a weight on a wire from certain toggle switches. This allowed the machine to remain operational for production purposes and only stop selected machine functions. Normally, operators hung a weight and wire on the carriage home switch, the head down switch and the spreader table closed switch. The slug reject switch, which was not a spring-loaded switch, was also engaged. In this configuration, the spreader table remained in an open position, but the carriage head was prevented from returning to its home position over the spreader table, and the head was prevented from descending to the spreader table. Engaging this combination of switches has the same effect as putting the machine in manual and allows the operator

to clean safely the excess clay from the spreader table. Some operators used weights and wires on different combinations of switches, and some operators used no weights and wires and simply tried quickly to remove the excess clay and "beat the head."

Defendant was aware its operators were running brick-setting machine number three in this manner. Indeed, operators were trained by management to leave the machine in automatic and use weights and wires when they needed to clean a small amount of clay from the spreader table. Defendant also trained its operators to put the machine in manual when they needed to clean a substantial amount of clay from the spreader table.

These weights and wires remained on the switches at all times, and duct tape was used to ensure the weights and wires would stay on the switches. At least two operators had a weight and wire fall off a switch while they operated brick-setting machine number three.

At the time of the accident, Rose was apparently attempting to clean excess clay from the spreader table. The machine was in automatic, and only the spreader table closed switch was engaged with a weight and wire. There are conflicting statements as to whether the switch controlling the head was engaged with a weight and wire, and if so, whether the weight and wire slipped off the switch, thereby restoring power to the head and allowing it to descend upon Rose.

An Occupational Safety and Health Administration ("OSHA") investigation into Rose's death and a hearing before Administrative Law Judge Carroll Tuttle resulted in citations against defendant for serious violations of 29 C.F.R. § 1910.212(a)(3)(ii) and of N.C.G.S. § 95-129(1). The OSHA investigator concluded in her report that the causal factors of Rose's death were the "improper use of machine controls (not operating machine according to manufacturer[']s design) and lack of machine guards or guarding devices."

John G. Buckner, president of Auto Systems and Service, designed brick-setting machine number three for defendant, and although he indicated that the switches were not designed to be used with weights and wires, he saw nothing unsafe about operating the machine in this manner. Buckner had not seen weights and wires used on similar machines in other companies, but he was aware of companies that used vise grips and magnets to hold toggle switches down while the machine was in the automatic mode. No written

operator's manual was provided by Auto Systems and Service for brick-setting machine number three.

The Court of Appeals, in holding that the plaintiff's forecast of evidence was insufficient to overcome defendant's motion for summary judgment, relied upon the following example taken from the Restatement (Second) of Torts as illustrative of the misconduct required to satisfy *Woodson's* substantial certainty test:

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

Restatement (Second) of Torts § 8A illus. 1 (1965). However, as we did in *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995), we disavow this example since in it, "A is *actually* certain his act will injure or kill C. A successful claim under the *Woodson* exception does not require such actual certainty." *Id.* at 110, 463 S.E.2d at 211.

We nevertheless agree with the Court of Appeals that in this case, the plaintiff's forecast of evidence was insufficient to overcome defendant's motion for summary judgment, as the evidence did not demonstrate that defendant knew its conduct was substantially certain to cause serious injury or death to Rose. As the Court of Appeals noted, defendant had never been cited for an OSHA violation with respect to either the carriage head or the use of weights and wires on brick-setting machine number three. Moreover, no specific regulations existed prior to this fatal accident which required defendant to equip the carriage head with safety guards. Plaintiff's expert indicated that according to his probability calculations, the chance of an operator suffering death or serious injury was between 77.3 and 93.1 percent. Yet no evidence shows that defendant was aware, prior to Rose's death, of the high probability that an operator would be injured by the carriage head. Indeed, defendant's accident history fails to bear out plaintiff's expert's probability calculations. Defendant's employees had been operating brick-setting machine number three with weights and wires for approximately six years prior to Rose's death, and in all this time, no operator of brick-setting machine number three suffered a serious injury or death due to an accident involving the carriage head. Further, the head, a massive piece of machinery, was painted reddish-orange and traveled slowly along a fixed path. The head made noise, generated from the blower

attached to the carriage, and cast a shadow as it traveled, thus warning of its approach.

Based on the forecast of evidence in this case, we agree with the Court of Appeals that after drawing all inferences of fact in favor of the plaintiff, no genuine issues of material fact exist and that the defendant is entitled to judgment as a matter of law. Therefore, we conclude that summary judgment was properly entered in favor of the defendant.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

KEITH JOHN CASSELL v. SAMUEL L. COLLINS AND AMERICAN SECURITY AND INVESTIGATION SYSTEMS, INC.

No. 566A95

(Filed 31 July 1996)

Negligence § 108 (NCI4th)— guest at apartment complex stabbed—security company—no duty owed plaintiff

Summary judgment was properly entered on behalf of defendant American Security and Investigation Systems in a negligence action where plaintiff was stabbed in the presence of defendant's security guard while visiting a tenant of an apartment complex. Common law distinctions between licensees and invitees are not determinative and, while the Restatement of Torts was cited by the Court of Appeals in concluding that defendant owed duties to plaintiff, the Restatement of Torts is not North Carolina law. The extent of the duty of defendant security company to plaintiff, if any, is governed by the contract between defendant and the management company, NPI, and neither the contract between defendant and NPI nor a memorandum from NPI imposed a duty on defendant to protect social guests of tenants at the complex. The fact that the guard was unarmed is further indication that neither defendant nor NPI contemplated that the guard would be required to intervene or attempt to prevent a criminal assault. The mere act of providing a security guard does

not impose upon defendant any greater duties than those delineated under its contract to provide security services and did not impose upon the defendant any duty to prevent a criminal assault upon plaintiff. While several exceptions have been recognized to the general rule that declines to impose civil liability upon landowners for criminal acts committed by third persons, those exceptions have been limited to specific circumstances.

Am Jur 2d, Premises Liability §§ 45 et seq.

Comment Note.—Private person's duty and liability for failure to protect another against criminal attack by third person. 10 ALR3d 619.

Liability of hotel or motel operator for injury to guest resulting from assault by third party. 28 ALR4th 80.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party. 31 ALR5th 550.

Appeal by defendant American Security and Investigation Systems, Inc. (ASI), 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. 798, 463 S.E.2d 782 (1995), reversing summary judgment entered in favor of ASI by Allsbrook, J., on 1 November 1993, in Superior Court, New Hanover County. Heard in the Supreme Court 16 May 1996.

Virginia R. Hager and Mark W. Morris for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Andrew A. Vanore, III, and Travis K. Morton, for defendant-appellant American Security and Investigation Systems, Inc.

MITCHELL, Chief Justice.

Plaintiff was stabbed by defendant Samuel L. Collins on 23 May 1991 while plaintiff was visiting a tenant of The Pines of Wilmington, an apartment complex managed by NPI Property Management Corporation (NPI). The assault occurred in the presence of a security guard who was an employee of defendant American Security and Investigation Systems, Inc. (ASI). By a contract with NPI, ASI had agreed to provide security guard services at The Pines of Wilmington. The contract provided that an unarmed, uniformed security guard was to patrol the apartment complex between the hours of 8:00 p.m.

and 2:00 a.m. A memorandum from the management of the apartment complex to ASI specified that ASI's guard "was to be visible both as a deterrent to potential vandals as well as a sense of security for residents."

On 22 May 1992, plaintiff filed suit against both defendants, alleging that ASI was negligent in that its security guard "was present and observed the events immediately preceding the stabbing assault, but made no effort to intervene, speak to [the assailant], or prevent the assault." Default judgment was ordered against Collins on 3 November 1992. No appeal was taken from that judgment. On 1 November 1993, the trial court granted ASI's motion for summary judgment, finding that no genuine issue as to any material fact existed with respect to the liability of ASI.

A divided panel of the Court of Appeals reversed. Writing for the court, Judge Greene concluded that plaintiff was a licensee; that ASI was subject to the same liability as the owner of the complex; and that by providing a security guard, ASI "had assumed an affirmative duty to provide some protection to the plaintiff." *Cassell v. Collins*, 120 N.C. App. 798, 800, 463 S.E.2d 782, 783 (1995). Taking the evidence in the light most favorable to plaintiff, the majority concluded that a genuine issue existed as to whether ASI breached its duty to plaintiff. In a concurring opinion, Judge Wynn stated that the "security guard's negligence cannot fairly be characterized as a condition or activity upon the land or premises of the apartment complex," *id.* at 801, 463 S.E.2d at 784, and thus, plaintiff's status as a licensee was not determinative. However, Judge Wynn also determined that plaintiff's forecast of evidence did present a genuine issue as to ASI's negligence because "a security guard's duties entail keeping the premises and persons on the premises safe and free from injury." *Id.* at 802, 463 S.E.2d at 784. In a dissenting opinion, Judge John C. Martin agreed with the conclusion that the duty owed to plaintiff was determined by his status as a licensee but disagreed that plaintiff's forecast of evidence tended to show that ASI had breached any duty. Judge Martin noted that neither ASI's contract with the apartment complex nor the memorandum from the apartment complex management imposed a duty upon ASI's security guards to protect licensees.

At issue before us is whether ASI, through its security guard, owed any duty to plaintiff such that ASI can be held liable in tort for the criminal assault committed by Collins. We conclude that ASI owed no duty to plaintiff. Therefore, we reverse the Court of Appeals

and remand this case for reinstatement of summary judgment for defendant ASI.

Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances. *Clarke v. Holman*, 274 N.C. 425, 428, 163 S.E.2d 783, 786 (1968); see also 22 Strong's North Carolina Index 4th *Negligence* § 1 (1993) and cases cited therein. In the absence of a legal duty owed to the plaintiff by ASI, ASI cannot be liable for negligence.

Neither party in the present case disputes the fact that as a social guest of a tenant of The Pines of Wilmington, plaintiff was a licensee. Common law distinctions between licensees and invitees, however, are not determinative in the present case. We are not presented with the issue of the duties owed a tenant of The Pines of Wilmington by the owner or possessor of the complex, *cf. Shepard v. Drucker & Falk*, 63 N.C. App. 667, 306 S.E.2d 199 (1983) (affirming jury verdict for landlord in negligence suit by tenant when tenant was sexually assaulted at gunpoint on landlord's property), nor are we presented with the issue of any duty owed plaintiff by NPI. While plaintiff's status as a licensee might be a factor in defining the extent of any obligation owed him by such parties, it does not determine the duty owed him by ASI under the facts presented.

Citing section 383 of the Restatement of Torts, both the majority and the dissent concluded that ASI owed the same duties to plaintiff, and thus was subject to the same liability in tort, as the landowner. Section 383 provides:

> One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts § 383 (1965). We reemphasize yet again that the Restatement of Torts is *not* North Carolina law. *Cf. Mickles v. Duke Power Co.*, 342 N.C. 103, 110, 463 S.E.2d 206, 211 (1995) (disavowing an illustration from section 8A of the Restatement of Torts as authority). While section 383 may be persuasive in other contexts, we reject it in the context of this case with respect to the duties owed the guest of an apartment complex tenant by a security services company. Rather, the extent of ASI's duty to plaintiff, if any, is governed by the contract between ASI and NPI. Thus, in determin-

ing whether the trial court erred in granting summary judgment for ASI, we turn to the contract and any other evidence in the record that might tend to present a genuine issue with respect to the duties owed plaintiff by ASI under the contract.

We conclude that the pleadings, depositions, and affidavits fail to present any genuine issue of material fact. Neither the contract between ASI and NPI nor the memorandum from the complex management imposed a duty on ASI to protect social guests of tenants at the complex. Rather, the evidence, taken in the light most favorable to plaintiff, tends to show that ASI only agreed to provide a security guard to The Pines of Wilmington between the hours of 8:00 p.m. and 2:00 a.m. ASI's guard was responsible under the contract for closing and securing the complex pool, tagging cars that were parked improperly, making rounds on the property, and preventing tenants from "hanging out" in common areas. In addition, the memorandum from the complex management noted that ASI's guard was "to be visible both as a deterrent to potential vandals as well as a sense of security for residents." No forecast of evidence exists tending to show that ASI agreed to protect tenants, much less the tenants' guests such as plaintiff, from the criminal acts of others. The fact that the ASI guard was unarmed is further indication that neither ASI nor NPI contemplated that the guard would be required to intervene or attempt to prevent a criminal assault. Thus, no material issue of fact arises as to whether ASI's guard had a duty to intervene in the assault, to speak to the assailant, or to prevent the assault.

We also decline to adopt the position that the mere act of providing a security guard imposed upon ASI any greater duties than those delineated under its contract to provide security services. While the provision of security services at the complex might have some relevance in determining the owner of the apartment complex's liability, *see Shepard*, 63 N.C. App. at 671-72, 306 S.E.2d at 203, that issue is not presented to this Court. Nevertheless, Judge Wynn concluded that a genuine issue of material fact existed with respect to whether ASI could be held liable for negligence because it provided the security guard, and "a security guard's duties entail keeping the premises and persons on the premises safe and free from injury." *Cassell*, 120 N.C. App. at 802, 463 S.E.2d at 784. We find no authority in North Carolina for imposing such a duty upon security guards or those who provide them, and we decline to create such a duty as a matter of law in the present case. Further, as stated earlier, there is no evidence that ASI agreed contractually to keep the tenants, much less the guests of ten-

ants, "safe and free from injury." Therefore, we cannot conclude that the mere act of providing a security guard imposed upon ASI any duty to prevent Collins from criminally assaulting plaintiff.

Our conclusion here also parallels our general rule of law that declines to impose civil liability upon landowners for criminal acts committed by third persons. While this Court has recognized several exceptions to this rule, the exceptions have been limited to specific circumstances. For example, in *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E.2d 36 (1981), we held that a customer who was assaulted in the parking lot of a shopping mall had stated a claim for relief in negligence against the owners of the shopping mall. We noted, however, that her forecast of evidence revealed thirty-one reported incidents of criminal activity in the mall's parking lot in the year prior to the assault. We held that the plaintiff in that case had alleged sufficient facts to raise an issue as to the foreseeability of the assault. *Id.* at 642, 281 S.E.2d at 40.

Subsequently, our courts have applied the *Foster* exception to actions by invitees against other landowners for criminal acts committed by third persons. *See, e.g., Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988) (registered guest of motel assaulted in motel room); *Abernethy v. Spartan Food Sys., Inc.*, 103 N.C. App. 154, 404 S.E.2d 710 (1991) (customer assaulted inside fast food restaurant); *Helms v. Church's Fried Chicken, Inc.*, 81 N.C. App. 427, 344 S.E.2d 349 (1986) (customers assaulted during robbery of fast food restaurant); *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E.2d 813 (1984) (customer injured during robbery of convenience store), *disc. rev. denied*, 313 N.C. 509, 329 S.E.2d 393 (1985); *Urbano v. Days Inn of America*, 58 N.C. App. 795, 295 S.E.2d 240 (1982) (registered guest of motel assaulted in motel's parking lot). Unlike the present case, however, the defendant in each of those cases was the owner or proprietor of the property where the criminal act occurred, and each plaintiff was a business invitee who was able to forecast evidence sufficient to raise an issue as to the foreseeability of the criminal act.

Other exceptions to the general rule that landowners have no duty to protect another from the criminal acts committed by a third person may also be justified by the existence of a special relationship between the parties. For example, this Court has held that a parent may incur tort liability for the criminal assault of another by a child if it can be shown "that the parent knew or in the exercise of due care should have known of the [dangerous] propensities of the child and

could have reasonably foreseen that failure to control those propensities would result in injurious consequences." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 440 (1982). Again, the foreseeability of the criminal conduct in conjunction with the parent-child relationship is determinative with respect to the parent's liability for the negligent supervision of the child.

Because plaintiff has failed to forecast evidence tending to show a duty owed him by ASI, summary judgment was properly entered on behalf of ASI by the trial court. We therefore reverse the decision of the Court of Appeals and remand to that court for further remand to the Superior Court, New Hanover County, for reinstatement of the trial court's order.

REVERSED AND REMANDED.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY EX REL. TIMOTHY RANDOLPH EASTER v. BETSY JILL DAVIS EASTER (MCALPIN)

No. 455PA95

(Filed 31 July 1996)

1. Divorce and Separation § 392.1 (NCI4th)— deviation from child support guidelines—contributions of third parties

A trial court may consider the contributions of third parties when determining whether to deviate from the child support guidelines even though the third parties have no legal obligation to provide child support. Therefore, the trial court could properly consider voluntary support provided by the maternal grandparents on a regular basis in determining whether to deviate from the guidelines.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree. 39 ALR3d 1292.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

2. Divorce and Separation § 392.1 (NCI4th)— deviation from child support guidelines—insufficient findings

The trial court erred in deviating from the child support guidelines by reducing the mother's obligation based on support provided by the maternal grandparents where the court failed to make the findings required by N.C.G.S. § 50-13.4(c) relating to the reasonable needs of the children and the relative ability of each parent to provide support.

Am Jur 2d, Divorce and Separation §§ 1035 et seq.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree. 39 ALR3d 1292.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 260, 461 S.E.2d 798 (1995), reversing and remanding an order entered by Boone, J., on 5 April 1994 in District Court, Guilford County. Heard in the Supreme Court 9 April 1996.

Joyce L. Terres, Assistant County Attorney, for plaintiff-appellee.

Wyatt Early Harris & Wheeler, L.L.P., by Lee M. Cecil, for defendant-appellant.

FRYE, Justice.

[1] In the instant case, the issue presented, which is one of first impression, is whether third-party contributions may be used to support a deviation from the North Carolina Child Support Guidelines. We answer in the affirmative, thereby reversing the decision of the Court of Appeals on this issue. However, we also conclude that the Court of Appeals was correct that the trial court's order in the instant

case did not contain findings required by the statute. Accordingly, the decision of the Court of Appeals is affirmed on this issue.

Timothy R. Easter and Betsy Jill Davis (now McAlpin) were married on 3 February 1983, separated in 1989, and divorced on 16 September 1991. They have two children who are in the primary custody of plaintiff Timothy Easter. Plaintiff-father contracted with the Guilford County Child Support Enforcement Agency, which filed a motion to establish child support on behalf of the children on 23 November 1993. Defendant-mother filed a "Request for Deviation from the Child Support Guidelines" on 19 January 1994.

Defendant's request for a deviation from the North Carolina Child Support Guidelines (the guidelines) was based on the support that her parents provide plaintiff-father and the children. Plaintiff and the children reside in a house that is owned by the maternal grandparents and located in close proximity to them. The grandparents pay the water bill and do not charge plaintiff rent. The children spend a great deal of time at their grandparents' home, and plaintiff and the children frequently eat meals there. The grandparents also provide for other needs of the children such as clothing, haircuts, and medical bills. The grandparents provide these and other expenses voluntarily and regularly.

Plaintiff earns a gross income of $1,300 per month, and defendant earns a gross income of $1,392 per month. Application of the guidelines indicates that defendant's child support obligation would be $255.00 per month. This figure takes into consideration medical insurance premiums paid by defendant and a credit for another child living with defendant but not born to the marriage of the parties to this action.

On 28 January 1994, Judge Donald L. Boone heard defendant's motion to deviate from the guidelines. In an order dated 5 April 1994, Judge Boone found that the "application of the guidelines would exceed the reasonable needs of the children and would be otherwise unjust and inappropriate" because of the contributions of the maternal grandparents. Accordingly, the trial court deviated from the guidelines and concluded that defendant should pay $150.00 monthly for the support of the children. This amount was $105.00 per month less than the presumptive amount in the guidelines.

Plaintiff appealed to the Court of Appeals. The Court of Appeals reversed the trial court's order and remanded the case for entry of a

support order in accordance with the guidelines. The Court of Appeals concluded that the trial court failed to indicate how and to whom an award pursuant to the guidelines would be unjust; that the trial court did not make a finding as to the reasonable needs of the children; and that absent such findings, the trial court abused its discretion in deviating from the guidelines. The appellate court specifically stated that the grandparents' contributions did not support a deviation from the guidelines.

N.C.G.S. § 50-13.4, enacted in accordance with federal mandate, provides that "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines." N.C.G.S. § 50-13.4(c) (Supp. 1994). The statute allows the trial court to deviate from the presumptive amount

> [i]f, after considering the evidence, the [c]ourt finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . .

Id.

This Court has never addressed the issue of whether a trial court may consider the contributions of third parties when determining whether to deviate from the child support guidelines. In the instant case, the Court of Appeals characterized the contributions of the grandparents as "gratuitous contributions" that could not be "relied upon as a permanent source of support" because the grandparents had no "legal obligation to offer the support to the children." *Guilford Co. ex rel. Easter*, 120 N.C. App. 260, 263, 461 S.E.2d 798, 801 (1995). Based on this characterization, the Court of Appeals reasoned that the grandparents' contributions could not "diminish the reasonable needs of the children nor [could] it reduce a parent's obligation for support." *Id.* Therefore, the Court of Appeals concluded that the grandparents' contributions could not be considered when determining whether to deviate from the guidelines. *Id.* We disagree with the conclusion reached by the Court of Appeals.

We find nothing in North Carolina case law or in N.C.G.S. § 50-13.4(c) which suggests that the contributions of third parties may not be considered when determining whether to deviate from the guidelines. The role of the trial court is to determine whether the reasonable needs of the children are being met and whether imposing

the presumptive amount would not meet or would exceed the reasonable needs of the children or would be otherwise inappropriate or unjust. N.C.G.S. § 50-13.4(c). In making this determination, the trial court should have at its disposal any information that sheds light on this inquiry. While the Court of Appeals is correct that the grandparents are under no "legal obligation," we conclude that a legal obligation need not exist in order for the contributions of a third party to support a deviation from the child support guidelines.

Allowing the contributions of third parties to be considered when determining whether to deviate from the guidelines is in accord with the law of other states. Several states either explicitly state or use language in their statutes that strongly suggests that the contributions of third parties may be considered. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-320 (Supp. 1993) (trial court may consider the "financial resources of custodial parent"); Me. Rev. Stat. tit. 19, § 317(3)(E) (West Supp. 1993) (trial court may consider the "financial resources of the parties including nonrecurring income not included in the definition of gross income"); Minn. Stat. § 518.551 (Supp. 1995) (trial court may consider "all earnings, income, financial resources of the parents"); S.D. Code Ann. § 25-7-6.10 (West 1996) ("contributions of a third party to the income or expenses of [a] parent" may support deviation). Other states' statutes provide that a trial court may deviate from the presumptive guidelines where application of the guidelines would be "inequitable," "unjust," "inappropriate," or "not in the child's best interest," leaving room for an interpretation that the contributions of third parties might be considered. *See, e.g.*, Colo. Rev. Stat. § 14-10-115 (Supp. 1993); Ill. Ann. Stat. ch. 750, para. 5/505 (Smith-Hurd Supp. 1994); Ky. Rev. Stat. Ann. § 403.211 (Michie/Bobbs-Merrill Supp. 1992); Mont. Code Ann. § 40-6-116 (1995); N.M. Stat. Ann. § 40-4-11.2 (Michie 1996); Okla. Stat. Ann. tit. 43, § 118 (West Supp. 1995); Tex. Fam. Code Ann. § 14.055 (West 1994); Vt. Stat. Ann. tit. 15, § 659(a) (Supp. 1993). Since the adoption of the presumptive guidelines, few other state courts have addressed the issue of whether third-party contributions support a deviation from the presumptive child support guidelines.[1] *See DeMo v. DeMo*, 679 So.2d 265 (Ala.

1. Before the enactment of federal child support guidelines, courts were split as to whether the contributions of a third party could be considered when determining child support. *See Taylor v. Taylor*, 313 Ky. 11, 230 S.W.2d 67 (1950) (amount of award found excessive where children were being fairly well provided for by grandparents); *Ristow v. Ristow*, 152 Neb. 713, 41 N.W.2d 924 (1950) (award excessive where mother and children living with maternal grandparents). *But see Schiff v. Schiff*, 123 So. 2d 295 (Fla. Dist. Ct. App. 1960) (mother living with maternal grandmother not relevant in determi-

Civ. App. 1996) (assets and unearned income received by or on behalf of a child may be considered by trial court when considering whether to deviate from the child support guidelines). *But see In Re Marriage of Nimmo*, 891 P.2d 1002 (Colo. 1995) (stating that as a general rule, third-party contributions are immaterial to child support determinations).

Plaintiff correctly points out that this Court has held that a parent cannot contract away or transfer his or her responsibility for the support of his or her children. *Alamance Co. Hosp. v. Neighbors*, 315 N.C. 362, 365, 338 S.E.2d 87, 89 (1986). However, defendant has not in any way been relieved of her obligation to provide for the support of her children. This obligation continues. If the grandparents' support changes, then the amount of defendant's support may be revisited on the basis of changed circumstances pursuant to N.C.G.S. § 50-13.7 (1995). We emphasize that we are holding that the trial court *may* consider support by third parties when determining whether there is evidence to support a deviation. It is important to note that contributions from a third party will not always support deviation from the guidelines. In each case where the trial court considers whether the contributions of a third party support deviation from the guidelines, that court must examine the extent and nature of the contributions in order to determine whether a deviation from the guidelines is appropriate considering the criteria for deviation set out in N.C.G.S. § 50-13.4(c). Accordingly, we conclude that the contributions of a third party may be used to support deviation from the child support guidelines.

[2] We must now determine whether the trial court was correct in deviating from the guidelines in the instant case. N.C.G.S. § 50-13.4(c) governs, *inter alia*, deviation from the child support guidelines. The statute provides:

> [U]pon request of any party, the [c]ourt shall hear evidence, and from the evidence, *find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support.* If, after considering the evidence, the [c]ourt finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent

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nation); *Cappel v. Cappel*, 243 Iowa 1363, 55 N.W.2d 481 (1952) (cash advances by maternal grandfather given to mother not relevant); *Slaughter v. Slaughter*, 313 S.W.2d 193 (Mo. Ct. App. 1958) (compensation given to child by government not relevant).

> to provide support or would be otherwise unjust or inappropriate[,] the [c]ourt may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

N.C.G.S. § 50-13.4(c) (emphasis added). We agree with the Court of Appeals that the trial court did not make the required findings relating to the reasonable needs of the children and the relative ability of each parent to provide support. *See, e.g., Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993). Accordingly, the trial court erred, and its order cannot stand.

In summation, we conclude that the Court of Appeals erred in ruling that the contributions of third parties may not be considered when determining whether to deviate from the North Carolina Child Support Guidelines. However, the Court of Appeals correctly concluded that the trial court did not make the required findings of fact. Accordingly, the decision of the Court of Appeals is reversed in part, affirmed in part, and the case is remanded to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED IN PART, AFFIRMED IN PART, REMANDED.

STATE OF NORTH CAROLINA v. BENJAMIN EDWARD PETERSON

No. 246A95

(Filed 31 July 1996)

1. Jury § 257 (NCI4th)— capital murder—jury selection—State's peremptory challenge of black juror—criminal record

There was no error in a capital prosecution for first-degree murder where the State used a peremptory challenge to excuse a black juror and defendant asserted that the challenge was exercised solely on the basis of race, but the State explained without prompting that the prospective juror had been convicted on six occasions of issuing worthless checks and was not forthright about her convictions upon questioning, and expressed concern

about her health because she had suffered a heart attack and was on medication. Although defendant argued that the State's explanations were pretextual because the State questioned only two jurors about their criminal histories, did not excuse a white juror convicted of driving while impaired, and no criminal record check was ever produced in court, disparate treatment of similarly situated jurors is not dispositive of discriminatory intent and the law does not demand that the State's explanation be persuasive or plausible. The State faces the burden of articulating legitimate race-neutral reasons that are clear, reasonably specific, and related to the particular case to be tried; in this case, the offenses indicated a lack of trustworthiness and the prospective juror did not respond to the State's questions candidly. Also, the State may use a prospective juror's criminal record as a justification for a challenge even when the prospective juror is not questioned about it; absent evidence to the contrary, it is not unreasonable for the trial court to assume that the prosecutor is telling the truth with regard to the criminal records of prospective jurors.

Am Jur 2d, Jury §§ 235, 244.

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

2. Jury § 248 (NCI4th)— capital murder—jury selection—State's use of peremptory challenge to excuse black juror—no findings or conclusions

The trial court did not err in a capital prosecution for first-degree murder by excusing a prospective juror on a peremptory challenge by the State after a *Batson* challenge by defendant without making any findings of fact or conclusions of law and without giving the defendant an opportunity for surrebuttal. When there is no material conflict in the evidence, no findings of fact are necessary and the court's response indicated that it accepted the State's proffered reasons as sufficient evidence that the State acted without discriminatory intent. Furthermore, there is no indication that the defendant was precluded from putting on additional evidence to show that the State's explanations were pretextual.

Am Jur 2d, Jury §§ 235, 244.

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

3. Evidence and Witnesses § 1323 (NCI4th)— capital murder—motion to suppress statement—no findings on invocation of right to counsel and subsequent waiver

A motion to suppress a first-degree murder defendant's statement to officers was remanded for findings of fact where defendant testified that he asked for an attorney and his mother at a 21 September 1992 interview; he told the officers at an interrogation on 4 November 1992 that he did not want to talk to them; they said that if he did not talk to them, his mother would be charged with a crime; and defendant made a statement. Although the trial court concluded that the defendant voluntarily, knowingly, and intelligently waived his rights, the court failed to make any findings of fact concerning whether the defendant had invoked his Fifth Amendment rights at the 21 September 1992 interrogation and whether any subsequent waiver was voluntary. If the defendant had invoked his right to counsel, the detectives would not have been permitted to reinitiate conversation with him without his attorney present.

Am Jur 2d, Evidence § 713.

4. Constitutional Law § 276 (NCI4th)— capital murder—right to counsel—attorney's demand to be present during questioning

A first-degree murder defendant's Fifth Amendment right to counsel was not invoked when his attorney demanded that he be present during any interrogation of the defendant and no finding of fact on this issue was necessary. A defendant's right to counsel is personal to him and he may waive this right even though his attorney has instructed the investigating officers not to talk to him. In light of the court's findings that support the conclusion that defendant's waiver of his rights was voluntarily, knowingly, and intelligently made, the statement would not have been inadmissible if the court had found that the attorney had advised officers not to talk to defendant.

Am Jur 2d, Criminal Law §§ 732-738.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 7 November 1994 Criminal Session of Superior Court, New Hanover County, upon a verdict of guilty of first-degree murder in a case tried capitally to a jury. Heard in the Supreme Court 9 April 1996.

STATE v. PETERSON

[344 N.C. 172 (1996)]

The defendant was tried for the first-degree murder of Charles Oakley. The evidence showed that on 19 September 1992, customers of Allen's Sports Supply found Mr. Oakley, its owner and manager, incoherent and bleeding from the head. The front panel of the cash register had been torn off, and the drawer had been pried open. A latent fingerprint matching the defendant's was found on a piece of plastic that had been broken from the register.

The victim remained hospitalized until he was taken off of life support and died on 7 October 1992. The victim died as the result of a subdural hematoma due to blunt trauma to the head.

On 4 November 1992, Detective Bryan Pettus and Detective Jeff Allsbrook interviewed the defendant, who was in custody for unrelated charges. The defendant was advised of his *Miranda* rights and waived them. He then gave three conflicting statements. He first stated that he had been in the store on 20 September 1992 to buy fishhooks, but had not been there the day before. When the detectives told him that the store was closed that day and that his fingerprint had been found in the store, he recanted and stated that two of his friends took him to the store, where they found the victim bleeding on the floor. They then took the money and left. Upon further questioning by the detectives, the defendant again changed his story and stated that on the day of the robbery, he had been smoking crack with an individual named Corky. He said that he and Corky went to the victim's store, where they saw the victim proceed to open his business. Corky said he wanted to rob the place, and the defendant protested. Corky then went into the store with a pipe. A few minutes later, the defendant found the victim lying on the floor bleeding. The defendant stated that he took fifty-two dollars from the register.

After a pretrial hearing and *voir dire* at trial, the trial court denied the defendant's motion to suppress his statement. The defendant was convicted of first-degree murder based on the felony murder rule. The jury recommended a sentence of life in prison, which was imposed. The defendant appealed.

Michael F. Easley, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and Sondra C. Panico, Associate Attorney General, for the State.

Nora Henry Hargrove for the defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the State's use of a peremptory challenge to excuse a black prospective juror. He asserts that the State impermissibly exercised the challenge solely on the basis of the prospective juror's race. The defendant contends that the prosecutor's proffered reasons for the challenge were pretextual and that the trial court abused its discretion in failing to hold a hearing on the objection and failing to allow the defendant an opportunity for surrebuttal. He says this violated his state and federal constitutional rights. N.C. Const. art. I, § 26; *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

The defendant in this case is black, the victim was white, and the excused prospective juror, Emma Parker, is a black female. After questioning Ms. Parker, the State exercised one of its peremptory challenges to excuse her. The State explained without prompting that she had been convicted on six occasions of issuing worthless checks and was not forthright about her convictions upon questioning. The State also expressed concern about Ms. Parker's health; she had suffered a heart attack and was on medication. The defendant then made an objection based on *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69. The trial court responded "Okay" and excused Ms. Parker.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the State from peremptorily challenging jurors solely on the basis of race. *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83. In the first step of the three-part analysis articulated by the Court, the defendant must make out a *prima facie* case of racial discrimination by the prosecutor in the exercise of peremptory challenges. *Id.* at 96-97, 90 L. Ed. 2d at 87-88. When the State voluntarily proffers explanations for a peremptory challenge, as in this case, the reviewing court need not determine whether the defendant has met his initial burden and may proceed as if the *prima facie* case has been established. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991). The State faces the burden of articulating legitimate race-neutral reasons that are clear, reasonably specific, and related to the particular case to be tried. *Id.* The law does not demand that the explanation be persuasive or even plausible. *Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839 (1995). The defendant then has a right of surrebuttal to show that the explanations are pretextual. *State v. Spruill*, 338 N.C. 612, 631, 452 S.E.2d 279, 288 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 63 (1995).

The defendant in this case argues that the State's explanations were pretextual because the State questioned only two jurors about their criminal histories and did not excuse a white prospective juror who had been convicted of driving while impaired. The defendant notes that no criminal record check was ever produced in court. We have held that disparate treatment of similarly situated potential jurors is not dispositive of discriminatory intent. *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152-53 (1990). In this case, Ms. Parker's offenses indicated a lack of trustworthiness, and she did not respond to the State's questions candidly; the juror convicted of driving while impaired volunteered the information to the court. We have also held that the State may use a prospective juror's criminal record as a justification for challenging her even when the prospective juror was not questioned about it. *State v. Kandies*, 342 N.C. 419, 436, 467 S.E.2d 67, 76 (1996). "Absent evidence to the contrary, it is not unreasonable for the trial court to assume that the prosecutor is telling the truth with regard to the criminal records of prospective jurors." *Id.* at 438, 467 S.E.2d at 77. For the foregoing reasons, we cannot say the superior court was in error for holding that the prosecutor's reasons for challenging the prospective juror were not pretextual.

[2] The defendant also contends that the court abused its discretion by excusing Ms. Parker without making any findings of fact or conclusions of law and without giving the defendant an opportunity for surrebuttal. When the defendant objected, the court merely stated "Okay" and excused the juror. We note that when there is no material conflict in the evidence, no findings of fact are necessary. *State v. Porter*, 326 N.C. at 502, 391 S.E.2d at 153. The court's response indicated that it accepted the State's proffered reasons as sufficient evidence that the State acted without discriminatory intent. The court's ruling is evidenced by the removal of the juror. Furthermore, there is no indication that the defendant was precluded from putting on additional evidence to show that the State's explanations were pretextual. The defendant has failed to show that the action of the trial court in allowing the prosecutor's peremptory challenge of Ms. Parker was erroneous. *See State v. Rouse*, 339 N.C. 59, 78, 451 S.E.2d 543, 553 (1994), *cert. denied*, — U.S. —, 133 L. Ed. 2d 60 (1995).

This assignment of error is overruled.

[3] The defendant next assigns error to the denial of his motion to suppress a statement he made to law enforcement officers on 4 November 1992. A *voir dire* was held on the defendant's motion out of the presence of the jury.

Richard G. Miller, an attorney practicing in New Hanover County, testified that in September 1992 he was appointed to represent the defendant, who was in jail on a charge of rape, which was not related to the charge in this case. He testified that the standard procedure he follows in all serious cases, and he was sure he did it in this case, was to advise the defendant not to speak to anyone unless he, Mr. Miller, was present. He also informed the jailer not to let the defendant be interviewed by anyone unless the attorney was informed prior to the interview.

Officers of the City of Wilmington Police Department testified that they interviewed the defendant on the rape charge on 21 September 1992 and that he did not request an attorney at this time. They interviewed him again on 4 November 1992 in regard to the murder involved in this case. They testified that they fully advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and that he waived them. The officers testified that the defendant made an inculpatory statement and then requested an attorney. They ceased the interview at that time.

The defendant testified that he asked for an attorney and his mother at the 21 September 1992 interview. He testified that at the interrogation on 4 November 1992, he told the officers he did not want to talk to them. They said that if he did not talk to them, his mother would be charged with a crime. At that time, he made a statement. Although the trial court concluded that the defendant voluntarily, knowingly, and intelligently waived his rights, the court failed to make any findings of fact concerning whether the defendant had invoked his Fifth Amendment rights at the 21 September 1992 interrogation and whether any subsequent waiver was voluntary. If the defendant had invoked his right to counsel, the detectives would not have been permitted to reinitiate conversation with him about the rape or any other crime without his attorney present. *Arizona v. Roberson*, 486 U.S. 675, 683-84, 100 L. Ed. 2d 704, 715 (1988); *State v. Pope*, 333 N.C. 106, 112, 423 S.E.2d 740, 743-44 (1992). Because we cannot say that admission of the statements was harmless beyond a reasonable doubt, we remand to the trial court for findings of fact that would resolve the conflict in the evidence regarding whether the defendant invoked his rights at the earlier interrogation. *See State v. Booker*, 306 N.C. 302, 312-13, 293 S.E.2d 78, 84 (1982).

[4] The defendant also says that his Fifth Amendment right to counsel was invoked when his attorney, Mr. Miller, demanded that he be

present during any interrogation of the defendant and that the court did not make findings of fact sufficient to resolve this issue. We have held that a defendant's right to counsel is personal to him. He may waive this right although his attorney has instructed the investigating officers not to talk to him. *State v. Reese*, 319 N.C. 110, 135, 353 S.E.2d 352, 366 (1987). Even if the court had found as a fact that Mr. Miller had advised the officers not to talk to the defendant, it would not have made his statement inadmissible in light of the court's findings that supported the conclusion that the defendant's waiver of his rights was voluntarily, knowingly, and intelligently made. The defendant could waive his rights in spite of his attorney's advice to the contrary. No finding of fact on this feature of the case was necessary. *See Moran v. Burbine*, 475 U.S. 412, 89 L. Ed. 2d 410 (1986).

NO ERROR IN PART; REMANDED IN PART.

THOMAS E. COLLINS, ADMINISTRATOR OF THE ESTATE OF JUDY DIANNE COLLINS PLAINTIFF (TA-10219), THOMAS E. COLLINS, INDIVIDUALLY PLAINTIFF (TA-11510) v. NORTH CAROLINA PAROLE COMMISSION, DEFENDANT

No. 199PA95

(Filed 31 July 1996)

1. State § 39 (NCI4th)— parole of inmate—negligence action—jurisdiction of Industrial Commission

The North Carolina Industrial Commission was not deprived of jurisdiction under the Tort Claims Act by allegations that three members of the Parole Commission acted wantonly, recklessly, and maliciously and were grossly negligent in granting and supervising parole of an inmate who subsequently shot plaintiff and his wife. To give the Industrial Commission jurisdiction of a tort claim, the claim must be based on negligence and there are degrees of negligence. Although the Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts, willful, wanton, and reckless conduct does not rise to the level of intent for an injury to occur.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 649-651.

2. State § 55 (NCI4th)— parole of inmate—Parole Commission—not negligence

The Industrial Commission correctly dismissed claims against three former members of the Parole Commission arising from the parole of an inmate who subsequently shot plaintiff and his wife. Defendants were undoubtedly acting within the scope of their official authority when they granted and refused to revoke the parole and there was nothing corrupt or malicious in their actions; the members of the Parole Commission could reasonably rely on the most recent available psychological evaluation and recommendations of prison officials in granting the parole and the violations incurred by the inmate while on parole were not of the type which would indicate he would commit violent acts if he remained on parole.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 137-157.

Immunity of public officer from liability for injuries caused by negligently released individual. 5 ALR4th 773.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 118 N.C. App. 544, 456 S.E.2d 333 (1995), affirming the 23 March 1994 decision of the Industrial Commission which dismissed the plaintiff's claims. Heard in the Supreme Court 13 December 1995.

This is an action by the plaintiff in his individual capacity and as administrator of the estate of his deceased wife. The action was commenced against the North Carolina Parole Commission and three former members of the Commission by the filing of affidavits with the Industrial Commission, in which it was alleged that the three former members of the Parole Commission, Walter T. Johnson, Joe H. Palmer, and Joy J. Johnson, acted wantonly, recklessly, and maliciously and were grossly negligent in granting a parole to one Karl DeGregory and in supervising him while he was on parole. The plaintiff alleged these acts were the proximate cause of the death of his wife and of serious injury to him. While DeGregory was on parole, he entered the plaintiff's home and shot him. DeGregory then took the plaintiff's wife to a motel in Myrtle Beach, South Carolina, where he shot her to death and then committed suicide.

The case was submitted to Deputy Commissioner Charles Markham on stipulated facts. Deputy Commissioner Markham found

the following facts: DeGregory was convicted in July 1973 of two charges of first-degree murder and was sentenced to concurrent life sentences. He was considered for parole in 1979 and 1981, but parole was denied. In 1982, the Division of Prisons recommended DeGregory for a Mutual Agreement Parole Program (MAPP). At that time, the defendant had only one prison infraction, which was incurred in 1975. Under the terms of the MAPP, DeGregory would be assigned to minimum security and given a work assignment, possibly at the Western Governor's Mansion, for one year. After one year, if satisfactory progress was made, DeGregory was to be placed on work release. If work release proved successful, DeGregory would be paroled. The district attorney for the Twenty-Sixth Prosecutorial District objected to a MAPP for DeGregory. He wrote to the Parole Commission that DeGregory was "a cold, calculating killer and extremely dangerous." The Sheriff of Mecklenburg County also objected to a MAPP for DeGregory.

Deputy Commissioner Markham found further facts as follows: Dr. Robert Delany, a psychiatrist, submitted a report in which he said DeGregory maintained an excellent prison adjustment record and had taken jobs requiring responsibility and dependability. He said, "Prison adjustment scales do not suggest assaultive tendencies, escape tendencies or tendencies to violate parole supervision." Dr. Delany said DeGregory had no evidence of seriously elevated anxiety, depression, or thought disorder. Dr. Delany recommended DeGregory's participation in the MAPP. There were at least thirteen letters recommending DeGregory for the MAPP, including letters from correctional officials. DeGregory was approved for the MAPP in March 1983 and then paroled on 13 August 1984.

Deputy Commissioner Markham found that the Parole Commission could and did reasonably rely on the most recent available psychological evaluation, recommendations and reports of prison officials, and endorsements from knowledgeable persons in the community. He concluded that the granting of the parole was not a breach of the ordinary care reasonable persons would have exercised under all the circumstances. He concluded it did not constitute wanton, malicious, corrupt, reckless, or grossly negligent conduct.

The deputy commissioner found as to the conduct of the Commission while DeGregory was on parole that several restrictions were placed on him, including not changing his job or residence or leaving the county without the permission of his parole officer. On 19

September 1984, special added conditions required him to continue counseling at a mental health center, to observe a curfew, and not to leave the county without the express permission of the Parole Commission.

Deputy Commissioner Markham found further that the Parole Commission had no statutory authority or duty to supervise a parolee. He also found that while DeGregory was on parole, the district attorney for the Twenty-Sixth Prosecutorial District wrote to the Parole Commission asking that DeGregory be reincarcerated. The district attorney said an attorney in Florida had advised him that DeGregory was suspected of committing five murders in that state prior to committing the murders for which he was convicted in North Carolina. Deputy Commissioner Markham said that a reading of *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 794 (1974), in which the defendant confessed to five murders in Florida in order to support his insanity plea, would show how tenuous this evidence was. The deputy commissioner also found that on several occasions DeGregory violated his parole by going to other counties without permission, violating curfew, and failing to keep appointments with his counselor and parole officer. He found that the infractions DeGregory committed were not of the type which would indicate he would commit violent acts if he was not reincarcerated.

The deputy commissioner also found that the relationship between plaintiff's intestate and DeGregory was such that her negligence would insulate any negligence which injured Thomas Collins and would be contributory negligence barring a claim for her estate. The facts upon which these conclusions were made are not necessary to our decision in this case, however.

Deputy Commissioner Markham concluded that (1) the plaintiff has not proved that the Parole Commission was negligent in placing DeGregory on parole and in not revoking his parole; (2) as public officials, the members of the Commission are immune from suit for negligence for actions taken in the course of their official duties while acting in their official capacity; and (3) the employees of the Parole Commission who supervised DeGregory while he was on parole were not negligent in their supervision because, from his actions, it was not foreseeable that he would commit a violent act. Deputy Commissioner Markham dismissed the claims. The full Commission adopted the findings of fact and conclusions of law of the deputy commissioner and affirmed the dismissal.

The Court of Appeals affirmed, and we granted the plaintiff's petition for discretionary review.

Griffin & Wright, P.A., by Michael H. Griffin, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, for defendant-appellee.

WEBB, Justice.

[1] The Court of Appeals affirmed the decision of the Industrial Commission on the ground that under the State Tort Claims Act, N.C.G.S. § 143-291 (1993), sovereign immunity is waived only for negligent acts. The plaintiff alleged in this case that the acts of the members and employees of the Parole Commission were wanton, reckless, malicious, and grossly negligent. The Court of Appeals held that the Tort Claims Act waived the State's sovereign immunity only for ordinary negligence, and the plaintiff has alleged more than ordinary negligence. The Court of Appeals said this deprived the Industrial Commission of jurisdiction.

We disagree with the reasoning of the Court of Appeals. In *Jenkins v. N.C. Dep't of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956), we held that the Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts. We said that to give the Industrial Commission jurisdiction of a tort claim, the claim must be based on negligence. We have held that there are degrees of negligence and that willful, wanton, and reckless conduct does not rise to the level of intent for an injury to occur. *Woodson v. Rowland*, 329 N.C. 330, 341, 407 S.E.2d 222, 229 (1991). The negligence alleged in this case does not deprive the Industrial Commission of jurisdiction.

[2] Nevertheless, we affirm the decision of the Court of Appeals on other grounds. The defendants in this case are public officials. "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976); *accord Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). The defendants were undoubtedly acting within the scope of their official authority when they granted parole to DeGregory and refused to revoke his parole. There was nothing

corrupt or malicious in their actions. Indeed, we agree with the conclusion of Deputy Commissioner Markham that the members of the Parole Commission could reasonably rely on the most recent available psychological evaluation and recommendations of prison officials in granting the parole, and the violations incurred by DeGregory while he was on parole were not of the type which would indicate he would commit violent acts if he remained on parole.

The Industrial Commission correctly dismissed the claims.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. RANDY ANTONIO COX

No. 26A96

(Filed 31 July 1996)

1. Evidence and Witnesses § 2528 (NCI4th)— capital murder—competency of witness—mental capacity

The trial court did not err in a capital prosecution for first-degree murder by not acting *ex mero motu* to disqualify the victim's mother as a witness where the witness had difficulty answering some of the questions and gave answers that were not responsive, and the court indicated at a bench conference that it believed the witness was "of low mentality" and said that it would allow the prosecutor to ask leading questions. The record does not show that the witness was incapable of expressing herself or incapable of understanding her duty to tell the truth and the fact that the court felt she was of low mentality did not disqualify her.

Am Jur 2d, Witnesses §§ 163, 187.

2. Evidence and Witnesses § 2815 (NCI4th)— capital murder—witness answering with difficulty or not responsively—use of leading questions

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the State to ask leading questions where the witness had difficulty answering some of the questions and gave answers that were not responsive, and the

court indicated at a bench conference that it believed the witness was "of low mentality" and said that it would allow the prosecutor to ask leading questions. The State used leading questions sparingly and where necessary to direct the witness's attention, to elicit the truth and not inadmissible statements, and to expedite the trial. Use of leading questions is committed to the discretion of the trial judge and is permissible when the witness has difficulty understanding questions because of immaturity, age, infirmity, or ignorance.

Am Jur 2d, Witnesses §§ 752-756.

3. Evidence and Witnesses § 163 (NCI4th)— capital murder—threat by defendant to victim—time between threat and murder—goes to weight

The trial court did not err in a capital prosecution for a first-degree murder committed on 27 January 1994 by admitting testimony that on 30 November 1993 defendant told the victim that he would kill her if she did not come out of her room. Evidence of previous threats is admissible in trials for first-degree murder to prove premeditation and deliberation; remoteness in time goes to the weight of the evidence and does not make it inadmissible.

Am Jur 2d, Evidence, §§ 1430 et seq.

4. Criminal Law § 560 (NCI4th)— capital murder—evidence that victim pregnant excluded—reference in telephone call between victim and defendant—mistrial denied

The trial court did not err by not granting a mistrial in a capital prosecution for first-degree murder where the trial court had granted a motion *in limine* to exclude any evidence that the victim was pregnant when killed, a witness testified that she had heard the victim say during a telephone conversation with defendant "I don't want you because you tried to get me to kill my baby," and the court instructed the jury to disregard this testimony. Assuming that the court was correct in its ruling on the motion *in limine*, it is not clear that the victim was speaking of an unborn baby and, even so, evidence that she was pregnant when she was killed was tangential to the issues in this trial. Jurors are presumed to follow the court's instructions when they are told not to consider testimony.

Am Jur 2d, Trial § 616.

5. Evidence and Witnesses § 155 (NCI4th)— capital murder—telephone conversation with victim—identification of defendant as caller

The trial court did not err in a capital prosecution for first-degree murder by not granting a mistrial after the victim's aunt testified as to what she heard the victim say to defendant in a telephone conversation. Although defendant contends that the identification of defendant as the person talking with the victim was not properly authenticated, N.C.G.S. § 8C-1, Rule 901(b) makes clear that the method prescribed by that section for identifying a telephone caller is not exclusive and, in this case, the quick succession of calls and the nature of the relationship, as well as the witness's familiarity with the defendant's attempts to contact the victim and the breakdown of their relationship, support the inference that the defendant was the caller.

Am Jur 2d, Evidence § 562.

6. Evidence and Witnesses § 881 (NCI4th)— capital murder—telephone conversation between victim and defendant—victim's statement—admissible to show motive

The trial court did not err in a capital prosecution for first-degree murder by not granting a mistrial after the victim's aunt testified that she heard the victim say to defendant in a telephone conversation that she didn't want him and didn't want to go back with him because he tried to get her to kill her child and the court granted a motion to strike. It would not have been error to admit the testimony; the statement that the victim would not go back to defendant because he had tried to get her to kill their child was not introduced to prove the truth of the statement, but to prove that she said it, which gave the defendant a motive to kill her whether or not she meant it.

Am Jur 2d, Trial § 1391.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Llewellyn, J., at the 8 May 1995 Criminal Session of Superior Court, Lenoir County, upon a verdict of guilty of first-degree murder in a case tried capitally. Heard in the Supreme Court 14 May 1996.

The defendant was tried for first-degree murder, breaking or entering, and possession of stolen goods. The evidence showed that

on 27 January 1994, the defendant entered the home of his girlfriend's grandmother and shot his girlfriend, Yonnie Staten, in the head and back, killing her. The defendant and Yonnie Staten had one child, six-month-old Kenisha, who was present in another room of the house during the shooting. The victim's mother and aunt also lived in the home and were present the day of the shooting as well.

The defendant was found guilty of first-degree murder on the basis of premeditation and deliberation and guilty of breaking or entering. After a capital sentencing hearing, the jury recommended a sentence of life in prison for the first-degree murder conviction. The judge sentenced the defendant to life imprisonment for first-degree murder and to a consecutive term of ten years' imprisonment for the breaking or entering. The defendant appealed.

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

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

WEBB, Justice.

[1] In his first assignment of error, the defendant makes two arguments. He says first that the court should have disqualified Barbara Staten, the victim's mother, as a witness. He says next that the court should not have allowed the State to ask leading questions of Mrs. Staten.

While Mrs. Staten was testifying, she had difficulty answering some of the questions and gave answers that were not responsive. At a bench conference, the court indicated it believed the witness was "of low mentality." The court said it would allow the prosecuting attorney to ask leading questions of this witness.

The defendant says the court should have held this witness to be incompetent to testify. The defendant did not move for the disqualification of this witness, but he says the court should have done so on its own motion. N.C.G.S. § 8C-1, Rule 601(b) provides:

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through

> interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C.G.S. § 8C-1, Rule 601(b) (1992). We cannot say the record shows that the witness was incapable of expressing herself or was incapable of understanding her duty to tell the truth such that the court should have disqualified her as a witness on its own motion. She was able to describe her extended family and their living arrangement as well as the events of 27 January 1994. The fact that the court felt she was of low mentality did not disqualify her.

[2] The determination of the use of leading questions is committed to the discretion of the trial judge. N.C.G.S. § 8C-1, Rule 611(a), (c) (1992); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976). Leading questions are permissible when the witness has difficulty understanding questions because of immaturity, age, infirmity, or ignorance. *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974). In this case, the witness was having trouble answering questions that were put to her. The State used leading questions sparingly and where necessary to direct the witness's attention, to elicit the truth and not inadmissible statements, and to expedite the trial. The defendant has failed to show abuse of discretion by the court in allowing the use of leading questions with this witness.

This assignment of error is overruled.

[3] The defendant next assigns error to the testimony of Barbara Staten that on 30 November 1993, the defendant came into her home and told Yonnie he would kill her if she did not come out of her room. The defendant says this evidence tended to prove his state of mind on 30 November 1993, which was too remote from the date of the murder to be relevant. The defendant also says testimony as to this threat was proof of a bad act for the purpose of proving his disposition to commit the murder of Yonnie Staten. The defendant contends this violates N.C.G.S. § 8C-1, Rule 404(b).

Evidence of previous threats is admissible in trials for first-degree murder to prove premeditation and deliberation. The remoteness in time of the threat goes to its weight and does not make it inadmissible. *State v. Myers*, 299 N.C. 671, 675, 263 S.E.2d 768, 771 (1980).

This assignment of error is overruled.

[4] The defendant next assigns error to the denial of his motion for a mistrial. Before the commencement of the trial, the court granted a motion *in limine* by the defendant to exclude any evidence that Yonnie Staten was pregnant at the time she was killed. While Barbara Staten was testifying as to a telephone conversation she heard Yonnie have with the defendant, she said she heard Yonnie say, "I don't want you because you tried to get me to kill my baby." The court instructed the jury to disregard this testimony.

The defendant says that it was error to allow this testimony that showed Yonnie was pregnant and that the testimony was so inherently prejudicial that it could not be cured by a corrective instruction. *State v. Gregory*, 342 N.C. 580, 588, 467 S.E.2d 28, 33 (1996). Assuming that the court was correct in its ruling on the motion *in limine*, a mistrial would not have been appropriate based on this colloquy. It is not clear that Yonnie was speaking of an unborn baby; even if she was, however, evidence that she was pregnant when she was killed was tangential to the issues in this trial. It is speculative as to how much it prejudiced the defendant. Jurors are presumed to follow the court's instructions when they are told not to consider testimony. *State v. Clark*, 298 N.C. 529, 534, 259 S.E.2d 271, 274 (1979).

This assignment of error is overruled.

[5] In his last assignment of error, the defendant contends that testimony by Kathy Williams, the victim's aunt, should have been excluded. Mrs. Williams testified as to what she heard Yonnie say to the defendant in a telephone conversation on the morning of the day she was killed. The defendant says this was error. Yonnie's oldest daughter, Miesha, answered the telephone that morning and said, "Mama, it's Randy." Yonnie took the telephone and talked briefly before terminating the conversation. A few moments later, the telephone again rang and Yonnie answered. Mrs. Williams testified that she heard Yonnie say "that she didn't want him no more and didn't want to go back with him because he tried to get her to kill Kenisha." The court allowed a motion to strike this statement.

The defendant says it was error not to declare a mistrial because the identification of the defendant as the person talking with Yonnie on the telephone was not properly authenticated, and the testimony as to what Yonnie said was inadmissible hearsay. The defendant says that the requirements of N.C.G.S. § 8C-1, Rule 901(b)(6) as to the identity of a person talking on a telephone were not met. N.C.G.S. § 8C-1, Rule 901(b) makes clear that the method prescribed by that

section for identifying a telephone caller is not exclusive. We hold that the quick succession of calls and nature of the conversation, as well as the witness's familiarity with the defendant's attempts to contact the victim and the breakdown of their relationship, support the inference that the defendant was the second caller.

[6] It would not have been error to admit the testimony of Mrs. Williams as to what she heard Yonnie say to the defendant. This testimony was not hearsay. The statement that she would not go back to the defendant because he had tried to get her to kill their child was not introduced to prove that she would not return to him or that he had tried to get her to kill their child. It was introduced not to prove the truth of Yonnie's statement, but to prove she said it. If she said it, this gave the defendant a motive to kill her whether or not she meant it. Whether Yonnie said it did not depend on Yonnie's credibility but on the credibility of Kathy Williams, the testifying witness. *See* N.C.G.S. § 8C-1, Rule 801(c) (1992); *State v. Crump*, 277 N.C. 573, 178 S.E.2d 366 (1971).

This assignment of error is overruled.

We note that the record filed with this Court does not show any appeal was taken from the defendant's conviction for breaking or entering. We do not pass on that case. In the defendant's conviction for first-degree murder, we find no error.

NO ERROR.

STATE OF NORTH CAROLINA v. MONTOYAE DONTAE SHARPE

No. 45A96

(Filed 31 July 1996)

1. Evidence and Witnesses § 983 (NCI4th)— first-degree murder—confession by another who committed suicide—not admissible as dying declaration

The trial court did not err in a noncapital first-degree murder prosecution by not allowing testimony concerning statements from another man who told his girlfriend that he had killed the victim and that he would kill himself before he went to jail for

killing a white man where the man later committed suicide. Although defendant contended that the testimony was admissible as the dying declaration of an unavailable declarant, nothing in the circumstances surrounding the making of these statements suggests that he was in immediate danger of being arrested, so that it was not established that the declarant believed his death was imminent when he made these statements, and, given the girlfriend's testimony that the declarant had threatened or attempted suicide on more than one prior occasion, it is altogether unclear whether his suicide was precipitated by his purported killing of the victim or by a different, wholly unrelated cause. N.C.G.S. § 8C-1, Rule 804(b)(2).

Am Jur 2d, Evidence §§ 828-830.

Opinion of doctor or other attendant as to declarant's consciousness of imminent death so as to qualify his statement as dying declaration. 48 ALR2d 733.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion. 86 ALR2d 905.

Comment Note.—Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration. 53 ALR3d 785.

2. Appeal and Error § 447 (NCI4th)— first-degree murder—confession of another who committed suicide—admissibility argued on one theory at trial—different theory not allowed on appeal

Defendant could not argue on appeal from a noncapital first-degree murder prosecution that statements from another man who confessed to a girlfriend and later committed suicide were admissible as statements against penal interest where defendant had argued at trial (expressly, extensively, and with citations of authority) the state of mind and dying declaration hearsay exceptions. The State responded at trial only to those arguments, and the trial court expressly ruled on admissibility only under those grounds. Under these circumstances, it is well settled that defendant cannot argue for the first time on appeal this new ground for admissibility.

Am Jur 2d, Appellate Review §§ 690, 691.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue. 76 ALR Fed. 522.

Circumstances under which federal appellate court will allow Federal Deposit Insurance Corporation (FDIC) or Resolution Trust Corporation (RTC) to raise on appeal issues not raised at trial involving financial institution put in receivership or conservatorship after trial. 120 ALR Fed. 469.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L. Ed. 2d 946.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Parker, J., at the 24 July 1995 Criminal Session of Superior Court, Pitt County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 May 1996.

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

Steven M. Fisher for defendant-appellant.

WHICHARD, Justice.

In July 1995 defendant was tried noncapitally, convicted of the first-degree murder of George Radcliffe, and sentenced to life imprisonment. He appeals from his conviction and sentence. We hold that defendant received a fair trial, free of prejudicial error.

The State's evidence tended to show that on 11 February 1994, two witnesses observed defendant, a known drug dealer, involved in a drug deal. Fifteen-year-old Charlene Johnson, who knew defendant, testified at trial that sometime after 9:00 p.m. on 11 February 1994, she was walking on 6th Street in Greenville and saw defendant and Mark Joyner talking to a white man and standing next to a pickup truck. The white man requested "a twenty" but did not have enough cash to pay for it. Defendant told the man that he had to have the money "straight up" and shoved him. When the white man cursed defendant, defendant shot him. Johnson heard two shots and observed defendant and Joyner lift the white man into the pickup truck and drive the truck into a field. Beatrice Stokes, a regular drug

user who had previously purchased drugs from defendant and Joyner in the area in which the murder occurred, testified that as she was walking on Sheppard Street near 6th Street on the night of 11 February 1994, she observed defendant, Joyner, and two or three others standing next to a truck. She heard an argument and a gunshot and noticed that defendant was holding a gun.

Defendant's aunt, Patricia Ann Ward, and her next-door neighbor, Patricia Hicks, testified on defendant's behalf. Ward stated that defendant ate dinner at her house from 8:15 to 8:45 p.m., and Hicks testified that defendant was at her house from 9:00 to 9:45 p.m. and from 10:30 to 11:30 p.m. on the night of the murder.

Defendant also offered the testimony of Tracy Highsmith. On *voir dire*, Highsmith testified that on the night of the murder, her boyfriend, Damien Smith, left their home shortly before 9:00 p.m. When he returned several hours later, he told Highsmith that he had seen a white man sitting in a truck and that this man had wanted to "buy some." Smith added that he had robbed and shot the man but did not know whether he had killed him. The following day, upon discovering that the man had died, Smith admitted to having killed the man and stated that "he would kill himself before he [would] go to jail for killing a white man." He repeated this comment to Highsmith numerous times over the next three weeks and confessed two or three times that he had shot the man who was killed on 6th Street. Twenty-seven days after the murder, Smith committed suicide by shooting himself in the head. Highsmith testified that she had noticed a drastic change in Smith's demeanor over this period but admitted that he had been suicidal before 11 February 1994. The trial court sustained the prosecutor's objection to the admission of this testimony on the basis that it was hearsay and did not fall within the dying declaration or state of mind exceptions to the rule against the admission of hearsay evidence. Defendant had expressly argued these grounds, and only these grounds, as the basis for admissibility of the proffered evidence.

[1] Defendant first argues that the trial court erred in not allowing Highsmith's hearsay testimony regarding Smith's statements because those statements were admissible as having been made under a belief of impending death. Pursuant to Rule 804(b)(2) of the North Carolina Rules of Evidence, the dying declaration of an unavailable declarant is admissible only where (1) the statement appears trustworthy because it is made at a time when the declarant believes his death to be imminent, and (2) the statement concerns the cause or circum-

stances of his impending death. N.C.G.S. § 8C-1, Rule 804(b)(2) (1992); *State v. Penley*, 318 N.C. 30, 40, 347 S.E.2d 783, 789 (1986). Following his confession, Smith stated that he would kill himself before he would go to jail for killing a white man, but nothing in the circumstances surrounding the making of these statements suggests that he was in immediate danger of being arrested. Thus, it was not established that Smith believed his death was imminent when he made these statements.

Nor did Smith's statement that he would kill himself before he would go to jail for killing a white man satisfy the second prong of the test. Given Highsmith's testimony that Smith had threatened or attempted suicide on more than one occasion before the events of 11 February 1994, it is altogether unclear whether his suicide was precipitated by his purported killing of the victim or by a different, wholly unrelated cause. In light of this significant ambiguity, the trial court could conclude that the statements did not relate to the cause or circumstances of Smith's impending death with sufficient certainty to render them admissible under the dying declaration exception to the rule against hearsay.

[2] Defendant does not contest on appeal the trial court's determination that Smith's statements were not admissible as statements of a present mental, emotional, or physical condition pursuant to N.C. R. Evid. 803(3). Instead, defendant contends, for the first time, that Smith's statements were admissible as statements against his penal interest pursuant to N.C. R. Evid. 804(b)(3).

This Court has long held that where a theory argued on appeal was not raised before the trial court, "the 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); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (where defendant relied on one theory at trial as basis for written motion to suppress and then asserted another theory on appeal, "no swapping horses" rule applied); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("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."); *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (where defendant objected on one theory at trial to denial of his request for an instruction and then asserted different theory on appeal, "no swapping horses" rule applied), *disc. rev. denied and appeal dismissed*, 329 N.C. 504, 407

S.E.2d 550 (1991). Here, defendant argued to the trial court—expressly, extensively, and with citations of authority—only that the proffered evidence should be admitted under the state of mind and dying declarations exceptions to the rule against hearsay. The State responded only to those arguments, and the trial court expressly ruled on admissibility only under those grounds, stating:

> The Court finds the defendant has failed to carry [his] burden of proof regarding the admissibility of the statement of one Damien Smith under either the state of mind exception [to] the hearsay rule or the dying declaration exception to the hearsay rule and the court rules such testimony [to] be inadmissible and sustains the objection of the State.

See Hunter, 305 N.C. at 112, 286 S.E.2d at 539 (noting, in denying review of argument raised for first time on appeal, that trial court "obviously based" its ruling on theory presented to it). Under these circumstances, it is well settled in this jurisdiction that defendant cannot argue for the first time on appeal this new ground for admissibility that he did not present to the trial court. Accordingly, the trial court did not err in excluding the proffered testimony. Defendant's assignment of error is overruled.

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

NO ERROR.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 184 JAMES F. AMMONS, JR., Respondent

No. 63A96

(Filed 31 July 1996)

Judges, Justices, and Magistrates § 36 (NCI4th)— censure of district court judge

A district court judge is censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based on his actions in a worthless check case in which the prosecuting witness was a personal friend of his and his issuance of an *ex parte* arrest order in a custody dispute.

Am Jur 2d, Judges § 21.

Power of court to remove or suspend judge. 53 ALR3d 882.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness. 82 ALR4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties. 87 ALR4th 727.

This matter is before the Court upon a recommendation by the Judicial Standards Commission (Commission), filed with the Court 13 February 1996, that James F. Ammons, Jr., a Judge of the General Court of Justice, District Court Division, Twelfth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Canons 2A, 2B, and 3A(1) of the North Carolina Code of Judicial Conduct.

William N. Farrell, Jr., Senior Deputy Attorney General, Special Counsel for the Judicial Standards Commission.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for respondent.

ORDER OF CENSURE.

The findings upon which the Commission based its recommendation that respondent be censured included the following:

1. When a worthless check case in which the prosecuting witness was a personal friend of respondent was called and failed on account of the prosecuting witness's absence, respondent had the assistant district attorney summons the witness to court rather than following normal procedure which would have been to continue the case; allowed the defendant's counsel to withdraw but refused to continue the case to enable the defendant to obtain counsel; and tried the defendant without counsel on the defendant's not guilty plea, cross-examined the defendant, and found the defendant guilty.

Subsequently, when the charge against the defendant was dismissed on appeal in Superior Court, Cumberland County, respondent discussed the matter with the prosecuting witness; voiced to the assistant district attorney respondent's displeasure over the dismissal of the charge; expressed his opinion that the charge was valid; and

stated his desire for the charge to be reinstated. The charge was in fact reinstated but was again dismissed by the district attorney three months later.

2. In a child custody matter respondent issued an *ex parte* order for the sheriff to assist the custodial parent in obtaining the children from the noncustodial parent. The noncustodial parent not having been cooperative, the next day respondent issued an additional *ex parte* order directing the sheriff to arrest the noncustodial parent if the noncustodial parent did not cooperate. This arrest order was issued without assuring that the noncustodial parent had received the notice and opportunity to be heard required by N.C.G.S. § 5A-23 and was issued six days prior to initiation of civil contempt proceedings against the noncustodial parent. As a result of the *ex parte* order, the noncustodial parent was arrested and incarcerated for thirteen hours until the $5,000 cash bond required for release could be posted.

By Notice filed with this Court on 1 March 1996, respondent accepted the Recommendation of the Judicial Standards Commission and waived his right to petition this Court or be heard on oral argument.

Based on our review of the record and respondent's acceptance of the Commission's recommendation, this Court concludes that respondent's conduct constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of N.C.G.S. § 7A-376. The Court approves the recommendation of the Commission that respondent be censured.

Now, therefore, pursuant to N.C.G.S. §§ 7A-376, 377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that James F. Ammons, Jr. be, and hereby is, censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

So ordered by the Court in conference this 30th day of July 1996.

ORR, J.
For the Court

STATE OF NORTH CAROLINA v. PHILIP EDWARD WILKINSON

No. 465A94

(Filed 6 September 1996)

1. **Constitutional Law § 313 (NCI4th)— capital sentencing—mitigating evidence—directive to counsel—no violation of defendant's rights**

The trial court did not err by directing defense counsel to proceed in a capital sentencing proceeding with mitigating evidence they had developed after defense counsel informed the court that they had been instructed by defendant not to put on certain expert witnesses, and defendant stated that he just wanted "to make it as simple and easy as possible and get this over with as quickly as possible," where there was no indication of an absolute impasse between defendant and his counsel; defendant did not express a desire to represent himself or to proceed without his attorneys and clearly told the court that he wanted his attorneys to represent him and that he thought they were doing a good job; defendant never told the court that he did not want to present any evidence in mitigation; and the trial court asked defendant if its response to the matter was "all right" with defendant and defendant voiced his satisfaction with the trial court's directive.

Am Jur 2d, Constitutional Law §§ 643, 644, 732; Criminal Law §§ 593, 594, 627, 628, 631.

2. **Appeal and Error § 504 (NCI4th)— proposed instruction—modification by court—invited error**

Where defendant submitted in writing a proposed instruction on depravity of mind in a capital sentencing proceeding which referred to "a circumstance which makes a murder *unusually* heinous, atrocious, or cruel," and defendant stated that he had no objection to the court's substitution of the word "especially" for "unusually" in its instruction, any error resulting from the court's modification of defendant's proposed instruction was invited error.

Am Jur 2d, Appellate Review §§ 743-748.

3. **Rape and Allied Offenses § 29 (NCI4th)— sexual offenses and attempted rape—guilty pleas—failure to show victims alive**

The State presented sufficient factual bases to support defendant's pleas of guilty to four counts of first-degree sexual

offense and one count of attempted first-degree rape, even if the evidence failed to show that the victims were alive at the time defendant committed the acts constituting those crimes, where the evidence showed that the sexual acts were committed in conjunction with the murders of the victims as part of a continuous chain of events forming one continuous transaction.

Am Jur 2d, Rape §§ 53-99.

4. Criminal Law § 1357 (NCI4th)— mitigating circumstance—mental or emotional disturbance—voyeurism instruction—consideration of other evidence

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could find the (f)(2) mental or emotional disturbance mitigating circumstance if it found that defendant suffered from voyeurism where (1) any error in the trial court's limitation of the scope of the (f)(2) mitigating circumstance to a consideration of voyeurism was invited error because defendant agreed with the court's proposed instruction; (2) defense counsel stated during closing argument that defendant's emotional disturbance was voyeurism and at no time contended that defendant was under the influence of any other mental or emotional disturbance; (3) the instruction was supported by the testimony of defendant's expert witnesses that defendant suffered from compulsive voyeurism but had no diagnosable mental disease or defect; and (4) the instruction did not prevent the jury from considering any evidence tending to support this mitigating circumstance because the court further instructed that "it is enough that the defendant's mind or emotions were disturbed from any cause." N.C.G.S. § 15A-2000(f)(2).

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

5. Burglary and Unlawful Breakings § 151 (NCI4th); Criminal Law § 1339 (NCI4th)— capital sentencing—aggravating circumstance—murder committed during burglary—intent to commit sexual offense—failure to define sexual offense—no plain error

The trial court did not commit plain error by failing to instruct on the legal definition of first-degree sexual offense in a capital sentencing proceeding when it gave an instruction for the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a first-degree

burglary for which the felonious intent was the intent to commit a first-degree sexual offense where the trial court had already found a factual basis for defendant's pleas of guilty to one count of first-degree burglary, three counts of first-degree murder, four counts of first-degree sexual offense, and other offenses; the evidence presented during the capital sentencing proceeding, including expert testimony and defendant's confession, served only to further support defendant's guilt of the sexual offenses and his underlying intent to commit such offenses at the time he broke into and entered the victims' home; and because there was no issue regarding defendant's intent when he entered the victims' dwelling, the phrase "sexual offense" did not have to be defined. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Appellate Review §§ 773-775; 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.

6. Jury § 141 (NCI4th)— capital sentencing—jury voir dire—parole eligibility—questions properly excluded

The trial court properly denied defendant's pretrial motion for permission to question potential jurors in a capital sentencing proceeding regarding their beliefs about parole eligibility. The decision of *Simmons v. South Carolina*, —— U.S. —— (1994), is inapplicable where defendant remains eligible for parole if given a life sentence.

Am Jur 2d, Jury § 279.

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

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

7. Criminal Law § 1343 (NCI4th)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—constitutional instruction

The trial court's instruction on the (e)(9) "especially heinous, atrocious, or cruel" aggravating circumstance was not rendered

unconstitutionally vague and arbitrary by the court's use of the disjunctive with the narrowing phrases or by the inclusion of an instruction on "depravity" as requested by defendant, and the court's instruction in this case provided constitutionally sufficient guidance to the jury. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Appellate Review §§ 743, 744; Criminal Law §§ 598 et seq.

8. Criminal Law § 1338 (NCI4th)— capital sentencing—aggravating circumstance—murders to avoid apprehension for another murder—sufficiency of evidence

In a capital sentencing hearing for three first-degree murders, the evidence supported the trial court's submission of the (e)(4) aggravating circumstance that the last two murders were committed for the purpose of avoiding or preventing a lawful arrest where the jury could find from statements in defendant's confession that, after he killed and sexually assaulted the first victim, it occurred to him that there might be other people in the apartment; defendant looked around the apartment and discovered another female and a boy sleeping in a bedroom; and defendant killed the other female and the boy to eliminate potential witnesses against him for the first killing. N.C.G.S. § 15A-2000(e)(4).

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

9. Criminal Law §§ 1339, 1347 (NCI4th)— capital sentencing—aggravating circumstances—murder during burglary—course of conduct—same evidence not used for both

The trial court did not improperly permit the jury in a capital sentencing proceeding to "double count" two aggravating circumstances based upon the same evidence when it submitted the (e)(5) circumstance that each murder was committed while defendant was engaged in the commission of a burglary and the (e)(11) circumstance that each murder was part of a course of conduct involving violence against other persons where the (e)(5) circumstance was supported by evidence that defendant

broke into and entered the victims' apartment at night with the intent to commit a sexual offense, and the (e)(11) circumstance was supported by evidence that defendant murdered three victims, committed four first-degree sexual offenses, and committed attempted first-degree rape.

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

10. Criminal Law § 1336 (NCI4th)— capital sentencing—aggravating circumstances—use of same evidence not permitted—failure to instruct—no plain error

The trial court's failure to instruct the jury in a capital sentencing proceeding that it could not use the same evidence to support more than one aggravating circumstance could not have affected the outcome and was not plain error in light of the severity of the three murders for which defendant was being sentenced, defendant's commission of four sexual offenses, and the fact that there was independent evidence supporting each aggravating circumstance.

Am Jur 2d, Appellate Review §§ 773-775; Criminal Law §§ 598 et seq.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-*Gregg* cases. 67 ALR4th 942.

11. Criminal Law §§ 1338, 1347 (NCI4th)— capital sentencing—aggravating circumstances—course of conduct—avoiding arrest—same evidence not used for both

The trial court did not improperly permit the jury in a capital sentencing proceeding to "double count" two aggravating circumstances based upon the same evidence when it submitted the (e)(11) course of conduct aggravating circumstance and the (e)(4) circumstance that the murder was committed for the pur-

pose of avoiding or preventing a lawful arrest where the (e)(11) circumstance was supported by evidence that defendant killed three persons, there was plenary evidence to support the (e)(4) circumstance based upon defendant's motivation for killing the last two victims, and the two circumstances were thus supported by separate and independent evidence.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

12. Criminal Law § 1348 (NCI4th)— capital sentencing—instruction on mitigation

The trial court did not err by failing to give defendant's requested instruction in a capital sentencing proceeding that mitigation means "something . . . that might cause you to lessen or reduce [defendant's] punishment" since the pattern jury instruction given by the court that mitigation is "a fact or group of facts . . . which may be considered as extenuating or reducing the moral culpability of the killing, or making it less deserving of extreme punishment than other first degree murders" substantially conformed with defendant's proposed instruction. Furthermore, the trial court's instruction on mitigation did not unduly focus the jury's attention on the killing itself and preclude the jury from considering any aspect of defendant's character or background as a basis for a sentence less than death.

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

13. Criminal Law § 1348 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—uncontradicted evidence—failure to find mitigating value

Even if uncontradicted evidence supported nonstatutory mitigating circumstances submitted to the jury, defendant's constitutional rights were not violated by the jury's failure to find that those circumstances existed and had mitigating value.

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

14. Criminal Law § 1348 (NCI4th)— capital sentencing—three murders—mitigating circumstances—failure to repeat instructions for each victim

The trial court in a capital sentencing proceeding for three first-degree murders did not err by failing to repeat the full set of instructions on Issues Two, Three, and Four related to the finding and weighing of mitigating circumstances with respect to each victim where the mitigating circumstances for each victim were the same; the court gave complete instructions to the jury as to one victim and then instructed as to the differing aggravating circumstances that applied to each victim; all of the possible mitigating circumstances were listed on the Issues and Recommendation form as to each victim; at the conclusion of the instructions, the court reminded the jury that the complete instructions on Issues Two, Three, and Four applied to each victim; and nothing in the record shows that the jurors did not carefully consider the mitigating circumstances or that they were confused or misled by the charge. Furthermore, any error in the manner in which the court gave these instructions was invited error because defendant consented thereto.

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

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

15. Criminal Law § 1360 (NCI4th)— capital sentencing—jury's failure to find impaired capacity—no constitutional violation

The jury's failure to find the (f)(6) impaired capacity mitigating circumstance did not render the sentences of death imposed upon defendant unreliable and cruel or unusual punishment where the trial court instructed on this circumstance and permitted the jury to consider the evidence of impaired capacity offered by defendant. The jury was free to disbelieve the evidence or to conclude that the evidence was not convincing. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Appellate Review §§ 743, 744.

16. Jury § 219 (NCI4th)— capital sentencing—death penalty views—excusal for cause

The trial court in a capital sentencing proceeding did not err by excusing for cause three prospective jurors who stated unequivocally in response to the prosecutor's questions that he or she would be unable to follow the law and recommend a sentence of death even if that was what the facts and circumstances required.

Am Jur 2d, Jury § 279.

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

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

17. Jury § 262 (NCI4th)— peremptory challenges—death penalty views

Defendant's constitutional rights were not violated when the trial court allowed the prosecutor in a capital sentencing proceeding to peremptorily challenge several prospective jurors who showed reluctance about imposing the death penalty.

Am Jur 2d, Jury § 279.

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

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

18. Criminal Law § 1373 (NCI4th)— death sentences not disproportionate

Sentences of death imposed upon defendant for three first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases where defendant beat all three victims to death with a bowling pin; the jury found the course of conduct aggravating circumstance for each murder and that each murder was committed while defendant was engaged in a first-degree burglary; the jury found as an aggravating circumstance

for two of the murders that they were committed by defendant to avoid a lawful arrest; the jury found the especially heinous, atrocious, or cruel aggravating circumstance for the murders of the two female victims; defendant committed multiple sexual offenses against the two female victims; and defendant was also convicted of multiple counts of burglary and larceny.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Johnson (E. Lynn), J., at the 22 August 1994 Criminal Session of Superior Court, Cumberland County, upon pleas of guilty for three counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed was allowed on 7 August 1995. Heard in the Supreme Court 10 April 1996.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

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

ORR, Justice.

On 9 January 1992, defendant turned himself in to the Fayetteville Police Department, waived his rights, and gave a tape-recorded confession to Sergeant Jeff Stafford. During this confession, defendant admitted to being a "peeping Tom"; to breaking and entering the apartment of Judy Hudson on 29 July 1991 in the middle of the night; to beating to death with a bowling pin Ms. Hudson, her nineteen-year-old daughter, Chrystal Hudson, and her eleven-year-old son, Larry Hudson; to attempting to rape Chrystal Hudson; to sexually assaulting and anally and vaginally penetrating Ms. Hudson and Chrystal Hudson; to stealing cigarettes, money, and a cigarette lighter from two pocketbooks in the apartment; and to breaking into the apartment a second time to retrieve the bowling pin and a lightbulb that he had used to sexually assault Ms. Hudson.

Defendant was subsequently indicted for three counts of first-degree murder, two counts of first-degree burglary, one count of attempted first-degree rape, four counts of first-degree sexual offense, and two counts of felonious larceny. On 22 August 1994,

defendant pled guilty to all charges. After the presentation of evidence by the State regarding the basis for defendant's pleas, the court directed that with respect to one of the first-degree burglary counts, it would instead proceed on a charge of second-degree burglary based upon the evidence that at the time defendant entered the Hudsons' apartment, all victims were deceased.

The cases were joined for a capital sentencing hearing before a jury at the 22 August 1994 Criminal Session of Superior Court, Cumberland County. The jury recommended and the trial court imposed a sentence of death for each of the three first-degree murder convictions. Additionally, the trial court sentenced defendant to four consecutive terms of life imprisonment for the four counts of first-degree sexual offense, to a consecutive term of life imprisonment for the first-degree burglary conviction, to a consecutive term of forty years' imprisonment for the consolidated second-degree burglary and larceny convictions, and to a consecutive term of twenty years' imprisonment for the attempted first-degree rape conviction. The sentences of death were stayed on 23 September 1994, pending this appeal. Defendant's motion to bypass the Court of Appeals on all other convictions was allowed on 7 August 1995.

Defendant appeals to this Court, asserting seventeen assignments of error. For the reasons stated herein, we conclude that defendant's capital sentencing proceeding was free from prejudicial error and that defendant's sentences of death are not disproportionate.

During the capital sentencing proceeding, the State's evidence tended to show the following: Defendant, a soldier stationed at Fort Bragg, had a history of being a "peeping Tom." On the evening of 29 July 1991, defendant was "thinking along the lines of rape." After deciding not to rape a friend with whom he had eaten earlier in the evening, defendant drove past the Heather Ridge Apartments and decided to go there to "sneak a peek," to be a "Peeping Tom" and "watch when people take their clothes off[] or engage[] in sex." While walking around the complex, defendant saw light coming from a television in one of the apartments. He walked up to the sliding glass doors at the back of the apartment, looked inside, and saw Chrystal Hudson lying on the couch asleep. Defendant stated that as he was looking at her, he was "getting all worked up" because he "had already planned on doing that other chick and it was already in my mind." Defendant saw a bowling pin outside the apartment by the sliding glass door and picked it up. He stated that he just "wanted the

sex" and "did not want to hurt anybody," but he had the bowling pin in his hand and "knew [he] was going to kill her."

Defendant walked into the apartment, went over to the young girl, and ran his hand across her thigh and buttocks. Chrystal Hudson woke up startled, and before she could yell, defendant "clubbed her on her head." She kept trying to scream, so defendant "just kept bopping her . . . like 70 times." When Chrystal stopped trying to scream, defendant bit her breasts, performed oral sex on her, and attempted to penetrate her vaginally but was unable to get an erection.

Defendant stated that it suddenly occurred to him that "somebody else might have come in the apartment," that "there might be some other people in the house," that "maybe there was a boyfriend in the bedroom," that "maybe she was married." While looking around the apartment, defendant saw "another female and a boy" lying in bed sleeping. Defendant stated that he thought, "Oh, man, if they wake up and see me in here, I still haven't had my jocks off yet." He went back to the living room to get the bowling pin and walked back to the bedroom where he had noticed the two individuals who were sleeping. Defendant "slugged them" with the bowling pin, hitting Ms. Hudson about eight times and Larry four or five times. Defendant stated that neither of them ever made a sound.

After he had killed Ms. Hudson, defendant performed oral sex on her and then took a lightbulb out of a lamp in the bedroom and used it to vaginally penetrate her. Defendant stated that he "just went back and forth between the chicks," engaging in perverted sexual acts.

Knowing that he did not want "to pay the price" for what he had done and that he would need to go AWOL, defendant began looking for money. He saw two purses on the dining room table. Defendant dumped the purses on the table and took a one-dollar bill, a cigarette lighter, and some cigarettes.

After defendant left the apartment and went back to his car, he realized that he had left the lightbulb and the bowling pin in the apartment. He went back to the apartment and retrieved the lightbulb and bowling pin. Concerned about the presence of his fingerprints in the apartment, defendant wiped off the screen door and the faucet in the bathroom where he had washed his hands.

At approximately 4:00 a.m., defendant arrived at his barracks. On 30 July 1991, the day after the murders, defendant went AWOL. On 9 January 1992, defendant turned himself in to the Fayetteville Police

Department and confessed to murdering the Hudsons. Defendant agreed to provide bite-mark, blood, saliva, and hair samples to the police. The results of the laboratory analyses of the samples confirmed that defendant had committed the crimes charged.

Defendant's evidence during the capital sentencing proceeding tended to show that defendant's childhood was marked by poverty, paternal abandonment, and maternal neglect. Defendant was obsessed with sin, heaven, and hell, having been raised by his mother, who was a member of the Pentecostal Church. Testimony by defendant's brother and sister tended to show that defendant was a caring, loving person; that he was an alcoholic; and that the murders were "grossly" out of character for him. Two expert witnesses, Dr. Janet Vogelsang, a psychotherapist, and Dr. Stephen Alexander, a forensic criminal psychologist, testified that defendant knew that what he had done was wrong, that defendant tends to exaggerate his childhood problems, that he relies on alcohol to cope, that he suffers from compulsive voyeurism, and that he has average or slightly above average intelligence. They also testified that although he is a "disturbed individual" and is at "high risk" to engage in criminal behavior because of his mother's extreme religious views, maternal neglect, his drinking, and his lack of coping skills, defendant has no diagnosed mental disease, mental illness, or defect.

I.

[1] In his first assignment of error, defendant contends that the trial court improperly required defense counsel to proceed with calling expert psychological witnesses, in contravention of defendant's wishes.

After accepting defendant's pleas of guilty, the trial court began a discussion with the State and defense counsel regarding which of defendant's pretrial motions needed to be heard prior to jury selection for the capital sentencing proceeding. During this discussion, the following exchange occurred:

> MR. MCGLOTHLIN [defense counsel]: . . . Mr. Wilkinson has certain desires on phase two which are inconsistent with what Mr. Carter and I feel [is] our responsibility as his lawyers.
>
> . . . [H]e instructed us at one time this past weekend not to put on certain evidence we had, certain witnesses. We have expert witnesses.

And we would like some guidance from the Court as to what our responsibilities are when our client instructs us in this matter . . . .

. . . .

THE COURT: . . . Your attorneys have indicated that you have certain desires in respect to a sentencing proceeding. What are those at this time?

THE DEFENDANT: Your Honor, first of all I would like to have these extra motions dismissed. I just don't see the need for it. I'm guilty of what I'm charged with. I've already said that.

. . . I just want to make it as simple as possible and as easy as possible and get this over with as quickly as possible. And I do want my lawyers to represent me. And I think they've done a good job. As far as the sentencing, I would just like to—

THE COURT: Well, at this time I'm going to enter a general directive to your attorneys to simply proceed to offer the evidence that they have developed in respect to any issues on mitigating circumstances that appear of record. They have a duty both as . . . attorney[s] and as officers of the Court to at least do that on your behalf . . . . [F]or our present purposes, I'm going to direct them to proceed with the evidence they've developed. All right, sir?

THE DEFENDANT: All right. Thank you.

Defendant first argues that the trial court did not exercise its discretion in considering whether to grant defendant's request under the alleged belief that it was a legal requirement for defense counsel to present evidence in mitigation. N.C.G.S. § 15A-2000(a) provides in pertinent part as follows:

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

. . . .

(3) Evidence may be presented as to any matter that the *court* deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). *Any evidence which the court deems to have probative value may be received.*

N.C.G.S. § 15A-2000(a)(1), (3) (Supp. 1995) (emphasis added). In *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996), this Court stated that

> the United States Supreme Court concluded that the Eighth and Fourteenth Amendments dictate that a jury in a capital case must "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *[Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)]; *accord* N.C.G.S. § 15A-2000(a)(3) (Supp. 1994); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995), *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). "[H]owever, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation." *Pinch*, 306 N.C. at 19, 292 S.E.2d at 219.

Walls, 342 N.C. at 51, 463 S.E.2d at 764-65.

Defendant also argues that he was entitled to control tactical decisions related to the capital sentencing proceeding. We stated in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), that it is only "when counsel and a fully informed criminal defendant client reach an absolute impasse as to . . . tactical decisions[] [that] the client's wishes must control." *Id.* at 404, 407 S.E.2d at 189. In *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996), the defendant claimed that the trial court erred by allowing defense counsel to make important tactical decisions about his case without allowing defendant's wishes to control, in violation of the holding in *Ali*. This Court rejected the defendant's contention, finding nothing in the record to indicate an "absolute impasse" between the defendant and his counsel regarding trial tactics. We noted in *McCarver* that "[a]t no time did defendant voice any complaints to the trial court as to the tactics of his defense team." *Id.* at 385, 462 S.E.2d at 36.

Similarly, here, there is no indication in the record of an absolute impasse. Defendant told the trial court what his wishes were regard-

ing the sentencing proceeding but claimed no conflict with his attorneys. There was nothing in the trial court's response that was inconsistent with defendant's concerns. At no time did defendant express a desire to represent himself or to proceed without his attorneys. In fact, defendant clearly told the trial court that he wanted his attorneys to represent him and that he thought they were doing a good job. Defendant never told the trial court that he did not want to present any evidence in mitigation. The trial court asked defendant if the trial court's response to the matter was "all right" with defendant, and defendant voiced his satisfaction with the trial court's resolution of the situation.

The trial court balanced defendant's desire to be represented by counsel and the obligation of defense counsel to effectively represent their client. Moreover, in the absence of "an absolute impasse," strategic and tactical decisions regarding what witnesses to call are within the province of counsel after consultation with the client. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. This assignment of error is overruled.

II.

[2] In his next assignment of error, defendant contends that the trial court committed plain error when it gave defendant's proposed instruction on "depravity." He argues that the instruction, "although a reasonably accurate dictionary definition of the word 'depravity,' had the effect of informing jurors that, because the defendant was unable to control his conduct, the killings were depraved and, therefore heinous, atrocious or cruel." He asserts that the instruction turned what should have been a mitigating circumstance—lack of control—into an aggravating circumstance, thereby violating his state and federal constitutional rights to due process of law and to be free from cruel and unusual punishment.

In the instant case, defendant requested that the trial court instruct the jury on depravity of mind, and the trial court did so in conjunction with the pattern jury instruction for the (e)(9) "especially heinous, atrocious or cruel" aggravating circumstance. N.C.G.S. § 15A-2000(e)(9). The trial court instructed in pertinent part as follows:

> I instruct you that the term "depravity" means a state of mind which is without moral restraint and control. Certainly every criminal offense, and in particular, each first degree murder

> demonstrates a lack of moral restraint or control. In order for the jury to consider whether the depravity of the defendant constitutes a circumstance which makes a murder especially heinous, atrocious, or cruel to the extent it constitutes an aggravating factor, you must find beyond a reasonable doubt that each—that the lack of moral restraint and control was in excess of the lack of restraint and control in an ordinary premeditated murder and rises to a level where the indignities, fear, and suffering of the victim during the course of the causing of death actually provide a gratification and satisfaction to the defendant.

See N.C.P.I.—Crim. 150.10(9) (1995).

Defense counsel had submitted a proposed instruction in writing which referred to "a circumstance which makes a murder *unusually* heinous, atrocious, or cruel." The trial court substituted the word "especially" for "unusually" to ensure that the "heinous, atrocious, or cruel" aggravating circumstance was labeled as provided in N.C.G.S. § 15A-2000(e)(9). Defendant stated that he had no objection to this change.

On appeal, defendant now contends that the trial court's modification of his proposed instruction had the effect of telling the jury that the inability to control one's moral conduct because of an emotional disturbance is an aggravating circumstance, thereby undercutting the (f)(2) "mental or emotional disturbance" and the (f)(6) "diminished capacity" mitigating circumstances. N.C.G.S. § 15A-2000(f)(2), (6).

Defendant did not challenge the instruction or the constitutionality of the instruction at trial. Consequently, the trial court did not have the opportunity to consider or rule on these issues. N.C. R. App. P. 10(b)(1). Generally, under these circumstances, defendant would be required to show plain error on appeal. N.C. R. App. P. 10(c)(4). However, this Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests. "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. Basden*, 339 N.C. 288, 303, 451 S.E.2d 238, 246 (1994) ("Having invited the error, defendant cannot now claim on appeal that he was prejudiced by the instruction."), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 845 (1995); *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992) ("[A]ny error in this regard was invited error which

does not entitle the defendant to any relief and of which he will not be heard to complain on appeal.").

Here, defendant requested an instruction on depravity and agreed to the substitution of the word "especially" for the word "unusually." "Since [defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error. Therefore, this assignment is without merit and is overruled." *McPhail*, 329 N.C. at 644, 406 S.E.2d at 596-97.

III.

[3] Next, defendant assigns as error the trial court's acceptance of defendant's guilty pleas to four counts of first-degree sexual offense and one count of attempted first-degree rape. After the State presented the factual bases for defendant's guilty pleas, defense counsel asked the trial court not to accept defendant's pleas of guilty to the sexual offense and attempted rape charges because of an alleged insufficient showing by the State that the victims were alive when they were sexually assaulted.

We note that, on appeal, defendant does not contend that he did not commit the acts necessary to constitute first-degree sexual offense or attempted first-degree rape. Instead, he contends that because there was no evidence that the victims were alive at the time defendant committed all of the acts, the evidence was insufficient to support pleas of guilty for the crimes of first-degree sexual offense and attempted first-degree rape. Defendant maintains that first-degree sexual offense and attempted first-degree rape are committed "only if the victim is alive at the time of the sexual conduct" because the essence of the crimes of first-degree rape and first-degree sexual offense is the assaultive character of the acts required to commit those offenses. *See State v. Zuniga*, 320 N.C. 233, 260, 357 S.E.2d 898, 915 (noting that the " 'essence' of forcible rape is the assault"), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

In response, the State, relying on *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991), contends that the sexual acts were committed during a continuous transaction that began when the victims were alive. Therefore, the evidence was sufficient to support defendant's pleas of guilty to and convictions of first-degree sexual offense and attempted first-degree rape.

"A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith another person by force and against

the will of the other person and . . . [i]nflicts serious personal injury upon the victim or another person . . . ." N.C.G.S. § 14-27.2(a)(2)(b) (Supp. 1995). "A person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim or another person . . . ." N.C.G.S. § 14-27.4(a)(2)(b) (Supp. 1995). The term "sexual act" is defined as "cunnilingus, fellatio, anilingus, and anal intercourse" or "the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C.G.S. § 14-27.1(4) (1988). "Bites to the breast do not fall within this definition." *Thomas*, 329 N.C. at 434, 407 S.E.2d at 149.

As the State correctly points out, this Court has considered and rejected defendant's position in *Thomas*. *Id.* at 433-36, 407 S.E.2d at 148-50. In *Thomas*, the State's evidence tended to show that the victim was alive when her breasts were bitten but probably was dead when defendant inserted a telephone into her vagina. The chief medical examiner testified that, in his opinion, " 'it was somewhat more probable that she was dead than alive' when the telephone was inserted in her vagina." *Id.* at 434, 407 S.E.2d at 149. The medical examiner testified that he "could not be certain whether she was dead or alive at that time, 'but to me the medical aspects of the evidence were a little more for her being dead at the time she received that.' " *Id.*

Under N.C.G.S. § 15A-1022(c), a "judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C.G.S. § 15A-1022(c) (Supp. 1995).

> "The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty . . . ." *State v. Dickens, supra*, 299 N.C. [76,] 79, 261 S.E.2d [183,] 185-86 [(1980)]. That which he does consider . . . must appear in the record, so that an appellate court can determine whether the plea has been properly accepted.

State v. Sinclair, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980).

However, in *Thomas*, we stated as follows:

> In the case *sub judice*[,] it is unnecessary for us to decide whether the evidence was sufficient to allow a reasonable inference that the victim was alive when the sexual offense as defined in our statutes was committed. Because the sexual act was com-

mitted during a continuous transaction that began when the victim was alive, we conclude the evidence was sufficient to support defendant's conviction for first-degree sexual offense. This Court, on numerous occasions, has held that to support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.

. . . .

This Court has for many years applied the same doctrine to sexual offense and murder occurring in a continuous chain of events. In *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), we upheld defendant's conviction for first-degree murder committed during the perpetration of sexual offense—repeatedly forcing a mop handle into a woman's vagina after beating her, resulting in her death. We held as follows: "It is immaterial whether the felony occurred prior to or immediately after the killing so long as it is part of a series of incidents which form one continuous transaction." *Id.* at 67, 301 S.E.2d at 348.

. . . While the first-degree sexual offense (the insertion of the receiver into her vagina) could have occurred before or after the victim's death, clearly, it occurred near the time of the victim's final demise during a continuous transaction.

The precise timing of the insertion of the telephone receiver into the victim's vagina is irrelevant if it occurred during a continuous transaction. All of the evidence clearly suggest[s] that the sexual offense and the death of the victim were "so connected as to form a continuous chain of events." *[State v.] Fields*, 315 N.C. [191,] 202, 337 S.E.2d [518,] 525 [(1985)].

Thomas, 329 N.C. at 434-35, 436, 407 S.E.2d at 149, 150.

Similarly, in the case of *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), this Court upheld the defendant's felony murder conviction based upon the underlying felony of first-degree rape after autopsy evidence showed that "[t]he bruises to [the victim's] vagina were inflicted within a half hour prior to death or within a few minutes after death." *Id.* at 100, 261 S.E.2d at 117.

In this case, the State's evidence tended to show that the investigators found Chrystal Hudson's body lying face down on the sofa.

She was nude except for her underpants, which had been pulled down around her legs. There was a shirt at the foot of the sofa. Judy Hudson was found by investigators lying face down on the floor of her bedroom; her head was resting on a pair of underpants. She was nude except for a yellow T-shirt that had been pulled above her breasts. There were blood smears on her breasts, thighs, sides, and legs. Both Chrystal and Judy Hudson had suffered blunt-force injuries to the face and head, bruises, and lacerations. Chrystal Hudson had bite marks on her back, buttocks, and right nipple. Dr. John Butts, chief medical examiner for the State of North Carolina, testified as follows:

> Q. Dr. Butts, with respect to the bite marks, is there any indication as to whether those bite marks were inflicted pre- or post-mortem?
>
> A. They are consistent with being inflicted in a peri-mortem interval. I couldn't say necessarily just before or just after, but around the time of death.
>
> . . . .
>
> Q. The bruising that you noted on the shoulder, hands, and arm areas, did that appear to be peri-mortem to you?
>
> A. There was bruising present indicative that the person was alive in my opinion at the time those bruises were received.

Dr. Butts further testified that the "defensive wounds" to Chrystal's hands and arms would not cause her to lose consciousness and would not be fatal; however,

> any one of [the wounds inflicted upon her head] could have caused unconsciousness . . . . A number of the injuries to the head could have been fatal. But certainly the one to the left side of the head which caused extensive laceration, bruising, and the damage to the brain would have been most likely to be the most fatal wound.

In summary, in the case at bar, there was sufficient evidence that the crimes of attempted first-degree rape and first-degree sexual offense to which defendant pled guilty were "committed in conjunction with the murder as part of a continuous chain of events, forming one continuous transaction." *Thomas*, 329 N.C. at 436, 407 S.E.2d at 150. This assignment of error is overruled.

IV.

[4] Next, defendant assigns as plain error the trial court's instruction to the jury on the (f)(2) mitigating circumstance that the murder was "committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). The trial court instructed the jury as follows:

> Consider 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 to, 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 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 the defendant suffered from voyeurism and that as a result, the defendant was under the influence of mental and emotional disturbance when he killed the victim.

Defendant contends that the instruction improperly limited the scope of the (f)(2) mitigating circumstance to a consideration of voyeurism.

We note at the outset that, at the charge conference, defendant agreed with the trial court's proposed instruction on the mental or emotional disturbance mitigating circumstance. The following exchange took place between the parties and the trial court:

> THE COURT: There is an additional statutory mitigating circumstance that, despite the cross-examination of the State, that the murder was committed while the defendant was under the influence of mental or emotional disturbance, that is, voyeurism. Do you want me to submit that one, Mr. McGlothlin?
>
> MR. MCGLOTHLIN: Yes.

In *State v. Harris*, 338 N.C. 129, 449 S.E.2d 371 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 752 (1995), the defendant argued

that it was error for the trial court to instruct the jury that the defendant was required to prove both the disease of alcoholism and that the defendant was intoxicated at the time of the crime in order for the jury to find the mitigating circumstance that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. There, we stated, "[T]he defendant, through his attorney, agreed at the charge conference that the court would charge on this feature of the case as it did. If there was error in the charge, it was invited error and we shall not review it." *Id.* at 150, 449 S.E.2d at 380. Likewise, because defendant agreed with the trial court's proposed instruction and confirmed his desire to have the mental or emotional disturbance mitigating circumstance submitted to the jury in the language suggested by the trial court, we shall not review it.

In addition, the transcript shows that defense counsel stated in his closing argument regarding the (f)(2) mitigating circumstance that "[defendant's] emotional psychological disturbance was voyeurism." At no time did defense counsel contend that defendant was under the influence of any other mental or emotional disturbance when he committed these crimes. " '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.' " *Benson*, 323 N.C. at 322, 372 S.E.2d at 519 (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

Moreover, the evidence at trial supported the instruction as given. Dr. Stephen Alexander testified that defendant was a disturbed individual who suffered from compulsive voyeurism. He also testified that at the time defendant committed the crimes, he was legally sane. On cross-examination, Dr. Alexander agreed that defendant had no diagnosable disease, mental illness, or defect. Defendant's other expert witness, Dr. Janet Vogelsang, also testified to defendant's problem with voyeurism but diagnosed no mental disease or defect.

Finally, 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), we held that the trial court's instruction did not improperly limit consideration of the mental or emotional disturbance mitigating circumstance to brain damage in light of language included in the instruction that " '[i]t is enough that the defendant's mind or emotions were disturbed, from any cause.' " *Id.* at 419, 417 S.E.2d at 782. Likewise, the trial court's instruction in the instant case expressly directed the jury that in order

to find this mitigating circumstance, "it is enough that the defendant's mind or emotions were disturbed from any cause." Thus, this instruction clearly did not prevent the jury from considering any evidence tending to support this mitigating circumstance. This assignment of error is overruled.

V.

[5] In defendant's next assignment of error, he contends that the trial court committed plain error in not instructing the jury on the legal definition of first-degree sexual offense. Here, defendant contends that the trial court should have instructed the jury on the elements of first-degree sexual offense when it gave the instruction for the (e)(5) aggravating circumstance that the murder was "committed while the defendant was engaged . . . in the commission of . . . a . . . burglary." N.C.G.S. § 15A-2000(e)(5). The trial court instructed the jury as follows:

> Turning to the first aggravating circumstance, which reads, was this murder committed by the defendant while the defendant was engaged in the commission of first degree burglary?
>
> . . . [F]irst degree burglary is the breaking and entering of an occupied dwelling house of another without his consent in the nighttime *with the intent to commit first degree sexual offense.*
>
> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant had broken and entered an occupied dwelling house without the consent of the tenant during the nighttime, and *at that time intended to commit first degree sexual offense*, you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after this aggravating circumstance on the issues and recommendation form. If you do not so find or have a reasonable doubt as to one or more of those things, you will not find this aggravating circumstance and would so indicate by having your foreman write "no" in that space.

(Emphasis added.)

Defendant made no objection at trial to the instructions given, thus waiving the issue on appeal. N.C. R. App. P. 10(b)(2). Defendant, therefore, contends that the lack of an instruction defining "sexual offense" constituted "plain error." We disagree.

" '[T]he plain error rule . . . is always to be applied cautiously,' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)), and "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court," *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977), *quoted in Odom*, 307 N.C. at 661, 300 S.E.2d at 378.

At the outset, we note that defendant contends that the burglary instruction unconstitutionally reduced the State's burden of proving the elements of first-degree sexual offense and the (e)(5) aggravating circumstance. Upon review of the record, we note that no constitutional issues were presented, argued, or decided by the trial court with respect to whether the instruction unconstitutionally lightened the State's burden of proof. As we have consistently held,

> this Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *City of Durham v. Manson*, 285 N.C. 741, 208 S.E.2d 662 (1974); *State v. Jones*, 242 N.C. 563, 89 S.E.2d 129 (1955); *[Motor Inn] Management, Inc. v. [Irvin-Fuller] Development Co.*, 46 N.C. App. 707, 266 S.E.2d 368, *disc. rev. denied and appeal dismissed*, 301 N.C. 93[, 273 S.E.2d 299] (1980). This is in accord with decisions of the United States Supreme Court. *E.g., Irvine v. California*, 347 U.S. 128, 98 L. Ed. 561 (1954); *Edelman v. California*, 344 U.S. 357, 97 L. Ed. 387 (1953).

State v. Creason, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985).

Here, defendant raises the issue of the constitutionality of the instruction for the first time on appeal. Because he did not ask the trial court to pass upon the constitutional issue, we decline to do so now. *Id.*

Next, defendant argues that the jury was allowed to speculate on what constituted a first-degree sexual offense and that, without the sexual offense instruction, there was no basis for the jury to determine from the burglary instruction given by the trial court if the (e)(5) aggravating circumstance existed. We find defendant's argument misguided because the State was not required to prove that defendant actually committed the felony of first-degree sexual offense, just that

when he broke into and entered the Hudsons' home, he *intended* to commit a sexual offense.

"Intent to commit a felony is an essential element of burglary." *State v. Faircloth*, 297 N.C. 388, 395, 255 S.E.2d 366, 370 (1979). However,

> "actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary." *State v. Tippett*, 270 N.C. 588, 155 S.E.2d 269 (1967). Moreover, when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.

Faircloth, 297 N.C. at 395, 255 S.E.2d at 370.

Before we turn to the evidence of defendant's intent, as the State argues, "it is important to consider this instruction in the context of the entire proceeding." Defendant pled guilty to one count of first-degree burglary, three counts of first-degree murder, four counts of first-degree sexual offense, one count of attempted first-degree rape, one count of second-degree burglary, and two counts of felonious larceny. The trial court, in its preliminary instructions to the jury, informed the prospective jurors, without objection by defendant, that defendant had pled guilty to all of the charged offenses. Thus, the trial court had already found a factual basis for defendant's pleas of guilty.

Turning now to the evidence of defendant's intent, we hold that the evidence presented during the capital sentencing proceeding only served to further support defendant's guilt of the sexual offenses and his underlying intent to commit such offenses at the time he broke into and entered the Hudsons' apartment. Dr. Vogelsang and Dr. Alexander both testified that the purpose for which defendant entered the Hudson home was to have sex. In addition, the State presented defendant's statement to law enforcement officers in which defendant said that he entered the apartment because he "wanted the sex."

Because there was no issue regarding defendant's intent when he entered the Hudsons' home, the phrase "sexual offense" did not have to be defined. *See State v. Robbins*, 99 N.C. App. 75, 79, 392 S.E.2d 449, 452 (where the evidence raised an issue regarding defendant's intent when he entered the victim's house, trial court's failure to

define rape in burglary instruction held no plain error based upon review of the entire record), *aff'd*, 327 N.C. 628, 398 S.E.2d 331 (1990) (*per curiam*); *see also State v. Simpson*, 299 N.C. 377, 384, 261 S.E.2d 661, 665 (1980) (trial court's failure to define larceny in burglary instruction held no error where there was no direct issue or contention that the taking was for some purpose other than a felonious intent to steal). This assignment of error is overruled.

VI.

[6] By his next assignment of error, defendant contends that the trial court erred by denying his pretrial motion to conduct *voir dire* regarding prospective jurors' beliefs about parole eligibility. This Court has consistently decided this issue against defendant's position. *State v. Chandler*, 342 N.C. 742, 749-50, 467 S.E.2d 636, 640 (1996); *State v. Powell*, 340 N.C. 674, 687-88, 459 S.E.2d 219, 225 (1995), *cert. denied*, — U.S. —, 133 L. Ed. 2d 688 (1996); *State v. Price*, 337 N.C. 756, 762-63, 448 S.E.2d 827, 831 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 224 (1995); *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995). "As we explained in *Payne*, the recent decision in *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), does not affect our position on this issue when, as here, the defendant remains eligible for parole if given a life sentence. *Payne*, 337 N.C. at 516-17, 448 S.E.2d at 99-100." *Chandler*, 342 N.C. at 750, 467 S.E.2d at 640. We continue to adhere to our prior rulings on this issue. This assignment of error is overruled.

VII.

[7] Defendant next contends that the trial court's instruction on the (e)(9) "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague, offering no guidance to the sentencing jury. N.C.G.S. § 15A-2000(e)(9). Specifically, defendant argues that the limiting instruction set forth below was insufficient to guide the jurors in their decision-making:

> This murder must have been especially heinous, atrocious, or cruel. And not every murder is especially so. For this murder to have been especially heinous, atrocious, or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. Or this murder must have been a conscienceless or pitiless crime which was unnecessarily tortuous [sic] to the victim.

Defendant also argues that the use of the disjunctive with the narrowing phrases is fatal to the constitutionality of the instruction. Finally, defendant argues that the inclusion of the instruction on "depravity," which was requested by defendant, rendered the instruction vague and arbitrary.

This Court has previously addressed and rejected each of these contentions. *See State v. Sexton*, 336 N.C. 321, 372-73, 444 S.E.2d 879, 908, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994); *State v. Syriani*, 333 N.C. 350, 390-92, 428 S.E.2d 118, 140-41, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Defendant has offered no new argument persuading this Court to overturn established precedent. "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." *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 140-41. This assignment of error is overruled.

VIII.

[8] Defendant also assigns error to the trial court's submission of the (e)(4) aggravating circumstance that, with respect to Judy and Larry Hudson, defendant committed their murders "for the purpose of avoiding or preventing a lawful arrest." N.C.G.S. § 15A-2000(e)(4). Defendant contends that this aggravating circumstance was not supported by the evidence. However, our review of the record discloses that the circumstances leading up to the murders of Judy and Larry Hudson based upon defendant's statement to police investigators support the trial court's submission of this aggravating circumstance to the jury.

> This Court has approved the submission of G.S. § 15A-2000(e)(4) to the jury when there is evidence that one of the purposes behind the killing was the desire by the defendant to avoid detection and apprehension of some underlying crime as opposed to submitting it only if the killing took place *during* an escape from custody of lawful arrest situations. In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 [1979], we held that evidence of a death is alone insufficient for submission to the jury of this factor and that such evidence must be coupled with "evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime." *Id.* at 27, 257

S.E.2d at 586. *See State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 [(1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980)].

State v. Oliver, 309 N.C. 326, 350, 307 S.E.2d 304, 320 (1983).

In the case at bar, there is plenary evidence tending to show that defendant's motivation for killing Judy and Larry Hudson was based upon his "desire to avoid subsequent detection and apprehension," *Goodman*, 298 N.C. at 27, 257 S.E.2d at 586, for killing Chrystal Hudson. After defendant killed Chrystal Hudson and realized that she was dead, he began sexually assaulting her. Defendant stated in his confession to the police that

> [a]fter that, after I was doing that for awhile, I realized[] that there might be some other people in the house. I didn't think of that, maybe she was married, maybe there was a boyfriend in the bedroom, I wasn't thinking. So I went into the bedroom and I saw the other female, and a boy. I was drunk, and I didn't realize how high I was. I didn't think about that, I slugged them both.
>
> . . . .
>
> I just went in [Judy Hudson's bedroom], and I saw them, and I was like[,] oh man, if they wake up and see me in here, I still haven't had my jocks off yet. So, I just slugged them too.

Later in his confession, defendant stated that after he was unable to penetrate Chrystal Hudson, "the thought hit me, man, somebody else might have come in the apartment, so I started looking around." He looked in one bedroom and saw that no one was there. When defendant saw Judy and Larry Hudson in the other bedroom, he went back to the living room and got the bowling pin. Defendant told investigators that he hit Judy Hudson enough times to kill her because he figured "the other girl" was dead. Defendant left the apartment after committing the murders and then realized that he had left the lightbulb that he had used to sexually assault Judy Hudson and the bowling pin that he had used to murder the three victims in the apartment. During his confession, defendant stated:

> I went all the way back to my car, hopped the fence, went through the backyard, hopped the other fence, when I got there, I was thinking so I had to go all the way back, so I went back through the back, hopped the fence, went back through the backyard, went back[,] looked around, found [the bowling pin] I left

laying [sic] in the bedroom on the bed. And the light bulb was in the chair.

Sgt. Calfee: Why did you go back and get it for [sic]?

[Defendant]: Fingerprints.

Sgt. Calfee: Were you conscience [sic] of fingerprints the whole time you were in there.

[Defendant]: Kind of. I remember being in the bathroom and I washed my hands, [a]nd I think I washed off the faucets. And then on the way out, I wasn't really, but I took my shirt and I wiped the screen door . . . .

All of this evidence establishes that defendant intended to and took every precaution possible to avoid detection and arrest for his crimes. It is entirely reasonable that a jury could infer that defendant's purpose was to eliminate two potential witnesses against him. Having recounted the evidence supporting submission of the (e)(4) aggravating circumstance that the killings of Judy Hudson and Larry Hudson were committed for the purpose of avoiding a lawful arrest, the trial court properly submitted this aggravating circumstance. Thus, this assignment of error is overruled.

IX.

[9] By defendant's next assignment of error, defendant contends that the trial court erred in submitting and allowing the jury to consider and find two aggravating circumstances based upon the same evidence. Specifically, defendant contends that the trial court should not have instructed the jury on the (e)(5) aggravating circumstance that the murder was "committed while the defendant was engaged . . . in the commission of . . . a . . . burglary," N.C.G.S. § 15A-2000(e)(5), *and* the (e)(11) aggravating circumstance that the "murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons," N.C.G.S. § 15A-2000(e)(11). Defendant argues that for each murder, the evidence supporting the (e)(11) course of conduct aggravating circumstance was duplicative of evidence supporting the (e)(5) aggravating circumstance. According to defendant in his brief, "It would be reasonable for one or more jurors to consider the burglary to be a 'crime of violence' that supported both of these aggravating circumstances." Defendant also contends that the trial court's

instruction on the (e)(11) course of conduct aggravating circumstance failed to inform the jury that it could not use the same evidence to find more than one aggravating circumstance.

Defendant made no objection to the submission of either aggravating circumstance at trial and raised no constitutional claim regarding "double counting" at trial. Consequently, the trial court did not have the opportunity to consider or rule on these issues. N.C. R. App. P. 10(b)(1). Generally, under these circumstances, defendant would be required to show plain error. However, Rule 10(c)(4) provides:

> In criminal cases, a question which was not preserved by objection as 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. Rule 10(c)(4) (emphasis added). Because defendant did not object at trial and then failed to allege plain error on appeal, 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). Notwithstanding defendant's failure to preserve this issue for appeal, "in the exercise of our discretion under Rule 2 of the Rules of Appellate Procedure and following the precedent of this Court electing to review unpreserved assignments of error in capital cases," *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996), we elect to consider defendant's contention under a plain error analysis.

It is error to submit two aggravating circumstances resting on the same evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987). "The submission of more than one aggravating circumstance supported by the same evidence 'amount[s] to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant.' " *State v. Conaway*, 339 N.C. 487, 530, 453 S.E.2d 824, 851 (quoting *Goodman*, 298 N.C. at 29, 257 S.E.2d at 587), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995). "Where, however, there is separate evidence supporting each aggravating circumstance, the trial court may submit both 'even though the evidence supporting each may overlap.' " *State v. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994) (quoting *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993)), *cert. denied*, —— U.S.——, 133 L. Ed. 2d 60 (1995).

"Aggravating circumstances are not considered redundant absent a *complete* overlap in the evidence supporting them." *Moseley*, 338 N.C. at 54, 449 S.E.2d at 444 (emphasis added).

This Court has previously upheld the submission of both the (e)(5) and (e)(11) aggravating circumstances. *E.g.*, *State v. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 355-56 (1993) (course of conduct aggravating circumstance did not rely on proof of burglary when the evidence tended to show that the defendant broke into the home of one of the victims, shot one victim, and then committed acts of violence against two others by shooting and killing them), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). Furthermore, the trial court's submission of the (e)(5) and (e)(11) aggravating circumstances for each murder in the instance case did not violate *Quesinberry* because there was substantial, separate evidence supporting each of these aggravating circumstances. Submission of the (e)(5) aggravating circumstance was based upon evidence that tended to show that defendant broke into and entered the Hudsons' apartment in the middle of the night with the intent to commit a sexual offense. The evidence supporting the (e)(11) course of conduct aggravating circumstance is entirely different from the evidence recited above supporting the (e)(5) aggravating circumstance. The evidence that defendant engaged in a course of conduct involving violence to another person or persons was that defendant murdered three victims, committed four first-degree sexual offenses, and committed attempted first-degree rape. "Evidence that a defendant killed more than one victim is sufficient to support the submission of the course of conduct aggravating circumstance." *Conaway*, 339 N.C. at 530, 453 S.E.2d at 851.

In light of the number of obviously violent crimes defendant committed after he broke into and entered the Hudsons' apartment, it is unlikely that the jury considered burglary to be a "crime of violence." There was independent evidence to support each aggravating circumstance. *See Rouse*, 339 N.C. at 99, 451 S.E.2d at 564.

[10] Defendant also contends that the trial court erred in not instructing the jury that it could not consider the same evidence in support of both aggravating circumstances. "This Court has held that the trial court should instruct the jury that it cannot use the same evidence as a basis for finding more than one aggravating circumstance." *Conaway*, 339 N.C. at 530, 453 S.E.2d at 851. Defendant, however, did not request such an instruction, failed to object to the trial court's failure to so instruct at trial, and did not allege plain error on appeal.

Again, in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure, we review for plain error, which requires defendant to show that the error was so fundamental that another result would probably have been obtained absent the error. *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

We conclude that the trial court's failure to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance does not rise to the level of plain error. In light of the severity of the murders, the commission of sexual offenses, and the fact that there was independent evidence supporting each aggravating circumstance, defendant has not shown that any error would have affected the outcome. This assignment of error is therefore overruled.

X.

[11] In a similar assignment of error, defendant contends that the trial court erred by submitting and allowing the jury to consider the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), as to the murders of Judy Hudson and Larry Hudson *and* the aggravating circumstance that the murders were "committed for the purpose of avoiding or preventing a lawful arrest," N.C.G.S. § 15A-2000(e)(4). As in the previous issue, defendant argues that the trial court's submission of both aggravating circumstances allowed the jury to unconstitutionally "double count" aggravating circumstances based upon the same evidence.

Defendant did not object to the trial court's submission of the course of conduct aggravating circumstance, but did object to the submission of the (e)(4) aggravating circumstance. His objection, however, was based upon his contention that the evidence did not support its submission, not because the circumstance was based upon the same evidence as the course of conduct aggravating circumstance. Because we are obligated to independently assure that the record supports the aggravating circumstances submitted during trial, we will, in our discretion, review this issue for plain error.

Defendant relies on *State v. Howell*, 335 N.C. 457, 439 S.E.2d 116 (1994). There, this Court stated that the trial court should not have submitted the aggravating circumstances that (1) the murder was committed while defendant was engaged in the commission of burglary, and (2) the murder was committed for pecuniary gain. This decision was based upon our conclusion that the two aggravating cir-

cumstances were supported by the same evidence because the undisputed evidence established that the motive for the burglary was pecuniary gain. *Id.* at 474-75, 439 S.E.2d at 126. We find defendant's reliance on *Howell* to support his position misplaced.

It is well settled that " 'there is no error in submitting multiple aggravating circumstances provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished.' " *State v. Green*, 321 N.C. 594, 610, 365 S.E.2d 587, 596-97 (quoting *Hutchins*, 303 N.C. at 354, 279 S.E.2d at 808), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). "The circumstance of violent course of conduct directs the jury's attention to the factual circumstances of defendant's crimes." *Id.* at 610, 365 S.E.2d at 597. However, "[t]he aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest force[s] the jury to weigh in the balance defendant's motivation in pursuing his course of conduct." *Hutchins*, 303 N.C. at 355, 279 S.E.2d at 809.

As we previously stated, submission of the (e)(11) course of conduct aggravating circumstance was supported by evidence that defendant killed more than one person. *Conaway*, 339 N.C. at 530, 453 S.E.2d at 851. Also as we have previously discussed, there was plenary evidence to support submission of the (e)(4) aggravating circumstance based upon defendant's motivation for killing Judy and Larry Hudson in order to "avoid subsequent detection and apprehension." *Goodman*, 298 N.C. at 27, 257 S.E.2d at 586.

Based upon the separate and independent evidence supporting each of these aggravating circumstances, the trial court did not err in submitting both of these aggravating circumstances. This assignment of error is overruled.

XI.

[12] Next, defendant assigns error to the trial court's denial of his motion for a special instruction on mitigation and its subsequent instruction to the jury on mitigation according to the North Carolina pattern jury instruction. Defendant claims that because " 'mitigation' is not a commonly-used word," the jurors needed a special instruction so that they would be able to understand the term. He argues that the instruction given by the trial court was not in "substantial conformity" with the one proposed by defendant because the jurors "would be no more likely to understand the meaning of the term 'extenuating'

than the term 'mitigating.' " He suggests that using the words "something . . . that might cause you to lessen or reduce Mr. Wilkinson's punishment" would communicate what the term "mitigation" means to the jury. Defendant also claims that the pattern jury instruction on mitigation focuses only on the circumstances of the crime and does not inform the jurors that they should also consider the characteristics of the criminal.

The trial court instructed the jury as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing, or making it less deserving of extreme punishment than other first degree murders.
>
> Our law identifies several possible mitigating circumstances. However, in considering issue two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value.
>
> The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence; that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists.

"It is well settled in this jurisdiction that in determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981). "It is [also] well settled that when a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, *the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith.*" *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992) (emphasis added).

Both parties acknowledge that defendant presented evidence that the jury could consider in mitigation. Defendant's evidence tended to

show that he had had little trouble with law enforcement in the past, that he grew up in an abusive and neglectful home, and that the crimes were out of character for him. Therefore, assuming, without deciding, that the proposed instruction was a correct statement of the law, resolution of the question before us focuses on whether the instruction given was in "substantial conformity" with the proposed instruction. We hold that it was.

As quoted above, the trial court instructed the jurors that "mitigation" is "a fact or group of facts . . . which may be considered as extenuating or *reducing the moral culpability of the killing, or making it less deserving of extreme punishment* than other first degree murders." (Emphasis added.) We find the language recommended in the pattern jury instruction to be virtually identical to and in "substantial conformity" with the language defendant proposed in his instruction.

Defendant further argues that by focusing the jury's attention on the killing itself, this instruction limited the jury's ability to consider defendant's character and background as a basis for a sentence less than death. In *Robinson*, 336 N.C. at 122, 443 S.E.2d at 328, this Court rejected similar challenges to this same definition of "mitigating." In *Robinson*, the jury was given virtually the same definition of a "mitigating circumstance" and was also further instructed to consider any aspect of the defendant's character and record and any circumstances of the murder that the defendant contended was a basis for a sentence less than death when determining mitigating circumstances. *Id.* at 122, 443 S.E.2d at 327. The *Robinson* jury was also further instructed to consider not only the statutory mitigating circumstances, but any others which it deemed to have mitigating value. This Court held that

> the instructions as given, which are virtually identical to the North Carolina Pattern Jury Instructions, are a correct statement of the law of mitigation. The instructions here are identical to those instructions that we held in *State v. Artis* to be "a correct statement of the law." 325 N.C. [278,] 326, 384 S.E.2d [470,] 497 [(1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)]. They did not preclude the jury from considering any aspect of defendant's character which he may have presented as a basis for a sentence less than death. Defendant has shown no basis for relief on this assignment of error.

Robinson, 336 N.C. at 122, 443 S.E.2d at 328; *see Conaway*, 339 N.C. at 534, 453 S.E.2d at 854. We conclude that the instruction given in the instant case is virtually identical to those upheld by this Court in *Robinson* and *Conaway*. The instruction did not preclude the jury from considering any aspect of defendant's character or background or any of the circumstances of the killing that defendant may have presented as a basis for a sentence less than death. This assignment of error is overruled.

XII.

[13] Defendant next assigns error to the jury's failure to find several nonstatutory mitigating circumstances. As to each murder, the trial court submitted fifteen nonstatutory mitigating circumstances. The jury found the existence of and mitigating value for two of the fifteen nonstatutory mitigating circumstances: (1) that "defendant confessed to the police authorities" for the murders under review, and (2) that "defendant voluntarily removed himself from society after the crimes by surrendering and confessing and then pleading guilty to all offenses." Of the remaining nonstatutory mitigating circumstances submitted, defendant challenges the jury's failure to find the following nonstatutory mitigating circumstances to exist and to have mitigating value: (1) that defendant grew up in a troubled and broken home, (2) that defendant was abused by his mother, (3) that defendant grew up as a neglected child, (4) that defendant's formative years were spent in a substantially economically deprived and loveless home, (5) that defendant had a good military record and that he enjoyed a reputation for being a law-abiding citizen in the military community, and (6) that defendant willingly assumed responsibility for the crimes and expressed remorse for his conduct.

Defendant contends that because there was uncontradicted evidence to support a finding by the jury of the challenged nonstatutory mitigating circumstances, the jury's failure to find any of these circumstances deprived him of his state and federal constitutional rights to be free from cruel or unusual punishment and to due process. He concedes that this issue has been decided against him by this Court, but argues that the Court's position is no longer valid in light of the decisions of *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989), and *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

This same issue raised by defendant in this case has been raised previously and rejected by this Court in *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d

478 (1996). In considering the defendant's claim in *Gregory* that "there is no constitutionally valid basis for treating nonstatutory mitigating circumstances any differently than statutory mitigating circumstances," this Court said:

> This Court rejected similar arguments to those raised by defendant in *State v. Williams*, 339 N.C. 1, 452 S.E.2d 245 [(1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 61 (1995)]. This Court considered both *Penry* and *McKoy* in reaching its conclusion that the pattern instructions for the consideration of nonstatutory mitigating circumstances are proper. This Court stated:
>
> > While a juror may not be precluded from considering evidence proffered by defendant as a basis for a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978); *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (198[2]); *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), a jury is not required to agree with a defendant that the evidence he proffers in mitigation is, in fact, mitigating, *Raulerson v. Wainwright*, 732 F.2d 803, 807, *reh'g denied*, 736 F.2d 1528 (11th Cir.), *cert. denied*, 469 U.S. 966, 83 L. Ed. 2d 302 (1984), unless the legislature has declared it to be mitigating as a matter of law. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated*, 494 U.S. [1022], 108 L. Ed. 2d 602 (1990), *on remand*, 327 N.C. 473, 397 S.E.2d 226 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991).
>
> *State v. Williams*, 339 N.C. at 43-44, 452 S.E.2d at 270-71.

Gregory, 340 N.C. at 420-21, 459 S.E.2d at 670.

Thus, this Court has considered defendant's position in light of *Penry* and *McKoy* and has overruled defendant's contentions. Defendant has offered no reason or basis for this Court to overrule its previous decision. This assignment of error is overruled.

XIII.

[14] Defendant next contends that the trial court committed plain error in violation of his state and federal constitutional rights by failing to repeat the full set of instructions on Issues Two, Three, and Four related to the finding of and weighing of mitigating circumstances with respect to each victim. He makes this assertion despite the fact that the instructions on Issues Two, Three, and Four were identical for each victim.

We note that defendant did not object to the charge as given by the trial court; in fact, our review of the transcript reveals that defendant, through his attorney, agreed at the charge conference to have the instruction given as it was. During the charge conference, the following exchange took place:

> THE COURT: All right. Let me ask you this, and then we'll stop: With the exception of the differences in the aggravating circumstances as they apply, noting that the defendant has objected, the charge to the jury will be identical as to the remaining issues. Your mitigators will be the same in each case. Whatever the charge is will be the same.
>
> What is the position of the defendant in particular in respect to if I give a comprehensive instruction as to the first issue, probably with Judy Hudson's matter, and only repeat the aggravating circumstances as they apply followed up by Chrystal Hudson and Larry Hudson—
>
> MR. CARTER: Rather than starting from the beginning with each one?
>
> THE COURT: No. I will give a complete instruction as to one of them, probably Judy Hudson, because she has a set of four aggravating circumstances. And give a complete instruction as to all the issues as to the first one. And then come back and give a complete set of instructions as to the aggravating circumstances as they apply to the next count, but ask the jury to recall the instructions as to issues two and three and four, as I have already fully instructed them. And then repeat the aggravating circumstances that apply to that particular defendant (sic) and ask them to recall the mitigating circumstances as I have instructed them. They're equally applicable in this case. I will give a full set of instructions, unless—but I would like the consent of the defendant to do it that way. The charge will be much shorter.
>
> MR. CARTER: That will be fine.
>
> THE COURT: And there's no reason, particularly, to repeat the mitigating circumstances in the entire charge. But I'll only do it if the defendant consents that way.
>
> MR. CARTER: We'll consent.

Although defendant labels this assignment of error as "plain error," it is actually invited error because, as the transcript reveals,

defendant consented to the manner in which the trial court gave the instructions to the jury. "The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). "If there was error in the charge, it was invited error and we shall not review it." *Harris*, 338 N.C. at 150, 449 S.E.2d at 380.

We note that "[t]he trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *Weddington*, 329 N.C. at 210, 404 S.E.2d at 677. The instructions were given in conformity with defendant's assent, and the manner in which the trial judge instructed the jury was not erroneous.

That notwithstanding, defendant can show no prejudice as a result of the manner in which the trial court instructed the jury. All of the possible mitigating circumstances are listed on the Issues and Recommendation as to Punishment forms as to each victim. The trial court gave complete instructions to the jury as to Judy Hudson and then only instructed as to the differing aggravating circumstances that applied to each victim. The trial court told the jury how the instructions would be done and explained the reasons for instructing in that manner. At the conclusion of the instructions, the trial court reminded the jury that the complete instruction on Issues Two, Three, and Four applied to all three victims. Thus, the trial court's instructions were complete, and there is nothing in the record to show that the jurors did not carefully consider the mitigating circumstances or that they were confused or misled by the charge. This assignment of error is overruled.

XIV.

[15] Next, defendant complains in this assignment of error that the jury's failure to find the (f)(6) statutory mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," N.C.G.S. § 15A-2000(f)(6), "render[s] the sentences of death unreliable and violative of defendant's constitutional right to be free from cruel or unusual punishment[]."

It is well settled that with respect to statutory mitigating circumstances, "the jury is free to disbelieve the evidence or to conclude

that the evidence is not convincing." *Rouse*, 339 N.C. at 108, 451 S.E.2d at 571. "The United States Supreme Court cases and our cases require merely that the sentencing jury not be precluded from considering evidence which may have mitigating value." *Id.* at 108, 451 S.E.2d at 570.

According to defendant, the evidence supporting the (f)(6) "diminished capacity" statutory mitigating circumstance showed that he was a compulsive voyeur under the influence of alcohol; that he was unable to resist the urge to "peep"; and that once he entered the Hudsons' apartment, he was unable to stop himself from committing the crimes. The trial court instructed jurors that they would find the (f)(6) mitigating circumstances "if you find that the defendant had drunk a sufficient quantity of alcohol, that the defendant was under the influence of that alcohol, and also suffered from voyeurism, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Thus, the jury was not precluded from considering the evidence of diminished capacity that defendant offered in mitigation; therefore, defendant has suffered no constitutional violation.

We note that defendant attempts also to argue that the trial court's instruction unconstitutionally restricted the jury's consideration of this mitigating circumstance. However, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." N.C. R. App. P. 10(a). Therefore, defendant has not properly presented this issue for appellate review because this issue bears no relation to the assignment of error set out in the record. This assignment of error is overruled.

XV.

[16] By his next assignment of error, defendant contends that the trial court erred in allowing death qualification by excusing for cause prospective jurors Latoya Johnson, John Harry, and Patricia Locklear, all of whom expressed during *voir dire* an unwillingness to impose the death penalty. He argues that there was an insufficient showing that these prospective jurors were not qualified to sit on the jury.

"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." *Conaway*, 339 N.C. at 511, 453 S.E.2d at 839. "A challenge for cause to an individual juror may be made by any party

on the ground that the juror . . . [a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (1988). "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.' " *State v. Green*, 336 N.C. 142, 158, 443 S.E.2d 14, 24 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994); *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 beliefs in deference to the rule of law.' " *Conaway*, 339 N.C. at 511, 453 S.E.2d at 839 (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)), *quoted in State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 907-08 (1993). However, "[w]e 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.' " *Green*, 336 N.C. at 159, 443 S.E.2d at 24 (quoting *Davis*, 325 N.C. at 624, 386 S.E.2d at 426) (alteration in original). "The ruling of the trial court will not be disturbed absent abuse of discretion." *Id.*

Here, the trial court did not abuse its discretion in excusing the prospective jurors for cause. Our review of the record indicates that each of the three prospective jurors excused for cause after answering the prosecutor's questions stated unequivocally that he or she would be unable to follow the law and recommend a sentence of death, even if that was what the facts and circumstances required. Defendant has pointed to nothing in the record to support his contention that "there was an insufficient showing that these jurors were not qualified to sit." Therefore, it was not error for the trial court to allow the State's challenges for cause of prospective jurors Johnson, Harry, and Locklear. This assignment of error is overruled.

XVI.

[17] In a related assignment of error, defendant contends that the trial court erred in allowing the prosecution to peremptorily chal-

lenge several prospective jurors who showed reluctance about imposing the death penalty, in violation of defendant's state and federal constitutional rights to a fair and impartial jury, to a jury selected from a fair cross-section of the community, and to be free from cruel and unusual punishment. He concedes that this Court has rejected his argument several times. *Conaway*, 339 N.C. at 512, 453 S.E.2d at 840; *State v. Jones*, 336 N.C. 229, 260, 443 S.E.2d 48, 56, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 423 (1994); *State v. Bacon*, 326 N.C. 404, 414, 390 S.E.2d 327, 333 (1990); *State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). Defendant has offered no basis for this Court to overrule its previous decisions. This assignment of error is overruled.

XVII.

[18] Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. 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 sentences of death were based; (2) whether the death sentences were entered under the influence of passion, prejudice, or other arbitrary considerations; and (3) whether the death sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

In this case, with respect to all of the murders, the jury found as aggravating circumstances that the murder was committed by the defendant while the defendant was engaged in the commission of first-degree burglary, N.C.G.S. § 15A-2000(e)(5), and that the murder was part of a course of conduct in which the defendant committed other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). In addition, with respect to the murders of Judy Hudson and Larry Hudson, the jury found as an aggravating circumstance that the murder was committed by the defendant for the purpose of avoiding a lawful arrest. N.C.G.S. § 15A-2000(e)(4). Finally, with respect to the murders of Judy Hudson and Chrystal Hudson, the jury found as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). We have thoroughly examined the record, transcripts, and briefs in the present case and conclude that the evidence fully supports all of the aggravating circumstances found by the jury. Further, we find no indication

that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

"In 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. Burke*, 343 N.C. 129, 162, 469 S.E.2d 901, 919 (1996). We have found the death penalty disproportionate in seven cases. *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. Most notably, in all the cases where the death sentence has been determined to be disproportionate, only one person has been murdered by the defendant. In contrast, this case involved a triple murder, multiple convictions of serious sexual offenses, and multiple convictions of burglary and larceny.

> It is also proper to compare this case to those where the death sentence was found proportionate. *[State v.] McCollum*, 334 N.C. [208,] 244, 433 S.E.2d [144,] 164 [(1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994)]. 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.*

Burke, 343 N.C. at 162, 469 S.E.2d at 918. This Court has upheld a death sentence when only the course of conduct aggravating circumstance has been found by the jury. This Court has also upheld death sentences when the only circumstance found was the especially heinous, atrocious, or cruel aggravating circumstance. *State v. Lynch*, 340 N.C. 435, 484, 459 S.E.2d 679, 705 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996); *see Syriani*, 333 N.C. 350, 428 S.E.2d 118; *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d

240 (1981). Moreover, "[t]his Court has held that the fact that a defendant is a multiple murderer stands as a 'heavy' factor against defendant when determining the proportionality of a death sentence." *Lynch*, 340 N.C. at 485, 459 S.E.2d at 705; *see State v. McHone*, 334 N.C. 627, 648, 435 S.E.2d 296, 308 (1993), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Robbins*, 319 N.C. 465, 529, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). "This Court has affirmed the death penalty in several cases involving death or serious injury to one or more persons other than the murder victim." *McHone*, 334 N.C. at 648, 435 S.E.2d at 308; *see Robbins*, 319 N.C. 465, 356 S.E.2d 279; *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *Pinch*, 306 N.C. 1, 292 S.E.2d 203; *Hutchins*, 303 N.C. 321, 279 S.E.2d 788.

In the present case, the evidence tended to show that, from the very beginning to its tragic end, defendant executed a deliberate and carefully thought-out plan to fulfill certain criminal intentions to satisfy his perverted lust; that he quickly recognized and adjusted to any new obstacles or barriers to his desired goals as such appeared; that he was aware of the legal implications of his various actions; and that he took special precautions against the possibility of being apprehended by the police, including the removal of the lightbulb, bowling pin, and his fingerprints from the bathroom faucet and the screen door. The murders generally indicate depravity of mind and inhumane cruelty; they were brutal, pitiless, and conscienceless.

After reviewing the cases, we conclude that based upon the particular aggravating circumstances found by the jury during the sentencing proceeding in the instant case, the death sentences imposed are not disproportionate. We also 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.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair capital sentencing proceeding, free from prejudicial error. After comparing this case to other 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 sentences were disproportionate or excessive.

Therefore, the sentences of death entered against defendant must be and are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN ROBERT ELLIOTT

No. 224A94

(Filed 6 September 1996)

1. **Jury § 123 (NCI4th)— capital murder—jury selection—whether a juror would stand up to other jurors—attempt to stake out jurors**

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding a question which seemed designed to determine how well prospective jurors would stand up to other jurors in the event of a split decision, which amounts to an impermissible "stake out."

Am Jur 2d, Jury §§ 189, 206, 208, 209.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

2. **Jury § 124 (NCI4th)— capital murder—jury selection—question as to whether juror would make up his own mind—improper**

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding the question "Will each of you make up your own mind about each and every aspect of this case?" In the context of this portion of defendant's *voir dire*, the excluded question may have had the tendency to suggest that jurors should make decisions without considering the opinions of other jurors. Furthermore, there was no prejudice in that the trial court permitted defendant to explore this panel's understanding of their right to reach their own opinions and each indicated an understanding that each juror has one vote, that no one juror's vote was stronger than any other, and

that each had a right to remain steadfast to his or her own resolve.

Am Jur 2d, Jury §§ 189, 206, 208, 209.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

3. Jury § 123 (NCI4th)— capital murder—jury selection—right of juror to stand by beliefs—attempt to stake out jurors

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding a question to a prospective juror where defendant asked whether the juror understood that while the law requires deliberation with other jurors, he has the right to stand by his beliefs, the juror replied affirmatively, and the court sustained the State's objection to whether the juror would stand by his beliefs. This question amounted to an impermissible attempt to "stake out" the prospective juror.

Am Jur 2d, Jury §§ 189, 206, 208, 209.

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. Jury § 123 (NCI4th)— capital murder—jury selection—presumption of innocence—attempt to stake out jurors

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by preventing defense counsel from asking prospective jurors whether they would "hold to" the presumption of innocence. The question may have suggested that jurors should do so without considering the evidence offered by the State to overcome the presumption; if so, the question amounted to an impermissible attempt to "stake out" the jurors.

Am Jur 2d, Jury §§ 189, 206, 208, 209.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

5. Jury § 124 (NCI4th)— capital murder—jury selection—defendant's attempt to define malice

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by not allowing defendant to explain malice to prospective jurors where defendant's attempt to define malice did not provide the jury with a complete statement of the law. It is well within the discretion of the court to prohibit counsel from instructing prospective jurors on the law during *voir dire.*

Am Jur 2d, Jury §§ 189, 205, 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.

6. Jury § 141 (NCI4th)— capital murder—jury selection—questions as to parole eligibility

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by denying defendant's pretrial motion to permit *voir dire* of prospective jurors on their perceptions of parole eligibility.

Am Jur 2d, Jury §§ 189, 205-208.

7. Criminal Law § 860 (NCI4th)— capital murder—jury selection—parole eligibility—motion to instruct denied

The trial court did not err in a first-degree murder prosecution by denying defendant's pretrial motion to instruct the jury on parole eligibility.

Am Jur 2d, Jury §§ 189, 205-208.

8. Jury § 148 (NCI4th)— capital murder—jury selection—whether juror could vote for sentence other than death

The trial court did not err during jury selection for a first-degree murder by disallowing questions asking a prospective juror whether he could think of any situation where he could vote to impose a sentence other than death for first-degree murder. The questions were an impermissible attempt to determine what kind of verdict he would render under certain circumstances.

Am Jur 2d, Jury §§ 189, 205-208.

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. Jury § 148 (NCI4th)— capital murder—jury selection—voir dire of prospective juror restricted—peremptory exercised—no prejudice

Defendant could not show prejudicial error during jury selection for a capital first-degree murder prosecution where defendant was permitted to ask a prospective juror whether she would automatically impose the death penalty, she answered by stating that she would follow the instructions given by the trial court, she stated that the fact that child abuse was involved would not change her answer, the court restricted further *voir dire*, defendant exercised a peremptory challenge, and defendant did not exhaust his peremptory challenges.

Am Jur 2d, Jury §§ 189, 205, 234, 235.

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

10. Homicide § 253 (NCI4th)— capital murder—child abuse—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence to support a verdict of guilty of first-degree murder based on premeditation and deliberation in a prosecution arising from the death of a two year old child named Brandie where the evidence showed that defendant, the boyfriend of Brandie's mother, became angry when Brandie soiled her pants; after cleaning and changing her he told her to assume a punishment position and went to the kitchen for a glass of water; Brandie was in the position with her head raised rather than down when defendant returned; and defendant grabbed Brandie by her hair and slammed her head to the floor six or seven times. The evidence that defendant became angry and went into the kitchen to get a glass of water after instructing Brandie to assume the punishment position and before grabbing her head and repeatedly slamming it to the floor permitted the jury to conclude that defendant formed the intent to kill and carried out that intent in a cool state of blood and not as a result of a violent passion attributable to sufficient provocation.

Am Jur 2d, Homicide §§ 228, 260.

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

11. Homicide § 446 (NCI4th)— capital murder—instructions—malice—use of hands or feet

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the court's instruction on malice where defendant contended that the instruction unconstitutionally reduced the State's burden of proof. Although malice is not implied when death ensues from an attack made with the hands or feet on a strong or mature person, death not ordinarily being caused by such an attack, this reasoning is inapplicable when a strong or mature person makes an attack by hands or feet alone upon a two-year-old child. The instruction here informed the jury that it could infer malice from an attack by hand alone when the attack was made by a strong or mature person upon a weaker or defenseless person, but did not require the jury to infer malice from the evidence.

Am Jur 2d, Homicide §§ 227, 265, 482, 483, 500, 509.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

Criminal liability of parent, teacher, or one in loco parentis for homicide by excessive or improper punishment inflicted on child. 89 ALR2d 417.

12. Homicide § 493 (NCI4th)— capital murder and felony child abuse—instructions—premeditation and deliberation—lack of provocation

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the court's instruction on premeditation and deliberation where defendant contended that the jury could have understood the instruction to express the trial court's opinion that the State had proven lack of provocation, but the instruction informed the jury that lack of provocation by the deceased is a circumstance which permits premeditation and deliberation to be inferred and did not suggest, and could not reasonably be understood to imply, the opinion that the State had proven lack of provocation.

Am Jur 2d, Homicide §§ 45, 52, 501, 508.

Instructions as to presumption of deliberation and premeditation. 96 ALR2d 1435.

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

13. **Homicide § 482.1 (NCI4th)— capital murder and felony child abuse—instructions—premeditation and deliberation—lack of provocation by victim**

There was no plain error in the trial court's instruction on premeditation and deliberation in a prosecution for capital first-degree murder and felony child abuse where defendant argued that the instruction, which was based upon the pattern jury instruction, improperly narrowed the scope of provocation by the deceased. The instruction required the State to prove lack of provocation by the deceased, did not permit the jury to infer premeditation and deliberation from lack of evidence of provocation, and was consistent with the Supreme Court's repeated statement that lack of provocation by the deceased is a circumstance that may be considered in determining whether a killing was done with premeditation and deliberation.

Am Jur 2d, Homicide §§ 45, 52, 483, 484.

Instructions as to presumption of deliberation and premeditation. 96 ALR2d 1435.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

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

14. **Homicide § 483 (NCI4th)—first-degree murder—instructions on premeditation and deliberation—killing of child**

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the trial court's instruction on premeditation and deliberation where defendant argued that the instruction improperly rendered any nonaccidental killing of a child a first-degree murder since a child is incapable of legal provocation, but the court did not instruct the jury that a child was incapable of provocation, and defendant argued

that the instruction erroneously informed the jury that deliberation means that defendant acted in a cool state of mind, but the instruction given was consistent with the pattern jury instructions and the North Carolina Supreme Court's definition of deliberation.

Am Jur 2d, Homicide §§ 45, 52, 483, 501.

Instructions as to presumption of deliberation and premeditation. 96 ALR2d 1435.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

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

15. Evidence and Witnesses § 2266 (NCI4th)— capital murder and felony child abuse—expert testimony—battered child syndrome

The trial court did not abuse its discretion in a prosecution for capital first-degree murder and felony child abuse by permitting the State to present to the jury testimony from an expert in pediatrics and child abuse with respect to battered child syndrome. The testimony was relevant to show that the child was killed by intentional means and to show premeditation and deliberation. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Expert and Opinion Evidence §§ 37, 179, 218; Homicide §§ 397, 398.

Admissibility of expert medical testimony on battered child syndrome. 98 ALR3d 306.

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

16. Homicide § 477 (NCI4th)— capital murder—absence of motive—instruction not given without request

There was no plain error in a capital prosecution for first-degree murder where defendant did not request and the court did not give an instruction that absence of a motive is a circumstance which could be considered in determining defendant's guilt or

innocence. The trial court is required to instruct on all substantial features of a case, but not on subordinate features in the absence of a special request. Motive is not an element of first-degree murder, nor is its absence a defense; the presence or absence of motive is merely a circumstance which may be considered in determining guilt or innocence.

Am Jur 2d, Homicide §§ 42, 280, 502.

Necessity that trial court charge upon motive in homicide case. 71 ALR2d 1025.

17. Criminal Law § 443 (NCI4th)— capital murder and felony child abuse—prosecutor's argument—what the victim would have been thinking

The trial court did not abuse its discretion by failing to intervene *ex mero motu* in a prosecution for capital first-degree murder and felony child abuse where defendant contended that the prosecutor asked the jurors to put themselves in the position of the victim, but the prosecutor's remarks described what the two-year-old victim may have been thinking as defendant beat her and did not ask the jurors to put themselves in her position. The argument was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom.

Am Jur 2d, Trial §§ 544, 545, 566, 649.

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

18. Criminal Law § 443 (NCI4th)— capital murder and felony child abuse—prosecutor's argument—advocate for victim

The trial court did not err by failing to intervene *ex mero motu* in a prosecution for capital first-degree murder and felony child abuse where defendant contended that the prosecutor argued that he was a representative of the victim, but the prosecutor's remarks only reminded the jury that he was an advocate for the State and the victim.

Am Jur 2d, Trial §§ 544, 545, 554, 555.

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

19. Criminal Law § 447 (NCI4th)— capital murder and felony child abuse—prosecutor's argument—fair trial for victim

The trial court did not err in a prosecution for capital first-degree murder and felony child abuse by not intervening *ex mero motu* when the prosecutor argued that the victim should receive a fair trial. The prosecutor had also told the jury that defendant should receive a fair trial; his subsequent statement amounted to nothing more than a request that the State be given equal consideration.

Am Jur 2d, Trial §§ 544, 545, 554, 555, 649.

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

20. Criminal Law § 463 (NCI4th)— capital murder and felony child abuse—prosecutor's argument—defendant's denial of killing

The trial court did not err in a prosecution for capital first-degree murder and felony child abuse by not intervening *ex mero motu* when the prosecutor argued that the jury should make the victim's life worth something and not let defendant get away with claiming before trial that her death was an accident. The argument was well-grounded in the record; defendant denied killing the victim prior to trial, stating that she sustained her injuries when she fell off a bed, and his testimony at trial admitting the killing came after extensive evidence which suggested that her injuries could not have been caused by a fall from her bed.

Am Jur 2d, Trial §§ 544, 545, 554, 555, 649.

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

21. Appeal and Error § 421 (NCI4th)— felony child abuse—motion to dismiss charge denied—no argument or authority supporting assignment of error—deemed abandoned

An assignment of error for which defendant did not make any argument or cite any authority was deemed abandoned.

Am Jur 2d, Trial §§ 473, 705-707.

Construction and application of provision of Rule 51 of Federal Rules of Civil Procedure requiring party objecting

to instructions or failure to give instruction to jury, to state "distinctly the matter to which he objects and the grounds for objections". 35 ALR Fed. 727.

22. Appeal and Error § 150 (NCI4th)— capital murder and felony child abuse—claim of double jeopardy—not preserved for appeal

An issue as to whether defendant's double jeopardy rights were violated when judgment was entered against him for both first-degree murder and felony child abuse was not preserved for appellate review where defendant did not object to the trial court's imposition of punishment for both convictions, did not make any motion to receive a ruling from the trial court as to the constitutionality of sentencing for both convictions, and did not assign error to the failure to dismiss the felony child abuse conviction.

Am Jur 2d, Criminal Law §§ 276, 277, 279; Trial § 707.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control. 75 ALR3d 933.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors— Supreme Court cases. 114 L. Ed. 2d 763.

23. Constitutional Law § 216.1 (NCI4th)— first-degree murder and felony child abuse—no double jeopardy violation

Assuming the issue had been preserved for appeal, double jeopardy did not preclude punishing defendant for felony child abuse and first-degree murder arising from the same conduct. A trial court in a single trial may impose cumulative punishments under the statutes where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes. Here the legislature expressly stated that felony child abuse is an offense additional to other criminal provisions and that it is not intended to preclude other sanctions. Moreover, felony child abuse is not a lesser included offense of murder; it requires the State to prove facts not required to prove murder and it addresses a distinct evil.

Am Jur 2d, Criminal Law §§ 276, 277, 279.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control. 75 ALR3d 933.

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

24. Criminal Law § 1345 (NCI4th)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—evidence sufficient

The trial court did not err in a capital sentencing proceeding by submitting the especially, heinous, atrocious or cruel aggravating circumstance where defendant grabbed the victim by the hair on the back of her head and slammed her head to the floor six or seven times, causing a massive head injury which led to her death; defendant continued to slap and hit the child in what he claimed was an effort to revive her; the beating left the victim with severe bruises on her legs, abdomen, back, buttocks, chest, shoulders, neck, face, and head; thirty percent of the victim's hair was forcefully ripped from her scalp; the victim attempted to put her arm around defendant's neck shortly after the beating, permitting the inference that she was conscious and in a great deal of pain at that time; the victim was two years old at the time of her death; defendant lived with the victim and her mother and had assumed a parental role in caring for the victim; and the victim's mother permitted defendant to discipline the victim and trusted defendant to take care of the victim while she was at work. This evidence permitted the jury to conclude that the killing would have been physically agonizing or conscienceless, pitiless, or unnecessarily torturous to the victim, and the victim's age and the existence of a parental relationship with defendant could also be considered. There was sufficient evidence to support a finding that the murder was especially heinous, atrocious or cruel.

Am Jur 2d, Criminal Law § 525; Homicide § 549.

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.

25. Criminal Law § 1343 (NCI4th)— capital sentencing—instructions—especially heinous, atrocious, or cruel aggravating circumstance

The trial court's instruction for the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding was not unconstitutionally vague.

Am Jur 2d, Criminal Law §§ 525, 536.

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

26. Criminal Law § 1343 (NCI4th)— capital sentencing—disparity in sentences—especially heinous, atrocious, or cruel aggravating circumstance instruction—not unconstitutional

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutional as applied to defendant in a prosecution for capital first-degree murder and felony child abuse despite defendant's argument that most killings of children by their parents are tried noncapitally and that there is no principled distinction between this case and numerous cases in which such conduct has been punished noncapitally. Disparity in sentences does not render this instruction unconstitutional as applied to defendant.

Am Jur 2d, Criminal Law §§ 535, 538; Homicide § 525.

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

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.

27. Criminal Law § 445 (NCI4th)— capital sentencing—prosecutor's argument—killing worst of the worst—not an expression of opinion

The trial court did not abuse its discretion by failing to intervene *ex mero motu* in a capital sentencing proceeding where the prosecutor argued that this killing was the "worst of the worst." The prosecutor did not state his personal opinion and merely

argued that the jury should conclude from the evidence that it should recommend a sentence of death.

Am Jur 2d, Trial §§ 648, 649.

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

28. Criminal Law § 456 (NCI4th)— capital sentencing—prosecutor's argument—killing worst of the worst—did not diminish juror's responsibility

A prosecutor's argument in a capital sentencing proceeding that this killing was the "worst of the worst" did not improperly diminish the jury's responsibility for recommending a sentence of death in violation of *Caldwell v. Mississippi*, 472 U.S. 320. The prosecutor's remarks did not tend to suggest that the responsibility for recommending a sentence of death rested elsewhere or that the jurors could rely on judicial or executive review to correct any errors in the jury's verdict.

Am Jur 2d, Trial §§ 648, 649.

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

29. Criminal Law § 450 (NCI4th)— capital sentencing—prosecutor's argument—killing worst of the worst—defendant not placed at unfair disadvantage

The trial court did not abuse its discretion by not intervening *ex mero motu* in a capital sentencing proceeding where the prosecutor argued that this killing was the "worst of the worst" on the ground that the argument placed defendant at an unfair disadvantage. The prosecutor's argument was reasonable in light of the evidence presented at trial.

Am Jur 2d, Trial §§ 648, 649.

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

30. Appeal and Error § 341 (NCI4th)— capital sentencing—prosecutor's argument—failure to assign error

Defendant did not assign error to the prosecutor's closing arguments involving the value of mitigating circumstances in a capital sentencing proceeding and they are therefore beyond the scope of review. N.C.R. App. P. 10(a).

Am Jur 2d, Trial §§ 533, 534, 706, 707.

Construction and application of provision of Rule 51 of Federal Rules of Civil Procedure requiring party objecting to instructions or failure to give instruction to jury, to state "distinctly the matter to which he objects and the grounds for objections". 35 ALR Fed. 727.

31. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's argument—balancing aggravating and mitigating circumstances

The trial court did not abuse its discretion by not intervening *ex mero motu* in a capital sentencing proceeding where defendant contended that the prosecutor's argument suggested that defendant was required to present sufficient evidence to convince the jury not to recommend death and that the jury should weigh mitigating circumstances against the value of the victim's life. Although defendant did not assign error and the argument was beyond the scope of appellate review, defendant would not be entitled to relief if the arguments were considered because, in context, the thrust of the prosecutor's argument was that the especially heinous, atrocious, or cruel nature of the killing justified imposing the death penalty. While it was improper to suggest that the jury should balance the mitigating circumstances against the victim's life, the remarks were not so grossly improper as to require the trial court to intervene *ex mero motu.*

Am Jur 2d, Trial §§ 554, 555.

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

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.

32. Criminal Law § 454 (NCI4th)— capital sentencing—prosecutor's arguments—no suggestion that death divinely required

A prosecutor's remarks in a capital sentencing hearing were not so grossly improper as to require intervention *ex mero motu* where defendant contended that the remarks constituted "theobabble" which suggested that the death penalty was divinely required to redeem or give value to the life of the victim. The prosecutor's remarks did not suggest that the law enforcement powers of the State were divinely inspired or ordained by God and did not improperly suggest that the death penalty was divinely required.

Am Jur 2d, Trial §§ 554, 555.

Propriety of reference, in instruction in criminal case, to jurors' duty to God. 39 ALR3d 1445.

33. Criminal Law § 442 (NCI4th)— capital sentencing—prosecutor's argument—jury as last link in law enforcement chain

The trial court did not abuse its discretion by not intervening *ex mero motu* in a prosecutor's argument in a capital sentencing proceeding where the prosecutor argued that the jury was the last link in the State's chain of law enforcement and that the law enforcement officers and the prosecutor had done all they could. It is improper to suggest that the jury is an arm of the State or the last link in the State's chain of law enforcement, but not so grossly improper as to require intervention *ex mero motu*. The essence of the prosecutor's argument was that defendant had committed a serious crime and that the time had come for the jury to make a decision in the case.

Am Jur 2d, Trial §§ 554, 555, 649.

34. Criminal Law § 461 (NCI4th)— capital sentencing—prosecutor's argument—supported by facts and inferences or not grossly improper

A prosecutor's argument in a capital sentencing hearing was not so grossly improper as to require intervention *ex mero motu* where defendant contended that there was no evidence to support the argument that the victim begged for her life and that the prosecutor referred to what the victim could not say. The prosecutor's argument related to the nature of defendant's crime and

was supported by facts in evidence and reasonable inferences therefrom. While there was no evidence suggesting that the victim begged for her life during the beating, the argument was not so grossly improper as to require the trial court to intervene.

Am Jur 2d, Trial §§ 554, 555, 649.

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

35. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstance—good employment record—not found

There was no error in a capital sentencing proceeding where the jury failed to find the nonstatutory mitigating circumstance that defendant had a good employment record. Defendant's evidence was contradicted by evidence that defendant was unemployed at the time of the murder, worked sporadically in the months preceding the murder, and had assaulted a supervisor in 1992. The jury either rejected the evidence of a good employment record or determined that this nonstatutory circumstance had no mitigating value.

Am Jur 2d, Trial § 841.

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

A sentence of death was not disproportionate where the evidence in the capital sentencing proceeding supported the especially heinous, atrocious, or cruel aggravating circumstance found by the jury; the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and, comparing defendant's case to similar cases in which the death penalty was imposed and considering both the crime and defendant, the penalty of death was not disproportionate or excessive as a matter of law. None of the cases found disproportionate involved the murder of a child and only two involved the especially heinous, atrocious, or cruel aggravating circumstance; both of those are easily distinguishable; although juries have returned sentences of life imprisonment in cases involving the murder of a child by a parent or adult caretaker, the fact that juries have recommended life imprisonment in factually similar cases is not alone dispositive; and this case is most analo-

gous to cases in which the death penalty was held not to be disproportionate.

Am Jur 2d, Criminal Law §§ 628, 627, 628; Homicide § 556.

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 a judgment imposing a sentence of death entered by Long (James M.), J., on 3 May 1994 in Superior Court, Davidson 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 felony child abuse was allowed on 17 April 1995. Heard in the Supreme Court 12 December 1995.

Michael F. Easley, Attorney General, by Gail E. Weis, Associate Attorney General, for the State.

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

PARKER, Justice.

Defendant John Robert Elliott was tried capitally on an indictment charging him with the first-degree murder of Brandie Jean Freeman ("Brandie"). The jury returned a verdict finding defendant guilty as charged based on premeditation and deliberation. The jury also found defendant guilty of felony child abuse. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the murder; and the trial court entered judgment accordingly. The trial court also sentenced defendant to a term of ten years' imprisonment for felony child abuse. For the reasons discussed herein, we conclude that the jury selection, guilt-innocence phase, and sentencing proceeding of defendant's trial were free from prejudicial error and that the death sentence is not disproportionate. Accordingly, we uphold defendant's conviction and sentence for first-degree murder and his conviction and sentence for felony child abuse.

Brandie Jean Freeman was two years old at the time of her death. Defendant was the boyfriend of Brandie's mother, Bobbie Linker.

Soon after moving into their home in November of 1992, defendant began taking care of Brandie while her mother was at work. Ms. Linker permitted defendant to discipline Brandie; and the evidence suggested that Brandie sustained bruises, black eyes, and other injuries while in defendant's care. After Ms. Linker became concerned that defendant was spanking Brandie too hard, defendant began using the "punishment position," a form of discipline described by witnesses as requiring Brandie to lie on her stomach with her arms and legs raised for ten to twenty minutes.

On the morning of 3 January 1993, Bobbie Linker went to work and left Brandie in defendant's care. Several hours later Brandie woke defendant and told him that she had "poopied" in her pants. This made defendant angry. Defendant cleaned and changed the victim and told her to assume the punishment position. Defendant went to the kitchen to get a glass of water for himself. When defendant returned Brandie was in the punishment position with her head raised. Defendant grabbed Brandie by the hair on the back of her head and slammed her head to the floor six or seven times.

Defendant asked the child if she was okay, and Brandie attempted to raise her arm and put it around defendant's neck. When defendant failed to get any further response from Brandie, he shook her, slapped her, and hit her in what he claimed was an effort to obtain a response. As part of this effort, defendant took Brandie to the bathroom, where he ran water over her and continued to hit and slap the child repeatedly.

At 11:45 a.m., forty-five minutes after slamming Brandie's head to the floor, defendant called Bobbie Linker and asked her if she could come home. Defendant explained that Brandie had "fallen again." When Ms. Linker arrived at her house, Brandie appeared lifeless. Defendant told Ms. Linker that Brandie had fallen off a bed.

Defendant and Ms. Linker drove Brandie to Rowan Memorial Hospital. Because of the severe nature of her injuries, Brandie was transferred to Baptist Hospital in Winston-Salem, where she died the following day.

Dr. David Skowronek, an expert in emergency medicine, treated Brandie in the emergency room at Rowan Memorial Hospital. Skowronek observed a severe head injury and saw bruises on Brandie's cheeks, eyes, pubic area, buttocks, feet, and the entire front of her chest. Skowronek testified that there was absolutely no way

that Brandie could have sustained her injuries merely by falling off a bed.

Dr. Sarah Sinal, an expert in pediatrics and child abuse, examined Brandie after her death. Sinal observed a massive head injury; bruises over the entire course of the body; a fracture of the left wrist; and a ruptured frenulum, the membrane that attaches the lip to the gum. Sinal noticed that a great deal of hair had been forcefully pulled from Brandie's head. Sinal testified that almost all Brandie's injuries would not occur in the course of a normal child's life without someone's knowing they had happened and that the injuries could not have been sustained by falling off a bed which was seventeen inches high. In Sinal's opinion the injuries suffered by Brandie were consistent with the "battered child syndrome." Sinal opined that many of the blows to the head would have been very painful and that Brandie was probably conscious if she was able to lift her arm in an attempt to put it around defendant's neck.

Dr. Donald Jason performed an autopsy on 5 January 1993. Jason observed a substantial, forceful, blunt-force injury to the head which required more than one blow. The cause of death was the massive head injury. Jason also found multiple injuries to Brandie's chest, back, buttocks, arms, and legs. Microscopic examination of Brandie's head revealed that thirty percent of Brandie's hair had been pulled from her scalp. Brandie's injuries were consistent with having her head slammed to the floor several times while lying in a prone position on the floor.

Defendant testified during the guilt-innocence phase. According to defendant Brandie woke him to tell him that she had "poopied" in her pants. Angry, defendant cleaned Brandie, changed her, and told her to get in the punishment position. Defendant went to the kitchen to get a drink of water. When he returned Brandie did not have her head down, so he grabbed her by the hair on the back of her head and pushed her head to the floor three or four times. Contradicting evidence offered by the State which suggested that he was "coming off crack" cocaine at the time of the killing, defendant stated that he did not use crack cocaine on the day of the killing.

During the sentencing proceeding the State initially relied on the evidence presented during the guilt-innocence phase.

Defendant presented evidence that he had no infractions at Central Prison, that his school records suggested no disciplinary

problems, and that he was a good employee. Defendant also presented numerous witnesses who testified to his good character, his loving relationships with family and friends, and his good relationship with Brandie.

Defendant also offered the testimony of Dr. John Warren, an expert in forensic psychology. Warren testified that defendant had substance abuse problems; that defendant's long-term use of marijuana and cocaine could cause him to be irritable; and that if defendant was "coming off crack" cocaine, his ability to conform his behavior to the dictates of the law could have been impaired.

In rebuttal the State presented the testimony of Oscar Edwards, who had been one of defendant's supervisors at Lothridge Plumbing Company. Edwards stated that on one occasion defendant cursed him, pushed him, and knocked his glasses off his head when he corrected defendant on the job.

Additional facts will be presented as necessary to address specific issues.

JURY SELECTION

By several assignments of error, defendant contends that the trial court abused its discretion by unduly restricting his *voir dire* of prospective jurors. "The *voir dire* of prospective jurors serves a twofold purpose: (i) to determine whether a basis for challenge for cause exists, and (ii) to enable counsel to intelligently exercise peremptory challenges." *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995), *cert. denied*, --- U.S. ---, 134 L. Ed. 2d 478 (1996). "Regulation of the manner and the extent of inquiries on *voir dire* rests largely in the trial court's discretion." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, --- U.S. ---, 130 L. Ed. 2d 547 (1994). "In order for the defendant to show reversible error, he must show that the trial court abused its discretion and that he was prejudiced thereby." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, --- U.S. ---, 132 L. Ed. 2d 873 (1995).

[1] Defendant argues that the trial court erred by sustaining objections to questions which inquired into the ability of prospective jurors to stand by their convictions during jury deliberations. In the first instance cited by defendant, the trial court sustained an objection to the form of the following question:

> In other words, if you believe something, you don't have to just change over because ten others did or nine voted a certain way. If you strongly believe in your heart that particular thing, that you can remain steadfast in that and will each of you do that particular thing?

"Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). "[S]uch questions tend to 'stake out' the juror and cause him to pledge himself to a future course of action." *Id.* In *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981), the defendant asked a question which required each prospective juror to assume that he had formed the opinion that the defendant was not guilty after the State presented all of its evidence. The defendant's question asked whether any juror would change his opinion simply because the eleven other jurors were of the opinion defendant was guilty. *Id.* at 118-19, 277 S.E.2d at 395. We concluded that this question could not reasonably be expected to result in an answer bearing on the qualification of the juror and that the question was designed to commit the juror to a fixed position in regard to the evidence. *Id.* A question which is designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to an impermissible "stake out." *State v. Syriani*, 333 N.C. 350, 374, 428 S.E.2d 118, 130, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). The excluded question in this case seems to be designed to determine how well prospective jurors would stand up to other jurors in the event of a split decision. For this reason the trial court did not abuse its discretion in sustaining the objection to the form of the question.

[2] Defendant's next question asked the following: "Will each of you make up your own mind about each and every aspect of this case?" The trial court sustained the State's objection to the form of this question. "[H]ypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed." *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. While each juror is required to make his or her own decisions about a case, each juror also has a duty to deliberate with other jurors with a view to reaching an agreement. *See* N.C.G.S. § 15A-1235(b) (1988). In the context of this portion of defendant's *voir dire*, the excluded question may have had the tendency to suggest that jurors should make decisions without considering the opin-

ions of other jurors. For this reason the trial court did not abuse its discretion in sustaining the objection to the form of defendant's question. Furthermore, a careful review of the transcript of the *voir dire* shows that the trial court permitted defendant to explore this panel of prospective jurors' understanding of their right to reach their own opinions. In response each prospective juror indicated he or she understood that each juror had one vote, that no one juror's vote was stronger than any other juror's vote, and that each juror had a right to remain steadfast to his or her own resolve about a particular issue. Accordingly, defendant cannot show any prejudicial error in the trial court's ruling.

[3] Defendant next argues that the trial court erred in restricting his *voir dire* of prospective juror Bryant. The following exchange occurred between defendant and Bryant:

> [D]o you understand . . . that while the law requires you to deliberate with the other jurors in order to try to reach a unanimous decision, that you do have the right to stand by your beliefs in this case?
>
> A. That's exactly right.
>
> Q. And you would do that?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

Bryant informed defendant that he understood his right to stand by his beliefs during jury deliberations. The question excluded by the court prevented defendant from asking Bryant whether he would do so in this case. This question amounted to an impermissible attempt to "stake out" the prospective juror. *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. Accordingly, the trial court did not abuse its discretion in sustaining the objection to the excluded question.

[4] Next, defendant argues that the trial court erred by preventing defense counsel from asking the prospective jurors whether they would "hold to" the presumption of innocence. The presumption of innocence "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin v. United States*, 156 U.S. 432, 459, 39 L. Ed. 481, 493 (1895), *quoted in State v. Marley*, 321 N.C. 415, 425, 364 S.E.2d 133, 139 (1988). The question asking prospective jurors whether they

would "hold to" the presumption of innocence may have suggested that jurors should do so without considering the evidence offered by the State to overcome the presumption. If so, the question amounted to an impermissible attempt to "stake out" the jurors. *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. For this reason we conclude that the trial court did not abuse its discretion in sustaining the objection. This assignment of error is overruled.

[5] Defendant next assigns as error the trial court's refusal to permit him to define first-degree murder or malice for prospective jurors. Defendant argues that a defendant has the right to inquire whether prospective jurors would have difficulty following the law and that a defendant must be able to ask questions which state the law in order to do this properly.

The trial court sustained an objection to defendant's attempt to inform the jury that first-degree murder

> is the killing of another human being with malice, which I think the judge will explain to you later is an evil intent, ill will—with malice with premeditation . . . and with deliberation.

Later, the trial court sustained an objection to defendant's attempt to define malice by stating that it generally "means with ill will." The trial court ruled that it would not allow defendant to explain malice to the prospective jurors and sustained the State's objections to further attempts by defendant during *voir dire* to define first-degree murder or malice.

"Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), *overruled on other grounds by State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337 (1965). Defendant's attempt to define malice as simply meaning ill will did not provide the jury with a complete statement of the law. Furthermore, it is well within the discretion of the trial court to prohibit counsel from instructing prospective jurors on the law during *voir dire*. *State v. Huffstetler*, 312 N.C. 92, 103, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Defendant did not ask the trial court to define first-degree murder or malice for the prospective jurors. After careful review of the transcript, we con-

clude that the trial court did not abuse its discretion by preventing defendant from doing so. This assignment of error is overruled.

[6] Defendant next contends that the trial court erred in denying defendant's pretrial motion to permit *voir dire* of prospective jurors on their perceptions of parole eligibility. Defendant's argument on this issue has previously been rejected by this Court. *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995). Since defendant would have been eligible for parole if given a life sentence, the decision in *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), does not affect our position on this issue. *Id.* at 516-17, 448 S.E.2d at 99-100. This assignment of error is overruled.

[7] Defendant also contends that the trial court erred by not granting defendant's pretrial motion to instruct the jury on parole eligibility. "This Court has consistently held that the possibility of parole is not a relevant issue during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding." *State v. Bacon*, 337 N.C. 66, 98, 446 S.E.2d 542, 558 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995). This assignment of error is overruled.

[8] Defendant next contends that the trial court erred by restricting defendant's *voir dire* of prospective jurors with respect to their ability to consider a sentence of life imprisonment. Defendant argues that by preventing defendant from asking the excluded questions, defendant's right to life-qualify the jury was improperly restricted. *See Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992); *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994). We conclude that defendant has failed to show any prejudicial error.

Defendant argues that the trial court erred by disallowing two questions asking prospective juror Bryant whether he could think of any situation where he could vote to impose a sentence other than death for first-degree murder. "Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980), *quoted in State v. Robinson*, 339 N.C. 263, 273, 451 S.E.2d 196, 202 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995). In *Robinson* the trial court sustained an objection to a question asking prospective jurors whether they could follow the trial court's instructions even though the defendant had

killed three people and had a previous conviction for first-degree murder. *Robinson*, 339 N.C. at 272, 451 S.E.2d at 202. The Court found that the defendant's question was "an improper attempt to 'stake out' the jurors as to their answers to legal questions before they are informed of legal principles applicable to their sentencing recommendation." *Id.* at 273, 451 S.E.2d at 202. In the present case we conclude that the questions asking prospective juror Bryant whether he could think of any situation where he could vote to impose a sentence other than death for first-degree murder were an impermissible attempt to determine what kind of verdict he would render under certain circumstances.

[9] Defendant also argues that the trial court erred by sustaining the State's objections to questions asked of prospective juror Legge. The transcript shows that defendant was permitted to ask Legge whether she would automatically impose the death penalty and that she answered by stating that she would follow the instructions given by the trial court. Legge stated that the fact that child abuse was involved would not change her answer. Defendant cannot show that any error in restricting further *voir dire* of Legge was prejudicial. Defendant exercised a peremptory challenge to excuse Legge. Furthermore, defendant did not exhaust his peremptory challenges in selecting the twelve jurors who decided his case. Accordingly, defendant cannot show any prejudicial error in the trial court's rulings restricting *voir dire* of prospective juror Legge. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[10] In his next assignment of error, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of first-degree murder on the grounds that there was insufficient evidence of specific intent to kill and insufficient evidence of deliberation. Defendant argues that he was provoked by Brandie's conduct and that he could not have formed a specific intent to kill in a cool state of blood.

> In ruling on a motion to dismiss a first-degree murder charge, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *State v. Jackson*, 317 N.C. 1, 22, 343 S.E.2d 814, 827 (1986), *judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Substantial evidence must be introduced tending to prove the essential elements of the crime

charged and that defendant was the perpetrator. *Id.* The evidence may contain contradictions or discrepancies; these are for the jury to resolve and do not require dismissal. *Id.* at 22-23, 343 S.E.2d at 827.

State v. Truesdale, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995).

First-degree murder "is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *Conner*, 335 N.C. at 635, 440 S.E.2d at 835-36. "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. "The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *State v. Thomas*, 332 N.C. 544, 560-61, 423 S.E.2d 75, 84 (1992).

"Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). In the present case the evidence tended to show that defendant grabbed the two-year-old victim by the hair on the back of her head and forcefully slammed her head to the floor six or seven times. Viewing this evidence in the light most favorable to the State, the jury could have concluded that defendant knew that this conduct would result in Brandie's death and that he intended to kill her. *See State v. Greene*, 332 N.C. 565, 572-73, 422 S.E.2d 730, 734 (1992).

The evidence was sufficient to permit the jury to conclude that defendant acted with deliberation. The evidence tended to show that defendant became angry when Brandie soiled her pants and failed to keep her head on the floor while in the punishment position. Defendant went into the kitchen to get a glass of water after instructing Brandie to assume the punishment position and before grabbing her head and repeatedly slamming it to the floor. This evidence, when viewed in the light most favorable to the State, permitted the jury to

conclude that defendant formed the intent to kill and carried out that intent in a cool state of blood and not as a result of a violent passion attributable to sufficient provocation. We conclude that the evidence was sufficient to support a verdict of guilty of first-degree murder based on premeditation and deliberation. This assignment of error is without merit.

[11] In his next assignment of error, defendant contends that the trial court committed plain error in its instruction on malice. After defining malice the trial court gave the following instruction:

> Malice may be implied from the evidence that the deceased's death resulted from an attack by hand alone without the use of other weapons when the attack was made by a strong or mature person upon a weaker or defenseless person.

Defendant contends that this instruction unconstitutionally reduced the State's burden of proof on malice. As defendant did not object to this instruction at trial, defendant must show plain error. "[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 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. We conclude that the trial court's instruction on malice did not constitute error, much less plain error.

Defendant argues that the instruction created a conclusive presumption of malice. The instruction informed the jury that it could infer malice from an attack by hand alone when the attack was made by a strong or mature person upon a weaker or defenseless person. This charge permitted the jury to infer malice from the evidence presented in this case but did not require the jury to do so.

Defendant further argues that it is unreasonable to infer malice from evidence that an adult attacked a child by hand alone. This Court has previously stated that malice may be inferred from the "willful blow by an adult on the head of an infant." *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 350 (1987); *accord State v. West*, 51 N.C. 505, 509 (1859); *State v. Sallie*, 13 N.C. App. 499, 510-12, 186

S.E.2d 667, 674-75, *cert. denied*, 281 N.C. 316, 188 S.E.2d 900 (1972). Malice is not implied when death ensues from an attack made with the hands or feet on a strong or mature person, death not ordinarily being caused by such an attack. *See West*, 51 N.C. at 509; *Sallie*, 13 N.C. App. at 510-11, 186 S.E.2d at 674-75. However, this reasoning is inapplicable when a strong or mature person makes an attack by hands or feet alone upon a two-year-old child. Such an attack is reasonably likely to result in death or serious bodily injury.

In *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983), the Court stated that

> [t]he fact that a defendant struck a person with his hand or kicked a person [with his feet] and proximately caused that person's death would not support either a presumption of malice as a matter of law or an inference of malice as a matter of fact unless the defendant was then using his hands or feet as deadly weapons.

Id. at 524, 308 S.E.2d at 323. The evidence in *Lang* tended to show that the victim, an adult woman, was intoxicated at the time the defendant and another adult man kicked her with their feet and attacked her with their hands. Defendant also cut the victim with a knife, and his accomplice hit her with a baseball bat. *Id.* at 526, 308 S.E.2d at 324. The trial court gave the following instruction, which the Court determined to be prejudicial error:

> If the state proves beyond a reasonable doubt, or if it's admitted that the defendant intentionally kicked, cut or struck [the victim], thereby proximately causing [the victim's] death, you may infer first that the killing was unlawful and second, that it was done with malice. But, you are not compelled to do so. You may consider this along with other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

Id. at 524, 308 S.E.2d at 323. We stated that the trial court could have instructed the jury, on the facts of that case, that the jury could infer malice if it found "from the evidence and beyond a reasonable doubt that the defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons.*" *Id.* at 526-27, 308 S.E.2d at 325.

The instruction given in the present case is distinguishable from the instruction given in *Lang* by the fact that it required the jury to

find that "the attack was made by a strong or mature person upon a weaker or defenseless person." While the evidence in *Lang* suggested that defendant was an adult and that the victim was severely intoxicated at the time she was killed, the instruction given by the trial court permitted the jury to infer malice simply from the evidence that the defendant kicked or struck the victim. The instruction in *Lang* neither required the jury to find that the defendant used his hands, fists, or feet as deadly weapons nor required the jury to find that "the attack was made by a strong or mature person upon a weaker or defenseless person."

We conclude that defendant has failed to show any error, much less plain error, in the trial court's instruction on malice. Accordingly, this assignment of error is overruled.

[12] Defendant next contends that the trial court's instruction on premeditation and deliberation constituted plain error. The trial court gave the following instruction:

> Fourth, the State must prove beyond a reasonable doubt that the defendant acted with premeditation. That is, that he formed the intent to kill Brandie Freeman over some period of time, however short, before he acted.
>
> Fifth, the State must prove beyond a reasonable doubt that the defendant acted with deliberation, which means that he acted, that is, he must have 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. I instruct you, members of the jury, that neither premeditation nor deliberation are usually susceptible of direct proof. They must be proved by proof of circumstances from which they may be inferred, such as the lack of provocation by the deceased, conduct of the defendant before, during and after the killing, any brutal or vicious circumstances of the killing or the manner in which or the means by which the killing was done.

Defendant first argues that the jury could have understood the instruction to express the trial court's opinion that the State had proven "lack of provocation." The instruction informed the jury that lack of provocation by the deceased is a circumstance which, if

shown to exist, permits premeditation and deliberation to be inferred. *See State v. Leach*, 340 N.C. 236, 241, 456 S.E.2d 785, 788-89 (1995). The instruction did not suggest, and could not be reasonably understood to imply, that the trial court was of the opinion that the State had proven lack of provocation.

[13] Defendant next argues that the instruction was flawed in that it permitted the jury to convict defendant based upon lack of evidence of provocation and improperly narrowed the scope to lack of provocation "by the deceased." The instruction given by the trial court is based upon the pattern jury instructions. N.C.P.I.—Crim. 206.11 (1994). The instruction requires the State to prove lack of provocation by the deceased and does not permit the jury to infer premeditation and deliberation from lack of evidence of provocation. Furthermore, this instruction is consistent with this Court's repeated statement that lack of provocation by the deceased is a circumstance that may be considered in determining whether a killing was done with premeditation and deliberation. *See, e.g., State v. Alston*, 341 N.C. 198, 245, 461 S.E.2d 687, 713 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996); *Truesdale*, 340 N.C. at 234-35, 456 S.E.2d at 302; *Brown*, 315 N.C. at 59, 337 S.E.2d at 823.

[14] Defendant also argues that the instruction improperly renders any nonaccidental killing of a child a first-degree murder since a child is incapable of "legal" provocation. This argument has no merit in this case. The trial court did not instruct the jury that a child was incapable of provocation.

Defendant further argues that the instruction erroneously informed the jury that deliberation means that defendant "acted while he was in a cool state of mind." Defendant argues that defendant must have been in a cool state of mind when he formed the intent to kill. "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Conner*, 335 N.C. at 635, 440 S.E.2d at 836. The trial court's instruction is consistent with the pattern jury instructions and our definition of deliberation. We conclude that defendant has failed to show any plain error in the trial court's instruction on premeditation and deliberation. Accordingly, this assignment of error is overruled.

[15] By his next assignment of error, defendant contends that the trial court erred in denying defendant's pretrial motion to exclude the

testimony of Dr. Sarah Sinal with respect to the "battered child syndrome." Defendant argues that Sinal's testimony was irrelevant and unfairly prejudicial. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). This Court has consistently stated that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). We conclude that the trial court did not abuse its discretion by permitting Sinal to give opinion testimony with respect to the injuries incurred by the victim.

Sinal, who was qualified as an expert in pediatrics and child abuse, gave extensive testimony with respect to the nature and extent of Brandie's injuries. Sinal testified that most of the injuries would not ordinarily be sustained in the course of a normal child's life and that the injuries could not have resulted from an accidental fall from a bed. Sinal further testified that all of Brandie's injuries were consistent with the battered child syndrome.

This Court has previously approved the admission of expert testimony with respect to the battered child syndrome. *State v. Wilkerson*, 295 N.C. 559, 568-71, 247 S.E.2d 905, 911-12 (1978). Evidence demonstrating the battered child syndrome " 'simply indicates that a child found with [certain injuries] has not suffered those injuries by accidental means.' " *Id.* at 570, 247 S.E.2d at 911 (quoting *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971)). "When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the per-

son who might have inflicted those injuries." *Estelle v. McGuire*, 502 U.S. 62, 68, 116 L. Ed. 2d 385, 396 (1991).

In the present case Sinal's testimony was relevant to show that Brandie was killed by intentional means. Sinal's testimony with respect to the number, nature, and extent of Brandie's injuries was also relevant to show premeditation and deliberation. We conclude that Sinal's testimony was relevant and that the trial court did not abuse its discretion under Rule 403 in permitting the State to present this evidence to the jury. Accordingly, this assignment of error is overruled.

[16] Defendant next contends that the trial court committed plain error by failing to instruct the jury that absence of motive is a circumstance which could be considered in determining defendant's guilt or innocence. The trial court is required to instruct the jury on all substantial features of a case. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). "In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case." *State v. Lester*, 289 N.C. 239, 243, 221 S.E.2d 268, 271 (1976). Motive is not an element of first-degree murder, nor is its absence a defense. *State v. Gainey*, 343 N.C. 79, 84, 468 S.E.2d 227, 230 (1996); *State v. Van Landingham*, 283 N.C. 589, 600, 197 S.E.2d 539, 546 (1973). The presence or absence of motive is merely a circumstance which may be considered in determining guilt or innocence in a criminal case. *Van Landingham*, 283 N.C. at 600, 197 S.E.2d at 546. We conclude that absence of motive is a subordinate feature of a first-degree murder case. Accordingly, the trial court did not err in failing to instruct the jury on motive in the absence of a request from defendant. This assignment of error is overruled.

[17] Defendant next contends that the trial court erred by permitting the prosecutor to make certain arguments at the close of the guilt-innocence phase of the trial.

> As defendant failed to object to any of these arguments at trial, they are reviewable only to determine whether they were so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the errors. *State v. Sexton*, 336 N.C. 321, 349, 444 S.E.2d 879, 895, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 429 (1994). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was

prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

Gregory, 340 N.C. at 424, 459 S.E.2d at 672.

Defendant first contends that the prosecutor asked the jurors to put themselves in the position of the victim with the following argument:

> Brandie Jean Freeman. Her date of birth, July the 5th, 1990. Her date of death, January the 4th, 1993. About two and a half years old. Her epitaph would read like this: (Mr. Morris on the table laying [sic] on stomach with legs up and arms behind his back and head up.)
>
> "I was in the punishment position, I don't know how long, and I couldn't keep my head up (demonstrating). And I was there because I pooed in my pants. And I tapped my sitter on the shoulder. And it angered him and he told me I was a bad girl. And I knew what I was going to have to do. I knew I was going to have to get in the position that's depicted in State's Exhibit Number 15, and State's Exhibit Number 12. And I knew my head was going to have to be up instead of down like Mr. Elliott told you." You know why we know that? Brandie knew that because she's not looking into the camera in that picture, that's from the side. Mr. Elliott told you she only has her head up in this picture because she's looking at the camera.
>
> And it would read that, "while I was there for however long Mr. Elliott went and got a glass of water in the kitchen, came back, and he was still angry. I still couldn't keep my little head up or feet, as Dennis Rowe told you. And Mr. Elliott, my caretaker, while my mother was at work trying to earn a living, came up and grabbed me by the back of my hair. He pulled a lot of it out. It hurt." Doctors have told you it hurt. There shouldn't be any question in your mind about the pain that little girl went through. "And he grabbed me by the back of my head, but instead of doing what he initially told you when his attorney was asking you the questions yesterday, bam, bam, bam, he really did do what like Mr. Morris told you in the questions. What kind of force? BAM..BAM..BAM..BAM (quickly.)"

We have previously reviewed closing arguments which suggested what a victim may have been thinking as he or she was dying and concluded that they were not grossly improper. *State v. Hunt*, 339 N.C.

622, 651-52, 457 S.E.2d 276, 293-94 (1995); *State v. McNeil*, 324 N.C. 33, 49, 375 S.E.2d 909, 919 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990); *State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980). The prosecutor's remarks in this case described what Brandie may have been thinking as defendant beat her. This argument was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom. By making this argument the prosecutor did not ask the jurors to put themselves in the position of the victim. Accordingly, we conclude that the trial court did not err by failing to intervene *ex mero motu*.

[18] Next, defendant argues that the trial court erred by permitting the prosecutor to make several arguments in which he indicated that he was a representative of the victim. The prosecutor began his guilt-innocence phase closing argument in the following manner:

> Ladies and gentlemen of the jury, this is my opportunity on behalf of the State of North Carolina and Brandie Freeman to argue to you what I think you should find from the facts that we spent all these days trying to present to you.

In *McNeil* the prosecutor told the jury that "[b]eing a prosecutor is not always a pleasant task, for I speak, Mr. Hobgood speaks for two dead ladies who can not speak." 324 N.C. at 48, 375 S.E.2d at 918. The *McNeil* Court noted that the prosecutor's statement only reminded the jury that he was an advocate for the two victims and concluded that the argument was not so grossly improper that the court abused its discretion in failing to intervene *ex mero motu*. *Id.* In the present case the prosecutor's remarks similarly reminded the jury that he was an advocate for the State and the victim, and the trial court did not err by failing to intervene *ex mero motu*.

[19] Defendant next complains about the emphasized portion of the following argument:

> The defendant is entitled to a fair trial. That is our system. John Robert Elliott is entitled to a fair trial. He has gotten a fair trial. You have seen that he has gotten a fair trial. *This man gets the fair trial (pointing to defendant). That's fine. If any of you were charged with anything you would want a fair trial. I want a fair trial for Brandie Jean Freeman. I think that's at least what she's entitled to for the little time she spent on this earth. I think the bottom of the epitaph should say: "She got her trial. That a jury in Davidson County will not stand for this crap.*

That John Robert Elliott is guilty of first degree murder and felony child abuse."

(Emphasis added.)

In *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976), this Court did not find any gross impropriety in the district attorney's statement that "everybody is concerned about the rights of the defendants . . . [.] When in God's name are we going to start getting concerned about the rights of the victims?" *Id.* at 328, 226 S.E.2d at 640. We stated that this utterance seemed "to be only a stirring plea that the defendants and the State be given equal consideration by the jury." *Id.* at 328, 226 S.E.2d at 641. In the present case the prosecutor told the jury that defendant was entitled to a fair trial. His subsequent statement that the victim was also entitled to a fair trial amounted to nothing more than a request that the State be given equal consideration. We conclude that the trial court did not abuse its discretion in declining to intervene *ex mero motu*.

[20] Defendant further assigns error to the following argument:

Make her life worth something. Don't let him get away with this. When he's denied killing her up until yesterday and said it was an accident and that she fell out of the bed, don't let him get away with that.

The prosecutor's argument is well-grounded in the record. Defendant denied killing Brandie prior to trial, stating that Brandie sustained her injuries when she fell off a bed. Defendant's testimony at trial admitting that he killed Brandie followed the presentation of extensive evidence which suggested that Brandie's injuries could not have been caused by a fall from a bed that was only seventeen inches high. We conclude that the trial court did not abuse its discretion by failing to intervene *ex mero motu* to stop the prosecutor's argument. This assignment of error is overruled.

[21] Defendant next assigns error to the trial court's failure to grant his motion to dismiss the charge of felony child abuse. The basis for this assignment of error was that the evidence was insufficient to support a verdict of guilty. Defendant does not make any argument or cite any authority in support of the contention that the evidence was insufficient to support felony child abuse. For this reason this assignment of error is deemed abandoned. N.C. R. App. P. 28(b)(5).

[22] Rather than contending that the evidence was insufficient, defendant contends that the trial court erred by entering judgment against the defendant for both first-degree murder and felony child abuse. Defendant argues that sentencing him for both convictions violated his double jeopardy rights because the serious physical injury element of felony child abuse was established by the head injury which resulted in Brandie's death.

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1). "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a). Defendant did not object to the trial court's imposition of punishment for both the felony child abuse and first-degree murder convictions, defendant did not make any motion or receive a ruling from the trial court with respect to the constitutionality of sentencing defendant for both convictions, and defendant did not assign error to the trial court's failure to dismiss the felony child abuse conviction on the basis that the court could not sentence defendant for both felony child abuse and first-degree murder. Accordingly, defendant has failed to preserve this issue for appellate review.

[23] Assuming *arguendo* that this issue had been preserved for appellate review, we would conclude that double jeopardy does not preclude punishing defendant for felony child abuse in this case.

Both the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution protect against multiple punishments for the same offense. *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 511-12 (1995); *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). "[W]here a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes." *State v. Murray*, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984), *overruled on*

other grounds by State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988); *accord Missouri v. Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535, 544 (1983); *Gardner*, 315 N.C. at 453, 340 S.E.2d at 708. The language of the felony child abuse provision permits us to conclude that the legislature intended to punish felony child abuse and first-degree murder separately, even when both offenses arise out of the same conduct. *See Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

Felony child abuse is defined by N.C.G.S. § 14-318.4, and the legislature's intent to punish felony child abuse is set forth in this provision. N.C.G.S. § 14-318.4(b) expressly provides that felony child abuse "is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies." N.C.G.S. § 14-318.4(b) (1993). The legislature's intent to provide for cumulative punishment may also be inferred from the fact that first-degree murder and felony child abuse each " 'requires proof of a fact which the other does not.' " *See Gardner*, 315 N.C. at 454-55, 340 S.E.2d at 708-09 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932)). Felony child abuse requires the State to prove that the accused is "a parent or any other person providing care to or supervision of a child less than 16 years of age" and that the accused intentionally inflicted a serious physical injury upon the child or intentionally committed an assault resulting in a serious physical injury to the child. N.C.G.S. § 14-318.4(a). First-degree murder "is the unlawful killing of a human being with malice and with premeditation and deliberation." *Fleming*, 296 N.C. at 562, 251 S.E.2d at 432. Felony child abuse is not a lesser included offense of murder. It requires the State to prove facts not required to prove murder; and it addresses a distinct evil, the serious physical abuse of children by parents or other persons providing care to or supervision of children.

The legislature expressly stated that felony child abuse is an offense additional to other criminal provisions and that it is not intended to preclude other sanctions. We conclude that the legislature clearly expressed its intent to punish a defendant cumulatively for felony child abuse and first-degree murder convictions arising out of the same conduct. Therefore, double jeopardy does not preclude punishing defendant for felony child abuse in this case. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[24] Defendant contends that the trial court committed reversible error in submitting the especially heinous, atrocious, or cruel aggra-

vating circumstance on the ground that the evidence was insufficient to warrant its submission.

> In determining sufficiency of the evidence to support this circumstance, the trial court must consider the evidence in the light most favorable to the State. *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). The State is entitled to every reasonable inference to be drawn from the facts. Contradictions and discrepancies are for the jury to resolve, and all evidence admitted which is favorable to the State is to be considered. *State v. Stanley*, 310 N.C. 332, 339, 312 S.E.2d 393, 397 (1984).

State v. Gibbs, 335 N.C. 1, 61, 436 S.E.2d 321, 356-56 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 881 (1994). This Court has previously identified several types of murder which may warrant the submission of the especially heinous, atrocious, or cruel circumstance.

> One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328[, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18] (1988). A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), including those which leave the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

Gibbs, 335 N.C. at 61-62, 436 S.E.2d at 356.

The evidence, viewed in the light most favorable to the State, supported the submission of the especially heinous, atrocious, or cruel circumstance. Defendant grabbed Brandie by the hair on the back of her head and slammed her head to the floor six or seven times, causing a massive head injury which led to her death. After repeatedly slamming Brandie's head to the floor, defendant continued to slap and hit the child in what defendant claimed was an effort to revive her. The beating left Brandie with severe bruises on her legs, abdomen, back, buttocks, chest, shoulders, neck, face, and head. Thirty percent of Brandie's hair was forcefully ripped from her scalp. Brandie attempted to put her arm around defendant's neck shortly after the

beating, permitting the inference that she was conscious and in a great deal of pain at that time. This evidence permitted the jury to conclude that the killing would have been "physically agonizing" or "conscienceless, pitiless, or unnecessarily torturous" to the victim.

The victim's age and the existence of a parental relationship between the victim and the defendant may also be considered in determining the existence of the especially heinous, atrocious, or cruel circumstance. *State v. Burr*, 341 N.C. 263, 307, 461 S.E.2d 602, 626 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996). Brandie was two years old at the time of her death. Defendant lived with Brandie and her mother and had assumed a parental role in caring for Brandie in the months prior to her death. Brandie's mother permitted defendant to discipline Brandie and trusted defendant to take care of Brandie while she was at work. As in *Burr* "defendant's murder of this defenseless child was not only pitiless, but it also betrayed the special role which defendant had been given in the family." *Id.* at 308, 461 S.E.2d at 626. Having reviewed all the circumstances surrounding this murder, we conclude that there was sufficient evidence to support a finding that the murder was especially heinous, atrocious, or cruel. Therefore, we hold that the trial court did not err in submitting this circumstance to the jury. This assignment of error is overruled.

[25] Next, defendant contends that the trial court's instruction for the especially heinous, atrocious, or cruel circumstance was unconstitutionally vague, violating defendant's federal and state constitutional rights to be free from cruel or unusual punishment and to due process of law.

After defining heinous, atrocious, and cruel, the trial court instructed the jury that

> it was not enough that this murder be heinous, atrocious or cruel as those terms have just been defined to you.
>
> Under the law this murder must have been especially heinous, atrocious, or cruel and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing or this murder must have been a consciousless [sic] or pitiless crime which was unnecessarily torturous to the victim.

"This Court has consistently held that the especially heinous, atrocious, or cruel aggravating circumstance is constitutional when the narrowing definition is incorporated into the instruction." *State v. Lynch*, 340 N.C. 435, 472, 459 S.E.2d 679, 698 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996); *accord Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141. Defendant has failed to provide us with any compelling reasons to overrule our prior holdings on this issue.

[26] Defendant further contends that this instruction is unconstitutional as applied to defendant. Defendant argues that most killings committed by parents against their children are tried noncapitally and that there is no principled distinction between this case and numerous cases in which such conduct has been punished noncapitally. Disparity in sentences imposed upon parents who have killed their children does not render the instruction on the especially heinous, atrocious, or cruel circumstance unconstitutional as applied to defendant. This assignment of error is overruled.

[27] Defendant next contends that the trial court erred by permitting the prosecutor to make certain sentencing proceeding closing arguments. Defendant did not object to any of these arguments; therefore, "they are reviewable only to determine whether they were so grossly improper that the trial court erred by failing to intervene *ex mero motu* to correct the errors." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672.

Defendant contends that the trial court should have intervened in the prosecutor's repeated argument that this killing was the "worst of the worst." Defendant argues that this argument amounted to a personal vouching by the prosecutor that this killing was worse than other first-degree murders. In *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994), the prosecutor argued that "this is probably the most cruel, atrocious, and heinous crime you'll ever come in contact with." *Id.* at 227, 433 S.E.2d at 154. The Court stated that the "prosecutor was not stating his personal opinion, but merely arguing that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case." *Id.* We conclude that the prosecutor in this case did not state his personal opinion by arguing that Brandie's killing was the "worst of the worst." As in *McCollum* the prosecutor was merely arguing that the jury should conclude from the evidence that it should recommend a sentence of death.

[28] Defendant also argues that this argument by the prosecutor improperly diminished the jury's responsibility for recommending a sentence of death in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). In *Caldwell* the Supreme Court held that it was unconstitutional "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L. Ed. 2d at 239. "This Court has limited *Caldwell's* applicability to those cases in which the prosecutor 'suggest[s] to the jurors that they could depend upon judicial or executive review to correct any errors in their verdict.' " *Alston*, 341 N.C. at 250, 461 S.E.2d at 716 (quoting *McCollum*, 334 N.C. at 226, 433 S.E.2d at 153). The prosecutor's remarks in this case did not tend to suggest to the jurors that the responsibility for recommending a sentence of death rested elsewhere or that the jurors could rely on judicial or executive review to correct any errors in the jury's verdict.

[29] Defendant further argues that the prosecutor's argument improperly placed defendant at a disadvantage in that defendant's counsel could not argue that "this killing was not all that bad" without offending the jurors. This argument is without merit. "[T]he prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *Green*, 336 N.C. at 188, 443 S.E.2d at 41. After careful review of the record, we conclude that the prosecutor's argument was reasonable in light of the evidence presented at trial and that the trial court did not abuse its discretion by failing to intervene *ex mero motu*. This assignment of error is overruled.

[30] Defendant next contends that the prosecutor misstated the law with respect to the burden of proof with the following sentencing proceeding closing arguments:

> I defy anybody to tell me that the murder of this little girl isn't especially heinous, atrocious or cruel.
>
> . . . .
>
> . . . [Y]ou will also be given an opportunity to consider a lot of mitigating circumstances, those things that they will contend are matters that will make this less than a death penalty [case]. The

bottom line is, it's a death penalty case. You in your conscious [sic] say it is a death penalty case.

. . . .

. . . Those are the mitigating circumstances. And the rest of it is pretty much, you know what you got to do. You balance those things and you decide the weight and you decide whether this little girl's life was worth his significant work history or his abusing marijuana since age 15 or him not having committed acts of violence, significant acts of violence against someone else.

Defendant contends that these arguments suggested that defendant was required to present sufficient evidence to convince the jury not to recommend death and that the jury should weigh mitigating circumstances against the value of the victim's life. We first note that defendant did not assign error to any of these arguments in the record on appeal. "Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a). For this reason defendant's argument with respect to these remarks is beyond the scope of our review.

[31] Even if we were to consider defendant's argument pursuant to Rule 2 of the Rules of Appellate Procedure, defendant would not be entitled to relief. "On appeal, particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 738 (1995). " 'Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.' " *Id.* (quoting *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 60 (1995), *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)). Our review of the prosecutor's argument reveals that he explained the balancing process that jurors are required to undertake in considering aggravating and mitigating circumstances. The thrust of the prosecutor's argument was that the mitigating circumstances had little value and that the especially heinous, atrocious, or cruel nature of the killing justified imposing the death penalty. While it was improper to suggest that the jury should balance the mitigating circumstances against Brandie's life,

we conclude that the prosecutor's remarks were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[32] Defendant next contends that the prosecutor improperly suggested that the death penalty was divinely required in this case to redeem or give value to the life of the victim. The prosecutor made the following arguments:

> I told you the other day, it is the State's goal to ask you to try to redeem that little child's unjust [death]. The State says we are halfway there. You have convicted Mr. Elliott of first degree murder. You did not let him get away with that. Mr. Elliott needs to be put to death by the State, by your recommendation. That fully redeems that little girl's life on this earth and that finishes the epitaph that we talked about.
>
> . . . .
>
> . . . "Dance death! Your deeds are done. A new time has set in and you are summoned by the Maker. One day death itself will dance before the Lord. The wind and breath of the Lord will call for death, and slowly death will bring all limp life and all brittle forms of death to the judgment seat. God will pronounce death guilty, will sentence death to death and thus sentence to death tears, crying, hunger, lonesomeness and disease. Even now there is enough evidence gathered against death by those who live under the spirit. They build evidence while they work and while they wait for the dance and death of death. The date has been set. God knows the hour." You jurors know the hour. A life for a life because of the facts of this case.

Defendant argues that the prosecutor's remarks constituted "theo-babble" which had the effect of suggesting that the death penalty is divinely required in this case in order to "redeem" or give value to the life of the victim.

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

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

A careful review of the prosecutor's remarks reveals, however, that neither argument suggested that the law enforcement powers of the State were divinely inspired or ordained by God. Neither argument improperly suggested that the death penalty was divinely required in this case. Accordingly, we conclude that the prosecutor's remarks were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[33] Defendant next assigns error to the emphasized portion of the following argument:

> And now it is time for you all to consider the punishment. You are the voice and your voice is the conscious [sic] of this county. *You are the last link in the State's chain of law enforcement, if you will, in this case, because the officers have done all they can do. I have certainly done all I think I can do.*

(Emphasis added.)

To suggest that the jury is effectively an arm of the State in the prosecution of the defendant or that the jury is the last link in the State's chain of law enforcement is improper. *State v. Brown*, 320 N.C. 179, 203-04, 358 S.E.2d 1, 18, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). However, the prosecutor's remarks in this case were not so grossly improper as to require the trial court to intervene *ex mero motu*. The essence of the prosecutor's argument was that defendant had committed a serious crime and that the time had come for the jury to make a decision in this case. This Court previously approved arguments suggesting that juries are "the voice and conscience of the community." *Hunt*, 339 N.C. at 651-52, 457 S.E.2d at 293; *accord Brown*, 320 N.C. at 204, 358 S.E.2d at 18. We conclude that the trial court did not abuse its discretion by failing to intervene *ex mero motu* to prevent this argument.

[34] Defendant finally contends that the trial court should not have permitted the prosecutor to make the following argument:

> Brandie Freeman can't come into this courtroom and tell me and tell you, when he slammed my head down the first time, it was extremely painful and I didn't die. She can't say, "I was begging for my life." She can't say, "When he slammed my head down the

second time it was again extremely painful and I felt this place on the back of my neck."

Defendant argues that there is no evidence suggesting that Brandie begged for her life and that the prosecutor referred to what Brandie could "not" say.

An "argument '[u]rging the jurors to appreciate the "circumstances of the crime' " is not improper during the penalty phase of a trial." *Gregory*, 340 N.C. at 426, 459 S.E.2d at 673 (quoting *State v. Artis*, 325 N.C. 278, 325, 384 S.E.2d 470, 497 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). The nature of the defendant's crime "is one of the touchstones for propriety in a capital sentencing argument." *Id.* The prosecutor's argument related to the nature of defendant's crime and was supported by facts in evidence and reasonable inferences which could be drawn therefrom. The evidence in this case tended to show that defendant slammed Brandie's head to the floor six or seven times, that she remained conscious for a short period of time after this beating, and that she experienced a great deal of pain. While there was no evidence suggesting that Brandie begged for her life during the beating, the prosecutor's argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. This assignment of error is overruled.

[35] Next, defendant assigns error to the jury's failure to find the nonstatutory mitigating circumstance that defendant had a good employment record. "Unlike statutory mitigating circumstances, the jury may determine that a nonstatutory mitigating circumstance has no value even if that circumstance is found to exist." *Alston*, 341 N.C. at 257, 461 S.E.2d at 720. Defendant's evidence of a good employment record was contradicted by evidence which showed that defendant was unemployed at the time of the murder, worked sporadically in the months preceding the murder, and assaulted a supervisor at Lothridge Plumbing Company in March of 1992. The jury either rejected the evidence suggesting defendant had a good employment record or determined that this circumstance had no mitigating value. Accordingly, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises three issues which he concedes have been decided against his position by this Court: (i) the trial court erred by permitting the State to peremptorily excuse jurors who showed a reluctance to vote for the death penalty, (ii) the trial court erred by

denying his motion to prevent the State from "death-qualifying" the jury, and (iii) the trial court erred in denying his motion to strike the death penalty on the ground that the North Carolina death penalty statute is unconstitutional. We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

PROPORTIONALITY

[36] Having found no error in the guilt-innocence phase or the capital sentencing proceeding, we must undertake our statutory duty to determine whether (i) the evidence supports the aggravating circumstance found by the jury; (ii) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (iii) the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (Supp. 1995).

Defendant was found guilty of first-degree murder based on premeditation and deliberation. Following a capital sentencing proceeding, the jury found the aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury found the statutory mitigating circumstance that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1). The trial court submitted three statutory mitigating circumstances which were rejected by the jury: (i) the murder was committed while defendant was mentally or emotionally disturbed, N.C.G.S. § 15A-2000(f)(2); (ii) 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); and (iii) the catchall circumstance, N.C.G.S. § 15A-2000(f)(9). The jury found ten of the eleven nonstatutory mitigating circumstances submitted for its consideration.

We have reviewed the sufficiency of the evidence supporting the especially heinous, atrocious, or cruel aggravating circumstance and conclude that the evidence supports this circumstance. We further conclude from our review of the record that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We must now determine whether the sentence of death in this case is excessive or disproportionate.

One purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aber-

rant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another purpose is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We compare this case to others in the pool, which we defined in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *Bacon*, 337 N.C. at 106-07, 446 S.E.2d at 563-64, 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).

This Court has determined that the sentence of death was disproportionate in seven cases. *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 Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We find the instant case distinguishable from each of these seven cases.

None of the cases found disproportionate by this Court involved the murder of a child. *State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87, *cert. denied*, —— U.S. ——, 136 L. Ed. 2d 167 (1996); *State v. Walls*, 342 N.C. 1, 71, 463 S.E.2d 738, 776-77 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996). Further, "only two involved the 'especially heinous, atrocious, or cruel' aggravating circumstance." *Syriani*, 333 N.C. at 401, 428 S.E.2d at 146-47 (citing *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170). *Stokes* and *Bondurant* are easily distinguishable from this case.

The defendant in *Stokes* was one of four individuals involved in the brutal beating death of a robbery victim. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. In finding the sentence of death disproportionate, the *Stokes* Court emphasized that the defendant was found guilty of first-degree murder based upon the felony murder rule; that there was little, if any, evidence of premeditation and deliberation; and that the defendant was seventeen years old at the time of the murder. *Id.* at 21, 24, 352 S.E.2d at 664, 666. In the instant case the jury found the thirty-one-year-old defendant guilty of first-degree murder on the basis of premeditation and deliberation. "The finding of premedita-

tion and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 499-500.

In *Bondurant* the defendant, the victim, and several friends were riding in a car when the defendant began taunting the victim by threatening to shoot him. The defendant eventually shot the victim and then immediately drove the victim to the hospital. The killing consisted of one gunshot wound to the head, and there was substantial evidence that the defendant was highly intoxicated at the time of the shooting. *Bondurant*, 309 N.C. at 677, 693-94, 309 S.E.2d at 173, 182. In the present case defendant brutally beat a two-year-old girl entrusted to his care. Despite the fact that he recognized the severity of Brandie's injuries, defendant did not immediately seek medical attention for her. While the State introduced evidence suggesting that defendant was "coming off crack" cocaine at the time of the killing, defendant testified and denied using crack cocaine or marijuana on the day of the killing.

We conclude that this case is not sufficiently similar to any of the seven cases found disproportionate by this Court to warrant a finding of disproportionality.

Defendant refers us to several additional cases in which juries recommended life sentences following a capital sentencing proceeding. We recognize that juries have returned sentences of life imprisonment in cases involving the murder of a child by a parent or an adult caretaker. However, "the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review." *Green*, 336 N.C. at 198, 443 S.E.2d at 46.

We conclude that this case is most analogous to cases in which this Court has held the death penalty not to be disproportionate. The case in the pool most similar to this one is *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602. In *Burr* the defendant was the thirty-three-year-old boyfriend of the mother of the four-month-old victim. The evidence in *Burr* tended to show that the defendant had taken on a parental role in caring for the victim and that the defendant brutally beat the victim to death. The defendant in *Burr* was convicted of first-degree murder on the basis of premeditation and deliberation. The only aggravating circumstance found by the jury was the especially heinous, atrocious, or cruel circumstance. We upheld the death penalty in *Burr*. This case is strikingly similar. Defendant assumed a

parental role in caring for Brandie, defendant brutally beat Brandie while he was caring for her, and Brandie died from a massive head injury caused by that beating. As in *Burr* defendant was convicted of first-degree murder on the basis of premeditation and deliberation; and the jury found only the especially heinous, atrocious, or cruel aggravating circumstance.

After comparing this case to similar cases in the pool used for proportionality review, 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. Comparing defendant's 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.

NO ERROR.

STATE OF NORTH CAROLINA v. TERRY LEE BALL

No. 68A94

(Filed 6 September 1996)

1. Criminal Law § 395 (NCI4th); Jury § 79 (NCI4th)— capital trial—comment by court—seeking jurors without predisposition

The trial court did not err by informing the jury venire in a capital trial that the court was seeking jurors with no predisposition concerning the case. Assuming, *arguendo*, that the trial court's instruction was improper, it was not so prejudicial as to amount to plain error.

Am Jur 2d, Jury §§ 189 et seq.

2. Jury § 114 (NCI4th)— capital trial—motion for individual voir dire—denial without evidence or argument

The trial court did not err by denying defendant's motion for individual *voir dire* in a capital trial without affording defendant the opportunity to present evidence or argument in support of his

motion since (1) defendant's motion included only an unsubstantiated allegation that individual *voir dire* was required in order to receive a fair trial and thus did not set forth any ground for the trial court to grant the motion, and (2) the mere refusal of the trial court to receive supportive oral argument does not demonstrate substantive reversible error in the denial of a discretionary motion.

Am Jur 2d, Jury §§ 198, 199.

3. Jury § 227 (NCI4th)— capital trial—jury selection—death penalty views—rehabilitation—excusal for cause

The trial court did not err in a capital trial by allowing the State's challenge for cause of a prospective juror who stated several times in initial questioning by the court that she could not, under any circumstances, vote to impose the death penalty, indicated during examination by defense counsel that she could set aside her beliefs and render a verdict that would require imposition of the death penalty, stated during examination by the State that she could not impose the death penalty unless it was mandated, and again told the court that there were no circumstances under which she could return a verdict requiring imposition of the death penalty. Notwithstanding her indication to defense counsel, the prospective juror was never able to state clearly, through her responses *in toto*, her willingness to temporarily set aside her own beliefs in deference to the rule of law, and the trial court did not abuse its discretion in determining that her views would prevent or substantially impair her from performing her duties as a juror.

Am Jur 2d, Jury §§ 199, 279.

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

4. Jury § 70 (NCI4th)— capital trial—jury selection—information sheet—absence of mitigation definition

The trial court did not err by utilizing a jury selection information sheet in a capital trial which failed to define for prospective jurors the concept of mitigation. The jury selection information sheet and the trial court's accompanying remarks met the trial court's obligation under N.C.G.S. § 15A-1213 to briefly intro-

duce the case to the prospective jurors by identifying the parties and their counsel and informing the jurors of the offense with which defendant was charged, the victim's name, the defendant's plea, and any affirmative defense relied on by the defendant.

Am Jur 2d, Jury §§ 186 et seq.

5. Jury § 127 (NCI4th)— jury selection—exclusion of irrelevant and redundant questions

The trial court did not err by refusing to permit defense counsel to ask a prospective juror who had indicated that he had utilized the services of a therapist whether he had found the treatment of the therapist helpful since the question was not relevant to the issue of the juror's ability to consider the testimony of a mental health expert. Nor did the trial court err by refusing to permit defense counsel to ask a prospective juror who had stated that she did not feel as qualified as a psychiatrist to form an opinion about drug abuse whether that applied to crack cocaine because the question was argumentative and redundant.

Am Jur 2d, Jury § 205.

6. Jury § 123 (NCI4th)— jury selection—question tending to stake-out jurors

The trial court did not err by refusing to permit defense counsel to ask prospective jurors in a capital trial how many of them thought that drug abuse was irrelevant to punishment in this case since the question was an improper attempt to "stake-out" the prospective jurors on how they would react to evidence of defendant's history of drug abuse.

Am Jur 2d, Jury § 205.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

7. Jury § 191 (NCI4th)— denial of challenges for cause—failure to preserve right to assign as error

Defendant failed to preserve his right to assign error to the denial of challenges for cause where he did not seek to renew any of his previously denied challenges for cause after exhausting his peremptory challenges. N.C.G.S. § 15A-1214(h).

Am Jur 2d, Jury §§ 334-336.

8. Evidence and Witnesses § 2479 (NCI4th)— refusal to sequester witnesses—reasoned decision—no abuse of discretion

The trial court did not abuse its discretion in the denial of defendant's pretrial motion to sequester the witnesses in a capital trial where defendant made no showing that the trial court failed to make a reasoned decision.

Am Jur 2d, Trial §§ 240 et seq.

9. Robbery § 84 (NCI4th)— attempted armed robbery—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of attempted armed robbery of the male victim as well as the female victim where it tended to show that defendant entered the victims' home with a concealed knife; defendant used the knife to attack the male victim in the kitchen of the home; while defendant was assaulting the male victim, the female victim entered the kitchen; defendant then chased her with the knife; and during the attack on the female victim, defendant was overheard to say, "Give me your money."

Am Jur 2d, Robbery § 89.

10. Burglary and Unlawful Breakings §§ 70, 78 (NCI4th)— first-degree burglary—constructive breaking—intent to commit larceny—sufficiency of evidence

There was sufficient evidence of a constructive breaking and an intent to commit larceny at the time of the breaking to support defendant's conviction of first-degree burglary where the evidence tended to show that defendant, armed with a concealed knife, rang the doorbell of a minister's home at 4:00 a.m.; when the minister went to the door, defendant stated that the minister had told him that he would be there if defendant ever needed to talk with someone; the minister acknowledged that he had made such a statement and let defendant into his home; within minutes of entering the home, defendant attacked the minister and then his wife with the knife; and defendant demanded money from the wife prior to stabbing her to death.

Am Jur 2d, Burglary § 50.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 ALR5th 125.

11. Evidence and Witnesses § 3165 (NCI4th)— capital sentencing—defendant's self-serving statement—exclusion prior to defendant's testimony

The trial court did not err by refusing to allow defendant's self-serving post-arrest statement to be read to the jury in a capital sentencing proceeding prior to defendant's own testimony since there is no right to corroboration in advance of a witness's testimony. In any event, defendant was not prejudiced by the exclusion of his statement where defendant thereafter testified and related the substance of the statement to the jury.

Am Jur 2d, Witnesses §§ 641 et seq.

12. Criminal Law § 458 (NCI4th)— capital sentencing—questions by prosecutor—parole eligibility not raised

The State did not improperly inject the issue of parole eligibility into a capital sentencing proceeding by questions on cross-examination of defendant's mental health expert pointing out that defendant had been incarcerated only a short time in California at the time a report was prepared stating that defendant's adjustment to prison had been good.

Am Jur 2d, Trial § 1443.

13. Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—aggravating circumstances—facts of prior felony—no impropriety

The prosecutor's argument concerning the violent nature of defendant's prior felony conviction in California was properly made in reference to the aggravating circumstance that defendant had previously been convicted of a violent felony and did not improperly urge the jury to consider the facts of defendant's prior felony in order to find the especially heinous, atrocious, or cruel aggravating circumstance in this case.

Am Jur 2d, Trial § 1760.

14. Criminal Law § 452 (NCI4th)— capital sentencing—mitigating circumstances—incorrect argument—prejudice cured by instructions

Although the prosecutor's comment to the jury that, in order to find a mitigating circumstance, the jury must find that it exists and that it has mitigating value was incorrect as to statutory mit-

igating circumstances, any prejudice was cured by the trial court's correct instructions to the jury.

Am Jur 2d, Trial § 1760.

15. Criminal Law §§ 442, 452 (NCI4th)— capital sentencing—mitigating circumstances—duty of jury—jury arguments not improper

The prosecutor's arguments in a capital sentencing proceeding that the mitigating circumstances submitted by defendant did not excuse defendant's conduct, that the jury should not find the "no significant history of prior criminal activity" and "age" mitigating circumstances, and that "the only thing standing between [defendant] and freedom" was the jury were within the wide latitude accorded counsel in the scope of argument and did not require intervention by the trial court.

Am Jur 2d, Trial § 1760.

16. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—no error in submission

The trial court did not err by submitting, over defendant's objection, the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity where defendant's conviction for robbery in California occurred thirteen years before the murder in question and when defendant was only twenty-two years old; defendant was convicted in 1991 for felonious assault but he had sought medical attention for the victim and was given a suspended sentence; and defendant had convictions for three forgeries but they were all related to his drug use and his culpability was limited as to each conviction. N.C.G.S. § 15A-2000(f)(1).

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

17. Criminal Law § 1362 (NCI4th)— capital sentencing—mitigating circumstance of age—no error in submission

The trial court did not err by submitting to the jury in a capital sentencing proceeding the (f)(7) mitigating circumstance of "age," although defendant was thirty-five years old at the time of the murder, where evidence of early emotional traumas suffered by defendant and testimony by defendant's mental health expert

that defendant had narcissistic and histrionic traits and that his attachments with others were more immature than mature provided a reasonable basis from which a rational juror could find that defendant was not as mature as his chronological age. N.C.G.S. § 15A-2000(f)(7).

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

18. 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 under theories of premeditation and deliberation and felony murder; defendant stabbed the victim numerous times in her own bedroom; the jury found four aggravating circumstances, including the circumstance that the murder was especially heinous, atrocious, or cruel; the victim suffered great physical pain before her death; the victim was of unequal physical strength to defendant; and defendant did not seek medical aid for the victim but searched the victim's belongings for money to buy drugs and then fled the scene.

Am Jur 2d, Criminal Law § 628.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Griffin, J., at the 24 January 1994 Criminal Session of Superior Court, Beaufort County. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by this Court 26 April 1995. Heard in the Supreme Court 11 October 1995.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, and Thomas S. Hicks, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 26 October 1993 for assault with a deadly weapon with intent to kill inflicting serious bodily injury, two counts of robbery with a dangerous weapon, first-degree burglary, and for the first-degree murder of Laura Krantz. The defendant was tried capitally, and the jury found the defendant guilty of first-degree murder on the basis of premeditation and deliberation and on the basis of felony murder. Defendant was also convicted of assault with a deadly weapon with intent to kill inflicting serious injury, of two counts of attempted robbery with a dangerous weapon, and of first-degree burglary. 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, the guilt/innocence phase of defendant's trial and defendant's capital sentencing proceeding were free from prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that the Reverend Tony Krantz lived in the parsonage beside the Beaver Dam Church with his wife, Laura, and their two children, Katrina and Jonathan. On the evening of 16 June 1993, Reverend Krantz put Katrina and Jonathan to sleep on a couch in the living room. Reverend Krantz and his wife then went to bed. Reverend Krantz was awakened by the doorbell at approximately four o'clock in the morning on 17 June 1993. Reverend Krantz was surprised but relieved to find the defendant at his door. Reverend Krantz testified that when he opened the door, he asked the defendant how he was doing, and the defendant replied, "not so well." The defendant further stated, "You told me that if I ever needed somebody to talk to that you would be there." Reverend Krantz acknowledged that he had made such a statement and let the defendant in the house.

Reverend Krantz further testified that as defendant entered the living room where the children were sleeping, the defendant stated, "I don't want to wake the kids up." Reverend Krantz moved some items from a chair, sat down and asked the defendant to sit down. However,

the defendant insisted that they go to the kitchen. Defendant and Reverend Krantz then proceeded to the kitchen. Reverend Krantz asked the defendant if he wanted something to drink, and defendant asked for a glass of ice water. Reverend Krantz poured a glass of ice water for the defendant and poured himself a Dr. Pepper. As Reverend Krantz sat down across the table from the defendant, the defendant put his hand behind his back and pulled out a knife. Reverend Krantz testified that the defendant then lunged at him and stabbed him in the eye. The force of the blow almost knocked Reverend Krantz unconscious. Reverend Krantz tried to grab defendant's arm but instead grabbed the knife with his left hand, cutting his ring finger to the bone. Reverend Krantz was screaming, "No, Terry, no, Terry, no," but the defendant continued to stab and cut Reverend Krantz. Reverend Krantz received several cuts and stab wounds, the worst wound being a stab wound to his side where the full length of the knife went into him.

About the time that Reverend Krantz was stabbed in the side, his wife, Laura, approached the kitchen. Laura Krantz took one or two steps into the kitchen, stopped and screamed. As Mrs. Krantz screamed, defendant stopped his attack on Reverend Krantz and ran after Laura Krantz. Reverend Krantz testified that he saw his wife run down the hall and that he heard a door slam and thought that his wife was safe. Reverend Krantz went to the telephone and dialed 911. After making the call to 911, Reverend Krantz ran out the back door and went to a neighbor's home.

Ten-year-old Katrina Krantz testified that she heard the doorbell ring when it was dark. Katrina stated that she saw her father walk into the living room and open the door. After her father opened the door, Katrina testified that she saw the defendant and observed the defendant and her father sit down. Katrina heard the defendant ask her father if they could go into the kitchen. After they left the room, Katrina went back to sleep. Katrina later awoke to the sound of screams from her mother. Katrina saw her mother running towards the bedroom and saw the defendant running about two steps behind her mother, holding a knife. Mrs. Krantz ran into the bedroom. Katrina heard a door being knocked open. Katrina walked into the hall and heard the defendant say, "Give me your money." Katrina testified that her mother replied, "I don't know where it is. I put it somewhere." After Katrina heard her mother make these statements, she went to the side door and ran to the church next door.

Reverend Krantz was hospitalized for his wounds for four days and then confined to bed for one week. At the time of trial, Reverend Krantz still had numbness and pain all the way to the center of his chest from the knife wound to his side. Laura Krantz died as a result of more than twenty stab wounds to her head and extremities. Dr. M.G.F. Gilliland, an expert in the field of forensic pathology, performed an autopsy on the victim. Dr. Gilliland testified that, in his opinion, the fatal stab wound was one to the victim's left thigh. Dr. Gilliland stated that this wound was very deep and cut both a major artery and a major vein. Dr. Gilliland further testified that the wounds to the victim's head and neck occurred earliest in the attack, that the victim was eventually knocked down and that the fatal wound to the victim's leg was inflicted after the victim had been knocked down and could no longer defend herself. Finally, Dr. Gilliland concluded that the wounds inflicted prior to the fatal wound were painful and that the victim could have remained alive for as much as twenty minutes from the start of the assault and for as much as ten minutes after the assault concluded.

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

At defendant's capital sentencing proceeding, the State introduced evidence of two prior convictions. The first was a North Carolina conviction for an assault with a deadly weapon with intent to kill inflicting serious injury. The second was a California conviction for armed robbery and aggravated assault.

Defense counsel presented evidence regarding the defendant's background which tended to show that the defendant had a serious alcohol and drug dependency problem. In addition, Dr. Bruce Berger testified for the defense that the defendant suffered from an antisocial personality disorder. Dr. Berger further testified that the defendant's ability to conform his behavior to the requirements of the law was impaired, and at the time of the offense, the defendant suffered from a mental or emotional disturbance.

PRETRIAL/JURY SELECTION

[1] In his first assignment of error, the defendant contends that the trial court erred under *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), by informing the jury venire that the trial court was seeking jurors with no predisposition concerning the case. The

defendant argues that *Witherspoon* and *Wainwright* allow jurors to carry into the jury room all manner and variety of personal beliefs so long as those beliefs do not prevent or substantially impair any juror's ability to follow the law.

After careful review, we conclude that the trial court's statement to the jury was an accurate statement of the law. Contrary to the defendant's argument, a juror who is predisposed with regard to the law or the evidence is not competent to serve on the jury. *See State v. Leonard*, 296 N.C. 58, 63, 248 S.E.2d 853, 856 (1978). Furthermore, the defendant failed to object at any point to the trial court's instruction. Therefore, the proper standard of review is for plain error. Plain 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.' " *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)). The defendant points out in his brief, "[p]rejudice from this error is difficult if not impossible to establish." This falls far short of a "fundamental" error. Thus, even assuming, *arguendo*, that the trial court's instruction was improper, the instruction was not so prejudicial as to amount to plain error. This assignment of error is overruled.

[2] In his next assignment of error, the defendant contends that the trial court erred by denying his motion for individual *voir dire* without affording him the opportunity to present evidence or argument in support of his motion.

Prior to jury selection, the following exchange between defense counsel and the trial court took place:

> MR. HARRELL: We have filed a motion in this matter, Your Honor, for individual examination of jurors . . . .
>
> COURT: Denied.
>
> MR. HARRELL: . . . and so that we don't waive that we want to bring it up at this time.
>
> COURT: Denied.

The defendant asserts that this summary denial of his motion was an abuse of discretion thereby entitling him to a new trial.

In a capital case, the trial court may direct that jurors be selected individually if the moving party shows "good cause" for the individual *voir dire*. N.C.G.S. § 15A-1214(j) (1988). No party has a right to individual *voir dire*, and the decision whether to grant individual *voir dire* rests in the sound discretion of the trial court. *State v. Short*, 322 N.C. 783, 788, 370 S.E.2d 351, 354 (1988).

Although the court's treatment of defendant's motion appears somewhat abrupt, we cannot say that the trial court abused its discretion by failing to consider the motion on its merits. The record indicates that the defendant filed his motion for individual *voir dire* several weeks before trial. In it, defendant raises as his only grounds for individual *voir dire* the conclusory allegation that "the defendant believes" individual *voir dire* is required in order to receive a fair trial. The defendant's motion does not set forth any grounds upon which the trial court could have found that there was good cause to grant his motion. Further, the trial court would not have abused its discretion even had the defendant's motion included more than the unsubstantiated allegation that individual *voir dire* was required in order to receive a fair trial. The practice of hearing oral argument on a motion is not mandated by statute. The mere refusal by the trial court to receive supportive oral argument, by itself, does not demonstrate substantive reversible error in the denials of discretionary motions. *See State v. Smith*, 305 N.C. 691, 699-700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). This assignment of error is overruled.

[3] The defendant next contends that the trial court erred by allowing the State's challenge for cause as to prospective juror Virginia Batts.

In *Witherspoon v. Illinois*, 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 prospective 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 v. Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52. Further, prospective 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. Batts stated that she was opposed to capital punishment and could not, under any circumstances, vote to impose the death penalty. When asked if she could think of any set of facts that would warrant the imposition of the death penalty, Ms. Batts answered, "I cannot vote for capital punishment." Ms. Batts further stated to the trial court that she was absolutely unable to consider the death penalty and that she was unequivocally opposed to the death penalty. During examination by defense counsel, however, Ms. Batts indicated that she could set aside her beliefs and render a verdict that would require the imposition of the death penalty. During questioning by the State, Ms. Batts stated that she could not impose the death penalty unless it was mandated. Finally, when asked by the trial court if there were any circumstances under which she could return a verdict requiring the trial court to impose the death sentence, Ms. Batts replied, "No sir." Prospective juror Batts was then excused for cause.

Notwithstanding her indications to defense counsel, prospective juror Batts was never able to state clearly, through her responses *in toto*, 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 Batts, we cannot say that the trial court abused its discretion in determining that the views of prospective juror Batts would prevent or substantially impair her from performing her duties as a juror. Deferring to the trial court's judgment, we find no error in excusing, for cause, prospective juror Batts. This assignment of error is overruled.

The defendant next contends that the trial court violated the defendant's constitutional rights during *voir dire* by (1) utilizing a jury selection information sheet, (2) sustaining the State's objections to several questions asked by defense counsel, and (3) failing to properly evaluate prospective jurors' responses for bias.

[4] The defendant first asserts that the trial court erred by utilizing a jury selection information sheet which failed to define for the prospective jurors the concept of mitigation. The defendant's argument is without merit. Prior to selection of a jury, the trial court is required to briefly introduce the case to the prospective jurors and in so doing to identify the parties and their counsel and inform the prospective jurors of the offense of which the defendant has been charged, the victim's name, the defendant's plea, and any affirmative defense relied on by the defendant. N.C.G.S. § 15A-1213 (1988). There is no requirement that the trial court define during this brief, general introduction any of the legal terms used or to be used during the *voir dire* process. After a thorough review of the jury selection information sheet and the trial court's accompanying remarks, we conclude that the trial court met its statutory obligation.

The defendant next asserts that the trial court abused its discretion by sustaining the State's objections to three of defendant's questions to prospective jurors during *voir dire.*

[5] The first two objections occurred during the questioning of a prospective juror who had indicated that he had utilized the services of a therapist. Defense counsel first asked the prospective juror if he had found the treatment of the therapist helpful. The State's objection to this question was properly sustained, as the question was not relevant. At issue was the prospective juror's ability to consider the testimony of a mental health expert, and not the prospective juror's evaluation of his own experience with a mental health expert.

The defendant was then allowed to ask whether any prospective juror felt that he or she was as qualified as a psychiatrist in rendering opinions about human behavior. One prospective juror indicated that while she felt she was equally qualified to render an opinion as to some issues, she did not understand drug abuse. The following exchange then took place:

> [DEFENSE COUNSEL]: Crack cocaine abuse you wouldn't have that feeling, would you?
>
> JUROR: No, I wouldn't.
>
> [PROSECUTOR]: Objection.
>
> COURT: Well, sustained.

The prospective juror had previously told defense counsel that she did not feel as qualified as a psychiatrist to form an opinion concern-

ing drug abuse. Clearly, a prospective juror who states that he or she does not understand or know much about drug abuse in general will not be knowledgeable regarding the abuse of a specific drug. The defendant's question appeared argumentative and redundant, and therefore the State's objection was properly sustained. In any event, the defendant can show no prejudice, as the prospective juror answered the question, and the defendant received the benefit of the prospective juror's answer.

[6] The third objection occurred after defendant's counsel asked the prospective jurors: "How many of you think that drug abuse is irrelevant to punishment in this case." This Court has repeatedly held that counsel may not use *voir dire* to "stake-out" a prospective juror or determine what kind of verdict a prospective juror would render given certain facts not yet in evidence. *See State v. Davis*, 340 N.C. 1, 23, 455 S.E.2d 627, 638, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995); *State v. Skipper*, 337 N.C. 1, 23, 446 S.E.2d 252, 264 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). The question asked by defendant was clearly an attempt to "stake-out" the prospective jurors on how they would react to evidence of the defendant's history of drug abuse and was unlikely to provide responses relevant to a prospective juror's qualification to serve. The trial court, therefore, did not abuse its discretion by sustaining the prosecutor's objection to this question.

[7] Finally, the defendant argues in support of his allegation that his constitutional rights were violated during *voir dire* that the trial court failed to properly evaluate the responses of four prospective jurors for bias prior to denying the defendant's challenges for cause. In order to preserve the right to assign error to a denial of a challenge for cause, counsel must have exhausted his peremptory challenges, must have renewed his challenge for cause as to each prospective juror whose previous challenge for cause had been denied, and must have had his renewed motion denied. N.C.G.S. § 15A-1214(h) (1988). The defendant at no time sought to renew any of his previously denied challenges for cause. By failing to comply with the procedure made mandatory by N.C.G.S. § 15A-1214(h), the defendant has failed to preserve this issue for appellate review and is not entitled to relief. This assignment of error is overruled.

[8] In his next assignment of error, the defendant argues that the trial court erred by denying his pretrial motion to sequester the witnesses. A ruling on a motion to sequester witnesses is reviewable only upon

a showing of abuse of discretion and will only be reversed upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Fullwood*, 323 N.C. 371, 380, 373 S.E.2d 518, 524 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). In the case *sub judice*, the defendant makes absolutely no showing of abuse of discretion by the trial court. Absent a substantive showing by defendant that the trial court failed to make a reasoned decision, we can find no error in the denial of defendant's motion. This assignment of error is overruled.

GUILT/INNOCENCE PHASE

[9] The defendant next argues that the trial court erred by denying his motion to dismiss the charge of attempted robbery with a dangerous weapon of Reverend Tony Krantz based on the insufficiency of the evidence.

When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each element of the offense charged and substantial evidence that the defendant was the perpetrator of such offense. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). If substantial evidence of each element is presented, the motion to dismiss is properly denied. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). Substantial evidence is "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). 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. *Olson*, 330 N.C. at 564, 411 S.E.2d at 595.

The two elements of attempt are (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980).

Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that the defendant attempted to rob Reverend and Mrs. Krantz with a deadly weapon. The evidence showed that the defendant entered the victims' house with a concealed knife. The defendant used the knife to attack Reverend Krantz in the kitchen. It is reasonable to infer that the defendant attacked

Reverend Krantz with the knife in order to assume control over Reverend Krantz's actions and facilitate the robbery. While defendant was assaulting Reverend Krantz, Laura Krantz entered the kitchen. The defendant then chased Laura Krantz to a bedroom and attacked her with the knife. During the attack on Laura Krantz, the defendant was overheard to say, "Give me your money." From this statement, it is reasonable to infer that the defendant's intent was the robbery of money or property of value from the person or the home. Based on this evidence, we find sufficient evidence of the crime of attempted robbery with a dangerous weapon and conclude that the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

[10] In a similar assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss the charge of first-degree burglary.

To convict a defendant of burglary, "the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. . . . If the burglarized dwelling is occupied it is burglary in the first degree." *State v. Wilson*, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976). The defendant argues that there was insufficient evidence of a "breaking" to support his conviction. "A breaking may be actual or constructive." *Id.* at 539, 223 S.E.2d at 316. The State's theory to support the breaking element was that there was a constructive breaking. A constructive breaking occurs when entrance to the dwelling is accomplished through fraud, deception or threatened violence. *State v. Young*, 312 N.C. 669, 681, 325 S.E.2d 181, 189 (1985).

The State's evidence disclosed that while armed with a concealed knife, defendant rang the doorbell of the victims' home at 4:00 a.m. on 17 June 1993. Reverend Krantz recognized the defendant and asked him how he was doing. Defendant replied, "not so well," and said, "You told me that if I ever needed somebody to talk to that you would be there." Reverend Krantz acknowledged that he had made such a statement and let the defendant into his home. Within minutes of entering the house, the defendant attacked Reverend Krantz and then Laura Krantz with the knife.

The evidence, when viewed in the light most favorable to the State, tends to show that Reverend Krantz was induced to open the door by defendant's representation that he was there for help. Stated

more accurately, the defendant obtained entry under the pretense that he was seeking help. In light of such evidence, we hold that there was sufficient evidence to support a charge of burglary based on a constructive breaking.

Defendant also argues that there was insufficient evidence to establish that the defendant intended to commit larceny, the specific intent element of the burglary. However, contrary to defendant's contention, the evidence showed that defendant entered the victims' home carrying a concealed weapon which he almost immediately drew and used to attack Reverend and Laura Krantz. The evidence further shows that the defendant demanded money from Laura Krantz prior to killing her, making it reasonable to infer that defendant had the requisite specific intent to commit larceny. When viewed in the light most favorable to the State, this evidence is sufficient to show that the defendant formed the intent to commit larceny prior to entering the victims' home. There being substantial evidence of each element of the crime of burglary and of the defendant being the perpetrator of the offense, we hereby overrule this assignment of error.

CAPITAL SENTENCING PROCEEDING

[11] In his next assignment of error, the defendant contends that the trial court erred by refusing to allow the defendant's post-arrest statement to be read to the jury. The defendant specifically argues that the statement should have been admitted as a prior consistent statement or, in the alternative, under one of three exceptions to the hearsay rule. We do not agree.

There is no right to corroboration in advance of the testimony of a witness. *State v. Hinson*, 310 N.C. 245, 256, 311 S.E.2d 256, 263-64, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984). Defendant cannot argue that the trial court erred in refusing to admit his self-serving statement, as it was offered into evidence prior to defendant's own testimony. We also note that after the defendant testified, his counsel could have recalled to the witness stand the officer who took the post-arrest statement and offered the statement as corroborative evidence. However, no such effort was attempted. Under these circumstances, defendant has failed to show that the trial court erred by refusing to admit defendant's statement.

In any event, the record reflects that the defendant testified and in so doing, fully and directly related the substance of his post-arrest statement to the jury. Defendant's testimony, like his post-arrest state-

ment, described the facts and circumstances of the crime from his perspective. Defendant cannot show that a reasonable possibility exists that a different result would have been reached had he been allowed to introduce his statement before taking the stand. Therefore, defendant's theory of admissibility is irrelevant, as he cannot show prejudicial error by the exclusion of his post-arrest statement. Accordingly, this assignment of error is overruled.

[12] In his next assignment of error, the defendant argues that the trial court erred by allowing the State to improperly raise the issue of parole eligibility into the defendant's capital sentencing proceeding.

On direct examination, the defendant's mental health expert, Dr. Bruce Berger, testified that one of the records he reviewed in evaluating the defendant was a psychological report from the California Penal System. Dr. Berger testified that he talked to the defendant about his incarceration in California. Dr. Berger further testified that the psychological report indicated that the defendant's institutional adjustment had been satisfactory. On cross-examination, Dr. Berger testified that the psychological report appeared to be an intake evaluation and that he did not believe that the defendant had been incarcerated for very long at the time the report was prepared. The State then asked Dr. Berger, "Do you know how long he spent in prison in California?" Dr. Berger replied that he did not know but believed it to be "a number of years." Finally, Dr. Berger testified that he did not know of any other report regarding any adjustment that may have taken place after the initial evaluation.

Clearly, the State was merely pointing out on cross-examination that at the time of the preparation of the report stating that defendant's adjustment to prison had been good, the defendant had been incarcerated for only a short period of time. This question implied only that the evaluation was not based on any lengthy period of incarceration. The State made no direct reference or argument suggesting that the defendant would be eligible for parole if sentenced to life imprisonment. The subject of parole was neither mentioned nor alluded to by the State. We find no basis in which to conclude that the State improperly injected the issue of parole eligibility into the proceedings. This assignment of error is therefore overruled.

The defendant next contends that the prosecutor made several improper arguments during closing arguments of the defendant's capital sentencing proceeding.

[13] First, the defendant argues that the prosecutor improperly argued to the jury that it should consider the facts of defendant's prior felony conviction in California in order to find the murder of Laura Krantz especially heinous, atrocious, or cruel. The defendant did not object to this argument at trial. Therefore, the "impropriety of the argument must be gross indeed in order for this Court to hold that [the trial court] abused [its] discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

In the case *sub judice*, it is clear from the record that the prosecutor's argument regarding the especially heinous, atrocious, or cruel circumstance did not refer to the prior felony conviction in California. Rather, the prosecutor's comments concerning the violent nature of the defendant's prior felony were in reference to the aggravating circumstance that the defendant had previously been convicted of a felony involving the use or threat of violence. The argument made was proper to show proof of this aggravating circumstance. When read in context, it is clear that the prosecutor never linked these two aggravating circumstances. Therefore, the trial court did not abuse its discretion by failing to intervene *ex mero motu* to prevent this argument.

[14] The defendant next argues that the prosecutor improperly advised the jury that in order to find that a mitigating circumstance existed, the jury must find that it existed and that it had mitigating value. The State acknowledges that this statement is incorrect as to statutory mitigating circumstances. However, the defendant failed to object to this statement at trial, and any prejudice was subsequently cured by the trial court's correct instructions to the jury.

[15] Finally, the defendant contends that the prosecutor impermissibly and prejudicially: (1) argued that the mitigating circumstances submitted by defendant did not excuse the defendant's conduct, (2) argued that the jury should not find the "no significant history of prior criminal activity" and "age" mitigating circumstances, (3) argued facts outside the record, and (4) argued that "the only thing standing between [defendant] and freedom" was the jury. The defendant did not interpose objection to the first three of these arguments. After thoroughly reviewing the record, we conclude that the prosecutor's arguments fall well within the wide latitude accorded counsel in the scope of argument, are consistent with and reasonably inferable from

the record, and are therefore not so grossly improper as to require the trial court's intervention. Accordingly, this assignment of error is overruled.

In his next assignment of error, the defendant argues that the trial court erred in submitting to the jury, over defendant's objections, the N.C.G.S. § 15A-2000(f)(1) statutory mitigating circumstance that defendant had "no significant history of prior criminal activity" and the N.C.G.S. § 15A-2000(f)(7) "age" statutory mitigating circumstance. We disagree.

This Court has consistently held that the trial court has a duty to submit statutory mitigating circumstances when supported by the evidence regardless of a defendant's objection to the submission. *See State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). Therefore, our inquiry must focus on whether the trial court properly concluded that evidence existed from which a reasonable juror could find the existence of each circumstance.

[16] When considering whether to submit the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity, "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." *State v. Williams*, 343 N.C. 345, 371, 471 S.E.2d 379, 394 (1996). In other words, "it is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether . . . 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).

In the case *sub judice*, the evidence indicated that the defendant had a conviction in California for robbery in 1980, a conviction in North Carolina for felonious assault in 1991, and three convictions for forgery. The defendant also had a history of drug use and abuse. However, the defendant's robbery conviction occurred thirteen years before the murder of Laura Krantz when defendant was twenty-two years old. The age of the defendant and the remoteness of the robbery conviction certainly could lessen the significance of this conviction. Although the defendant was convicted in 1991 for felonious assault,

he was given a suspended sentence. The evidence also shows that the defendant took the victim to the emergency room after the altercation. The fact that defendant received a suspended sentence and that he sought medical assistance for the victim could lessen the significance of the felonious assault conviction. Finally, the evidence shows that defendant's forgeries were all related to his drug use. The defendant also testified that his culpability was limited as to each conviction. It is not unreasonable to assume that if his testimony was believed by one of the jurors, that juror might question the significance of defendant's criminal history. Based on this evidence, it cannot be said that the trial court erred in submitting the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity.

[17] When considering whether to submit the statutory mitigating circumstance of age, chronological age is not the sole determining factor. *See State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). "Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances." *Id.* Although defendant was thirty-five years old at the time of the murder, there was evidence from which the jury could conclude that defendant was mentally immature.

For example, there was evidence that the defendant was involved in a serious car accident when he was ten which, according to defendant's parents, seemed to change defendant's personality; that defendant ran away from home when he was thirteen and that while "on the streets," he was sodomized and abused; and that the defendant developed serious drug and alcohol dependencies at an early age. Further, defendant's mental health expert, Dr. Bruce Berger, testified that the defendant seemed to have a "mixture of character traits that reflected both narcissistic, or kind of self-centered sort of traits, where it was more difficult to not have his own needs met first." Dr. Berger also testified that the defendant seemed to have "histrionic traits" and that his attachments with others were "more immature than mature." Clearly, the early emotional traumas suffered by defendant and Dr. Berger's testimony provide a reasonable basis from which a rational juror could find that the defendant was not as mature as his chronological age would seem to indicate. We therefore hold there was no error in the trial court's submission of the statutory mitigating circumstance of age. This assignment of error is overruled.

PRESERVATION ISSUES

The defendant raises four issues which he concedes have been decided against his position by this Court: (1) the trial court erred by giving an inherently vague instruction regarding the aggravating circumstance that the murder was especially heinous, atrocious, or cruel; (2) 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; (3) the trial court erred by instructing the 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; and (4) the trial court erred by failing to instruct the jury that the defendant would not be eligible for parole if given a sentence of life imprisonment. 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

[18] Having found no error in either the guilt/innocence phase or 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) (1988) (amended 1994). 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).

In the case *sub judice*, the jury found the defendant guilty of first-degree murder on the basis of premeditation and deliberation and on the basis of felony murder. At sentencing, the trial court submitted the following four aggravating circumstances, each of which the jury found: that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); that the murder was committed while the defendant was engaged in the commission of the felony of attempted robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5); that the murder was part of a course of conduct involving violence against another person, N.C.G.S. § 15A-2000(e)(11); and that the defendant had previously been convicted of a felony involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3). The jury declined to find the existence of any one of five statutory mitigating circumstances submitted for its consideration. Of the thirty-one nonstatutory mitigating circumstances submitted, the jury found two: that the defendant has a long history of drug use and abuse and that the defendant suffered from poly-substance abuse.

This case has several distinguishing characteristics: the jury convicted the defendant under the theory of premeditation and deliberation; the victim's brutal murder was found to be especially heinous, atrocious, or cruel; the victim was killed in her own bedroom; the victim suffered great physical pain before her death; the victim was of unequal physical strength to defendant; 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)." *State v. Syriani*, 333 N.C. 350, 401, 428 S.E.2d 118, 146-47, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). 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 alone was responsible for the victim's death. Defendant Stokes was only seventeen years old at the time of his crime. In this case, the defendant was thirty-five years old at the time of the crime, and the jury specifically declined to find that the defendant's age was a mitigating circumstance. In *Stokes*, the defendant was convicted under a theory of felony murder, and there was virtually no evidence of premeditation and deliberation. In the present case, the defendant was convicted upon a theory of premeditation and deliberation in addition to felony murder. "The 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. Finally, in *Stokes*, the victim was killed at his place of business. In this case, the victim was killed in her bedroom. A murder in one's home "shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

In *Bondurant*, the victim was shot while riding with the defendant in a car. *Bondurant* is distinguishable because the defendant immediately exhibited remorse and concern for the victim's life by directing the driver to go to the hospital. The defendant also went into the hospital to secure medical help for the victim, voluntarily spoke with police officers and admitted to shooting the victim. In the present case, by contrast, the defendant stabbed the victim numerous times, ensuring the victim's death. Further, the defendant did not seek medical aid for the victim. Instead, the defendant searched through

the victim's belongings for money to buy drugs and then simply fled the scene.

As noted above, one distinguishing characteristic of this case is that several 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, 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 four 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 State v. 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 trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. VINCENT MONTE WOOTEN

No. 208A94

(Filed 6 September 1996)

1. Criminal Law § 1348 (NCI4th)— capital murder—prospective jurors—instructions in outline of law—mitigating circumstances

The trial court did not err in a capital first-degree murder prosecution by preliminarily instructing potential jurors in a summary of trial procedures and capital punishment that mitigating circumstances were "things that might tend to mitigate the offense." The jury considered twenty-two different mitigating circumstances, including the catchall provision, and the trial court instructed the jury that it should consider as mitigating circumstances any aspect of defendant's character or record, any circumstances of the murder, and any other circumstances arising from the evidence which it deemed to have mitigating value. There is no reason to believe that the jury failed to consider any mitigating evidence as a result of the trial court's definition.

Am Jur 2d, Criminal Law §§ 598-600, 912; Trial § 841.

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

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

2. Criminal Law § 1326 (NCI4th)— capital murder—prospective jurors—outline of law—finding necessary for death penalty

The trial court did not err in a capital first-degree murder prosecution in a four page summary of trial procedures and capital punishment given to prospective jurors where defendant argued that the court confused venire members by omitting the requirement that the jury consider defendant's mitigating evidence during the capital sentencing proceeding, thereby prejudicing defendant by misrepresenting the State's burdens of production and persuasion. The trial court properly instructed the jury on the three findings necessary to support the imposition of the death penalty—existence of any aggravating circumstances, substantiality of those aggravators, and failure of the mitigators to outweigh the aggravators.

Am Jur 2d, Trial §§ 841, 1440-1449.

3. Criminal Law § 1319 (NCI4th)— capital murder—instructions to prospective jurors—outline of law

The trial court did not err in a capital first-degree murder prosecution in a four page summary of trial procedures and capital punishment given to prospective jurors where defendant argued that the instructions misstated the law by conveying to prospective jurors that they could not be opposed to the death penalty and at the same time be able to recommend the death sentence based on the evidence and the law, erroneously informed prospective jurors that they could not serve if they had any inclination to favor one punishment over another, and improperly focused the jury on sentencing. A trial court's instructions to the jury are to be construed contextually and isolated passages will not be deemed prejudicial when the charge as a whole is correct. Here the trial court's instructions were designed to inform members of the venire that both sides were looking for fair and impartial jurors who would follow the law by voting for punishment based upon the evidence. At least ten jurors were excused for cause after stating that their beliefs were so strong that they would be unable to follow the law, but no jurors expressing views against capital punishment but stating that they could follow the law were excused for cause. The instructions did not have the effect of prejudicing defendant's right to a fair and impartial jury.

Am Jur 2d, Trial §§ 1441-1449.

4. Jury § 145 (NCI4th)— capital murder—prospective jurors—outline of law—capital sentencing

The trial court did not err in a first-degree murder prosecution in giving prospective jurors a four-page "Outline of the Law" where defendant argued that the outline dealt "exclusively" with capital sentencing with respect to a verdict for first-degree murder and that the instructions improperly emphasized sentencing. This outline included a substantial amount of information with respect to the guilt phase of the trial, including the relevant law on the presumption of innocence and the State's burden of proof. Furthermore, the court made it clear that the first duty of the jury was to determine defendant's guilt or innocence and that the discussion of sentencing issues was simply to help the jurors understand the jury selection process. The instructions about capital sentencing originated with the trial court in the interest of securing a fair and impartial jury; the court was merely acting to expedite the trial and did not err on these facts.

Am Jur 2d, Trial §§ 1441-1449.

5. Jury § 153 (NCI4th)— capital murder—jury selection—qualms about death penalty—question not improper

The trial court did not err in a capital first-degree murder prosecution by allowing the prosecutor to ask during *voir dire* whether prospective jurors could write the word "death" and sign their names on the sentence recommendation form if chosen as a foreperson and the State proved the case beyond a reasonable doubt where the prosecutor subsequently peremptorily challenged jurors expressing hesitancy about returning a death sentence. Although defendant contended that these questions were not relevant under *Witherspoon* to the determination of a juror's fitness to serve and that the prosecutor's peremptory challenges went beyond *Witherspoon*, it has been held that it is not error for the prosecution to use peremptory challenges to excuse jury pool members who have qualms about the death penalty but who would not be excludable under *Witherspoon*.

Am Jur 2d, Homicide §§ 513, 514, 522-524; Trial §§ 1118-1120, 1441.

6. Jury § 103 (NCI4th)— capital murder—jury selection—individual voir dire and sequestration—denied

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion for individual *voir dire* and sequestration of prospective jurors. The North Carolina Supreme Court has consistently denied relief on this basis and defendant has offered no convincing reason explaining how the denial of his motion may have harmed him.

Am Jur 2d, Jury §§ 189-199, 204, 210.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

7. Constitutional Law § 353 (NCI4th)— capital murder—defense witness—assertion of privilege against self-incrimination

There was no error in a capital murder prosecution in the trial court's denial of defendant's request to examine a defense witness on *voir dire* to ascertain whether he would invoke the privilege against self-incrimination. While defendant objected at trial to the witness's assertion of the privilege against self-incrimination in the presence of the jury, defendant raised for the first time on appeal the issue of the trial court's denial of his motion to question the witness on *voir dire*.

Am Jur 2d, Criminal Law §§ 701 et seq., 936 et seq.; Witnesses §§ 172-174.

8. Criminal Law § 682 (NCI4th)— capital murder—mitigating circumstances—mental and emotional disturbance—peremptory instructions denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the statutory mitigating circumstance of mental and emotional disturbance, N.C.G.S. § 15A-2000(f)(2), where there was substantial evidence indicating that defendant became very angry and threatened to kill the victim upon learning that $250,000 worth of drugs and cash had been taken from him. The jury could find from the evidence that defendant's feelings of anger were not those of a disturbed individual, but the common reaction of

one who has just had a great deal of money and property taken from him.

Am Jur 2d, Criminal Law § 598.

9. Criminal Law § 681 (NCI4th)— capital murder—mitigating circumstances—impaired capacity—peremptory instruction denied

The trial court did not err in a capital sentencing proceeding by not giving a peremptory instruction on the statutory mitigating circumstance of impaired capacity, N.C.G.S. § 15A-2000(f)(6), where there was substantial evidence that defendant's mental state was not such that his capacity to understand the events as they took place and to conform his conduct to the directives of the law was impaired. Defendant immediately investigated the theft of his drugs and money by going to the scene of the theft, interrogating potential witnesses, and searching the country for suspects; conceived a plan to evade capture in driving to another town, buying new clothes, and having one of his two girlfriends meet him and hide the weapons; and his mental ability was sufficient for him to have renewed his driver's license in 1992 and scored ninety-two out of one hundred on the written test.

Am Jur 2d, Criminal Law § 598.

10. Criminal Law § 680 (NCI4th)— capital murder—mitigating circumstances—age of defendant—peremptory instruction denied

There was no plain error in a capital murder prosecution in the court's failure to give a peremptory instruction on the statutory mitigating circumstance of defendant's age. While defendant argues that the evidence as to the mitigating nature of his age (20) was uncontroverted, evidence at trial tended to show that defendant had previous criminal convictions and had served time in prison; that defendant was the kingpin of an elaborate drug syndicate with several "employees"; and that defendant provided for his mother, brother, and his girlfriend's family with the earnings from the drug operation. N.C.G.S. § 15A-2000(f)(7).

Am Jur 2d, Criminal Law §§ 598, 603.

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 § 1362 (NCI4th)— capital murder—sentencing—mitigating circumstance of age—instructions

The trial court did not err in a capital sentencing proceeding in its instruction on the mitigating circumstance of age where the court gave an instruction consistent with the pattern jury instruction which said that the mitigating effect of defendant's age is for the jury to determine from all the facts and circumstances. It was held in *State v. Skipper*, 337 N.C. 1, that the requirement is that the jury may not refuse to consider any relevant mitigating evidence and that the language "mitigating effect" did not allow the jury to refuse to consider evidence about age as a mitigating circumstance.

Am Jur 2d, Criminal Law § 598.

12. Criminal Law § 1348 (NCI4th)—capital sentencing—instructions—sympathy

The trial court did not err in a capital sentencing hearing by rejecting defendant's request that the jurors be instructed that they could base their recommendation upon any sympathy or mercy they may have for defendant arising from the evidence. It was held *State v. Hill*, 331 N.C. 387, that the better course is to avoid mentioning sympathy in instructions concerning mitigating circumstances in capital sentencing proceedings.

Am Jur 2d, Criminal Law §§ 598-600.

13. Criminal Law § 1312 (NCI4th)— capital murder—sentencing—proof of prior conviction—testimony of court clerk

The trial court did not abuse its discretion in a capital sentencing proceeding by admitting the testimony of a court clerk with respect to information in an indictment concerning a prior conviction of defendant. The State may present any competent evidence with respect to defendant's character or record that will substantially support the imposition of capital punishment and is not precluded from methods of proof of a prior conviction other than stipulation or original certified court record; however, the court may exercise discretion to ensure that the proof of aggravating circumstances does not become a mini-trial of the previous charges. Here, the jury was clearly cognizant of defendant's having pled guilty to an assault due to an admission on cross-examination and the victim's name and type of firearm was relevant, competent evidence properly ad-

mitted. The trial court prevented a mini-trial of the previous charge.

Am Jur 2d, Evidence §§ 327-329.

14. Criminal Law § 1348 (NCI4th)— capital murder—sentencing—instructions—definition of mitigating circumstances

The trial court did not err in a capital sentencing proceeding by giving a definition of mitigation drawn directly from the relevant pattern jury instruction.

Am Jur 2d, Criminal Law § 596.

15. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

A death sentence was not disproportionate where the record fully supports the aggravating circumstance 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, and the case is more similar to cases where the death sentence was found proportionate than to those in which the death penalty was found to be disproportionate or those in which juries have consistently recommended life imprisonment. Defendant spent the day at issue implementing a plan by interrogating suspects, patrolling the neighborhood and surrounding areas, and ambushing the victim and murdering him with an illegal machine gun. Defendant's televised exhibition of the technique by which he murdered the victim was a cavalier demonstration of his callousness and obliviousness to the value of human life.

Am Jur 2d, Criminal Law § 628.

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27 from a judgment imposing a sentence of death entered by Griffin, J., on 28 April 1994, in Superior Court, Pitt County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 March 1996.

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

Malcolm Ray Hunter, Jr., Appellate Defender, and J. Michael Smith, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was tried capitally upon an indictment charging him with first-degree murder in the killing of Edward Maurice Wilson. The jury returned a verdict finding defendant guilty of first-degree murder on the theories of premeditation and deliberation and lying in wait. Following a separate capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death for the murder, and the trial court entered a death sentence in accord with that recommendation. Defendant appeals to this Court as a matter of right from the judgment and sentence of death imposed for first-degree murder. For the reasons set forth in this opinion, we conclude that defendant received a fair trial, free from prejudicial error, and that the sentence of death for first-degree murder in this case is not disproportionate.

Evidence presented at trial tended to show that on 9 February 1993, defendant found out that someone had broken into the home of Dorothy Taft, defendant's girlfriend's mother, and stolen a number of items, including defendant's safe. The safe contained about $13,000 in cash and around 500 grams of cocaine. Defendant kept the safe in Dorothy's house because his mother would not allow him to keep it at home. Defendant was very upset about the theft and went out with Calvin Gardner (defendant's half-brother) and Eric Wooten (defendant's cousin) to investigate the matter.

Upon arriving at Dorothy's house, defendant argued about the theft with Stacy Taft (Dorothy Taft's son) and Edward Wilson, the victim in this case. Defendant told Wilson that he would kill him if he had anything to do with the theft of the safe. Defendant knew Wilson from Wilson's previous involvement in defendant's drug dealing activities. Although defendant, Gardner, and Wooten left the area shortly thereafter, they were in the Tafts' neighborhood several other times throughout the evening, once coming to argue again with Stacy about the safe. They returned to Dorothy's house later that evening after seeing Wilson going in the direction of the house.

Defendant and the others followed Wilson to the house and pulled up behind Wilson in the driveway. As Wilson walked toward defendant's car, defendant got out and shot Wilson several times with a .223 Colt AR-15 semiautomatic rifle that had been illegally modified so that it would fire automatically.

Defendant was arrested later that evening. While defendant did not want to speak with police investigators about the incident, he did tell them that "I love to shoot people." He later told a television reporter on camera that "I shot [the victim] down," demonstrated how he shot the victim, and said that he had no remorse about the killing. Defendant subsequently testified that he did not commit the killing and that he made the statements to the television reporter because he felt responsible for the victim's death and because he wanted to clear the names of his brother and cousin.

Dr. M.G.F. Gilliland, the Pitt County Medical Examiner, testified that Wilson suffered four gunshot wounds to the head, including two to the cheek, one above the temple, and one above the ear. All of the wounds passed from front to back, and the bullets exited near the back of Wilson's head. Dr. Gilliland testified that there was extensive damage to the brain and skull and that all four of the wounds were fatal.

In his first assignment of error, defendant contends that the trial court erred in distributing a document to prospective jurors entitled "Outline of Legal Principles." Defendant argues that the outline, a four-page summary dealing with the trial procedures and law with respect to capital punishment, misrepresented the capital punishment law. He contends that because it was given to potential jurors before the jury was selected, the document suggested that defendant would be found guilty and that a death penalty proceeding would therefore be necessary. Defendant takes issue with three aspects of the outline and the instructions that accompanied it: (1) the trial court's erroneous definition of mitigating circumstances; (2) the emphasis on the State's burden of production and persuasion, thereby confusing potential jurors; and (3) the overemphasis of the capital sentencing proceeding, thereby predisposing the jurors toward the death penalty. We address each of these issues.

[1] The trial court preliminarily instructed the potential jurors that mitigating circumstances were "things that might tend to mitigate the offense." Defendant contends that this instruction violated *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), by precluding the prospec-

tive jurors from considering any aspect of his background, his character, and the circumstances surrounding the crime that might form the basis for a sentence other than death. While *Lockett* involved an Ohio statute that specifically limited the sentencing body to the consideration of only three mitigators, N.C.G.S. § 15A-2000(f) allows the jury to consider eight specific statutory mitigating circumstances, a "catchall" statutory circumstance, and any number of nonstatutory mitigators for which there is substantial evidence.

In this case, the jury considered twenty-two different mitigating circumstances, including the catchall provision, and the trial court instructed the jury that

> [o]ur law identifies several possible mitigating circumstances. However, . . . it would be your duty to consider as mitigating circumstance [sic], any aspect of the defendant's character or record and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstance arising from the evidence which you deem to have mitigating value.

There is no reason to believe that the jury failed to consider any mitigating evidence as a result of the trial court's definition of mitigating circumstances, and this contention is therefore without merit.

[2] Defendant further argues in support of this assignment of error that the trial court's *voir dire* instructions confused the venire members by omitting the requirement that the jury consider defendant's mitigating evidence during the capital sentencing proceeding, thereby prejudicing defendant by misrepresenting the State's burdens of production and persuasion. Defendant contends that this error allowed the jurors to ignore mitigating evidence throughout the guilt phase of the trial.

The trial court instructed the jury that

> [t]he law further provides that it is the duty of the jury to recommend that the defendant be sentenced to death if the State satisfies 12 jurors beyond a reasonable doubt of three things:
>
> First, that one or more of the aggravating circumstances prescribed in this statute, in the law, exists.
>
> Second, that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating [circumstances] found by the jury

> or any juror. The reason for that, putting it that way, is that the mitigating [circumstances] do not have to be found unanimously. Any one juror can find a mitigating [circumstance].
>
> And third, that any mitigating circumstances found to exist are insufficient to outweigh the aggravating circumstance or circumstances found. So the jury is called upon to engage in this process that I've just described.

This instruction is a correct statement of the law. In *State v. Holden*, 321 N.C. 125, 160, 362 S.E.2d 513, 535 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988), this Court held that an instruction enumerating the three findings necessary to support the imposition of the death penalty—existence of any aggravating circumstances, substantiality of those aggravators, and the failure of the mitigators to outweigh the aggravators—was proper. The trial court so instructed the jury here and therefore did not err. This argument is without merit.

[3] Defendant's next argument under this assignment of error involves the trial court's instructions with respect to juror qualifications under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). He argues that the trial court's instructions (1) misstated the law by conveying to prospective jurors that they could not be opposed to the death penalty and at the same time be able to recommend the death sentence based on the evidence and the law, (2) erroneously informed prospective jurors that they could not serve if they had any inclination to favor one punishment over another, and (3) improperly focused the jury on sentencing.

The United States Supreme Court ruled in *Witherspoon* that the State may exclude for cause only those jurors who would be unable to perform or would be substantially impaired in the performance of their duties as capital sentencing jurors, notwithstanding their personal, political, moral, or religious objections to the death penalty. *Id.* at 522, 20 L. Ed. 2d at 784-85. The trial court instructed the jury in this case in the following manner:

> [W]e're looking for jurors who can fairly weigh this manner without any predisposition with regard to sentence, that is, no predisposition toward the death penalty, no predisposition towards life imprisonment[,] who can, on the evidence, in following the principles and the instructions that the Court will give you, fairly weigh the aggravating and mitigating circumstances as I'll explain

to you at an appropriate time and deciding the matter of punishment fairly and without any predisposition either way, and base a decision on the evidence and the law. . . .

If you're selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether the defendant[] is guilty or not guilty of first-degree murder or any lesser offense? . . .

Second, if you are satisfied beyond a reasonable doubt of those things necessary to constitute first-degree murder, can and will you vote to return a verdict of first-degree murder even though you know that death is one of the possible penalties?

Considering the next question they would be asking you or considering your personal beliefs about the death penalty, tell us whether you would be able or unable to vote to recommend the death penalty even though you are satisfied beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances that have been previously mentioned[.]

Another way to say it, to ask this question is: Are you opposed to the death penalty, completely and unequivocally opposed to the death penalty . . . .

Another way to frame that question you'd be asked whether you would automatically vote to impose the death penalty. And again this is designed to get at those people who feel that it—they would not be able to weigh or impose a life sentence if the evidence and the law warranted that result.

Can you consider the death penalty based on the evidence and the law is another way to put that question.

You will be asked considering your personal belief about the death penalty, tell us—or state whether you would be able or unable to vote for a recommendation of life imprisonment if the State fails to satisfy you beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances previously mentioned. Would you be able to consider life imprisonment based on the evidence and the law, in other words?

You would be asked would you automatically vote to impose life imprisonment? And again, the effort is to find jurors who can

fairly weigh the matter without any predisposition toward either—any result in this case.

If the defendant is convicted of first-degree murder, can and will you follow the law of North Carolina and the instructions that I will give you regarding this sentencing phase that I will ultimately explain to you? Really, it boils down to one question of whether or not you can do all of these things that we've talked about.

We have consistently held that a trial court's instructions to the jury are to be construed contextually and that isolated passages from those instructions will not be deemed prejudicial when the charge as a whole is correct. *State v. Jones*, 342 N.C. 523, 541, 467 S.E.2d 12, 23 (1996). In this case, the trial court's instructions were designed to inform members of the venire that both sides were looking for fair and impartial jurors who would follow the law by voting for punishment based upon the evidence. The instructions did not have the effect of prejudicing defendant's right to a fair and impartial jury. At least ten jurors were excused for cause pursuant to *Witherspoon* after stating that their beliefs were so strong that they would be unable to follow the law. However, no juror expressing views against capital punishment but stating that the juror could follow the law was excused for cause. This argument is without merit.

[4] Defendant further argues that the outline dealt "exclusively" with capital sentencing law with respect to a verdict for first-degree murder and that the instructions accompanying the outline improperly emphasized sentencing. The outline read as follows:

The Defendant, VINCENT MONTE WOOTEN, is charged with First Degree Murder of one Edward Maurice [Wilson] on February 9, 1993, and has entered a plea of not guilty of this charge.

Under the law of North Carolina, the Jury must first decide whether the Defendant is guilty or not guilty of First Degree Murder.

If the Jury finds the Defendant guilty, it must then, after a second hearing, decide to recommend whether a sentence of life imprisonment or death should be imposed by the Court.

Do you understand this to be the law?

Answer: _____

During the first stage of the trial, the Court will, at an appropriate time, instruct the Jury as to the elements of First Degree Murder and any lesser offenses which may be considered by the Jury under the law and the evidence.

In reaching its verdict as to whether the Defendant is guilty or not guilty, it is the sworn duty of each juror to fairly and impartially weigh and consider the evidence and to follow these basic principles of law.

First, the fact that the Defendant has been charged with an offense is not evidence of guilt.

Second, the Defendant is presumed to be innocent.

Third, the State has the burden to satisfy all twelve jurors beyond a reasonable doubt that the Defendant is guilty of an offense.

And Fourth, if the State does satisfy beyond a reasonable doubt of the existence of those facts necessary under the law, then it would be your duty as a juror to vote for a verdict of guilty. If it fails to do so, it would be your duty to find the defendant not guilty.

Do you understand this to be the law?

Answer: _____

If you are selected as a juror in this case, can and will you follow this law?

Answer: _____

The law further provides that it is the duty of the Jury to recommend that the Defendant be sentenced to death if the State satisfied the twelve jurors beyond a reasonable doubt of three things:

First, that one or more of the aggravating circumstances prescribed by Statute exists.

Second, that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty when considered with any of the mitigating [circumstances] found by the Jury or any juror.

And Third, that any mitigating circumstances found to exist are insufficient to outweigh the aggravating circumstances found.

Do you understand this?

Answer: _____

If the State fails to satisfy the Jury of all of these three things, it is the duty of the Jury to recommend life imprisonment.

Do you understand this?

Answer: _____

Please listen carefully to these questions that I'm going to ask you and consider them before answering.

If you are selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether the Defendant is guilty or not guilty of First Degree Murder or of any other lesser offense?

Answer: _____

Second, if you are satisfied beyond a reasonable doubt of those things necessary to constitute First Degree Murder, can and will you vote to return a verdict of guilty of First Degree Murder even though you know that death is one of the possible penalties?

Answer: _____

Considering your personal beliefs about the death penalty, state whether you would be able or unable to vote for a recommendation of the death penalty even though you are satisfied beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances previously mentioned?

Answer: _____

Would you automatically vote to impose the death penalty?

Answer: _____

Considering your personal belief about the death penalty, state whether you would be able or unable to vote for a recommendation of life imprisonment if the State fails to satisfy you beyond a reasonable doubt of the three things required by law

concerning the aggravating and mitigating circumstances previously mentioned?

Answer: _____

Would you be able to consider life imprisonment?

Answer: _____

If the Defendant is convicted of First Degree Murder, can and will you follow the law of North Carolina as to the sentence recommendation to be made by the Jury as the Court will explain it?

Answer: _____

We have warned that special instructions or synopsized "outlines" of the law

> might be fruitless, as the sentencing jury is not always composed of the same individuals as the guilt-phase jury; it might be distracting, as the function of the jury during the guilt phase is to determine the guilt or innocence of the defendant, not to be concerned about his penalty; and it could have a prejudicial effect, suggesting to the jury that the second stage in the trial will assuredly be reached, presupposing defendant's guilt.

State v. Artis, 325 N.C. 278, 295, 384 S.E.2d 470, 479 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). However, the outline at issue here obviously includes a substantial amount of information with respect to the guilt phase of the trial, including the relevant law on the presumption of innocence and the State's burden of proof. Furthermore, the trial court made it clear that the first duty of the jury was to determine defendant's guilt or innocence and that the discussion of sentencing issues was simply to help the jurors understand the jury selection process. Thus, the trial court instructed that

> in this particular case, it's a two stage process. Theoretically, we may select a jury here that would determine only whether the defendant is guilty or not guilty of first-degree murder or some lesser offense. And conceivably at a later time, we could have a second jury to undertake . . . the issue of punishment.
>
> Ordinarily, the course of things is that the jury that would be selected here would come to consider at some point, if we reach that point, if the jury finds the defendant is not guilty, of course, or some lesser offense, then we wouldn't reach the question of

> punishment. The jury wouldn't have to be concerned about it. But in selection of the jury, we need to consider the matter as if we would reach that point. But keep in mind this is done simply as a matter of informing you what the procedure is.

Defendant has failed to show that the trial court abused its discretion through these instructions and through the distribution of the outline.

Defendant argues that the outline violates this Court's holdings in *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. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990); and *Artis*, 325 N.C. 278, 384 S.E.2d 470. We held in those cases that it was not an abuse of discretion for the trial court to refuse to give a *defendant's* request for special instructions with respect to capital sentencing procedures. In this case, however, the instructions about capital sentencing originated with the trial court in the interest of securing a fair and impartial jury. The trial court was merely acting in accordance with this Court's statement in *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980), that "the duty of the [trial] judge [is] to expedite the trial in every appropriate way." The trial court did not err on these facts by providing the venire members with an accurate synopsis of the law and streamlining the preliminary *voir dire* through a series of questions. This assignment of error is overruled.

[5] In another assignment of error, defendant argues that the trial court erred in allowing the prosecutor to ask impermissible questions during *voir dire* and that the prosecutor's subsequent peremptory challenges to jurors expressing hesitancy about returning a death sentence violated defendant's rights to be tried by an impartial jury. During the *voir dire*, the prosecutor asked prospective jurors whether they could write the word "death" and sign their names on the sentence recommendation form if chosen as foreperson and the State proved the case beyond a reasonable doubt. Defendant contends these questions were not relevant under *Witherspoon* to the determination of a juror's fitness to serve.

In *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994), this Court rejected a similar argument, stating that 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.' " *Id.* at 158-59, 443 S.E.2d at 24 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)). While defendant contends that the prosecutor's peremptory challenges went beyond *Witherspoon*, we held in *State v. Allen*, 323 N.C. 208, 221-22, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), that it is not error for the prosecution to use peremptory challenges to excuse jury pool members who have qualms about the death penalty but who would not be excludable under *Witherspoon*. This assignment of error is without merit.

[6] Defendant contends in another assignment of error that the trial court erred in denying his motion for individual *voir dire* and sequestration of prospective jurors. Defendant concedes that we have consistently denied relief on this basis. *See, e.g., State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). As defendant has offered no convincing reason explaining how the denial of his motion may have harmed him, we need not revisit this issue. This assignment of error is without merit.

[7] Defendant next assigns error to the trial court's denial of his request to examine defense witness Calvin Gardner on *voir dire* to ascertain whether Gardner would invoke the privilege against self-incrimination. Gardner was with defendant and Eric Wooten at the time the victim was killed. Defendant's attorneys argued that it would be prejudicial to defendant if Gardner invoked his rights against self-incrimination in the presence of the jury. Gardner's attorneys informed the trial court that they had advised Gardner not to testify. After the trial court denied defendant's motion for *voir dire*, Gardner took the stand and refused to testify. While defendant objected at trial to Gardner's assertion of the privilege against self-incrimination in the presence of the jury, defendant raises for the first time on appeal the issue of the trial court's denial of his motion to question Gardner on *voir dire*.

In *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), this Court examined the issue whether a trial court, on its own motion, is required to conduct *voir dire* "to determine if there is a basis for a witness's fifth amendment claim when (1) that witness was presented by the defense and (2) the defendant failed to object at trial to the witness's assertion of the fifth amendment right." *Id.* at 12, 316 S.E.2d at 203. We held in *Maynard* that the trial court had no duty to conduct on its own motion a *voir*

dire to determine if there was a valid basis for a defense witness's Fifth Amendment claim. *Id.* at 14, 316 S.E.2d at 204. While defendant in this case requested that Gardner be examined, the only purpose of this request was to determine whether Gardner would assert his Fifth Amendment privilege. The sole concern defense counsel expressed at trial was that Gardner's invocation of the privilege before the jury would prejudice defendant. As in *Maynard*, defendant never objected to the witness's assertion of the privilege, nor did he ask the trial court to examine the witness as to the basis of his invocation of the privilege. Therefore, this assignment of error is without merit.

[8] Defendant contends in his next assignment of error that the trial court erred in failing to give peremptory instructions on the statutory mitigating circumstances involving defendant's mental condition. Defendant requested peremptory instructions on the statutory mitigators for mental and emotional disturbance (N.C.G.S. § 15A-2000(f)(2) (Supp. 1995)) and impaired capacity (N.C.G.S. § 15A-2000(f)(6) (Supp. 1995)). Evidence was introduced tending to show that defendant's IQ was such that it would make it difficult for him to deal with most activities of daily living, such as health, personal care, and remembering his responsibilities. Furthermore, evidence tended to show that he had chronic brain syndrome, a condition that would affect his ability to deal with emotions and feelings, thereby impairing his ability to conform his conduct to the dictates of the law. Defendant argues that this evidence entitled him to peremptory instructions as to the (f)(2) and (f)(6) mitigators.

A peremptory instruction is proper only when all the evidence, if believed, tends to show that a particular mitigating circumstance exists. *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993). With respect to the (f)(2) mitigator, there was substantial evidence indicating that defendant did not suffer from a mental or emotional disturbance at the time of the murder. Evidence tended to show that upon learning that $250,000 worth of drugs and cash had been taken from him, defendant became very angry and threatened to kill the victim if he had anything to do with the theft. In *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), we distinguished mental disturbance from mere anger and ruled that, where the events show that the killing was the product of deliberation rather than the "frenzied behavior of an emotionally disturbed person," a peremptory instruction is improper. *Id.* at 23, 320 S.E.2d at 656. In this case, the jury could find from the evidence that defendant's feelings of anger were not those of a disturbed individual,

but were the rather common reaction of one who has just had a great deal of money and property taken from him. The trial court's refusal to give a peremptory instruction as to the (f)(2) mitigator was not improper.

[9] With respect to the (f)(6) mitigator, there was substantial evidence showing that defendant's mental state was not such that his capacity to understand the events as they took place and to conform his conduct to the directives of the law was impaired. For example, defendant immediately investigated the theft of his drugs and money by going to the scene of the theft, interrogating potential witnesses, and searching the county for suspects. Furthermore, defendant conceived a plan to evade capture in driving to another town, buying new clothes, and having one of his two girlfriends meet him and hide the weapons. Defendant's mental ability was sufficient for him to have renewed his driver's license in 1992 and scored ninety-two out of one hundred on the written test. This evidence was inconsistent with the (f)(6) mitigator. As the trial court did not err in refusing to issue peremptory instructions with respect to the (f)(2) and (f)(6) mitigators, this assignment of error is without merit.

[10] Defendant next contends that the trial court erred in failing to give a peremptory instruction on the statutory mitigating circumstance of his age (N.C.G.S. § 15A-2000(f)(7)) and by giving instead an instruction that allowed jurors to reject the mitigator by finding that defendant's youth and immaturity had no mitigating value.

We have said with respect to the (f)(7) circumstance that " '[a]ny hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this [circumstance] weighed in the light of varying conditions.' " *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983) (quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894, 54 L. Ed. 2d 180 (1977)). Therefore, there is no definitive chronological age at which a trial court should decline as a matter of law to submit the statutory age mitigator. *Cf. id.* ("[T]he chronological age of the defendant is not the determinative factor under G.S. § 15A-2000(f)(7)."). While defendant did request a peremptory instruction in this case with respect to his age, he did not object to the pattern jury instruction as it was given at the close of the capital sentencing proceeding. As defendant did not object to this instruction, plain error analysis applies. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Defendant argues that as there was evidence tending to show that he was twenty years old at the time of the murder and lacked the emotional and cognitive functioning necessary to lead a normal life, he was entitled to such a peremptory instruction. In *State v. Simpson*, 341 N.C. 316, 462 S.E.2d 191 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 194 (1996), we held that "[w]here defendant's age is requested as a mitigating circumstance and is submitted to the jury, it is the province of the jury, upon evaluation in light of all other facts and circumstances found from the evidence, to determine whether defendant's age should be 'found' as a circumstance of mitigating value." *Id.* at 346-47, 462 S.E.2d at 208. While defendant argues that the evidence as to the mitigating nature of his age was uncontroverted, he overlooks certain evidence presented at trial. Evidence at trial tended to show that defendant had previous criminal convictions and had served time in prison; that defendant was the kingpin of an elaborate drug syndicate with several "employees"; and that defendant provided for his mother, brother, and his girlfriend's family with the earnings from the drug operation. We cannot say that the trial court's failure to offer the peremptory instruction was plain error.

[11] Defendant further argues that the instruction on age actually given by the trial court was erroneous. The trial court offered the following instruction, consistent with the pattern jury instruction, to the jury: "Third, you must consider whether the age of the defendant at the time of this murder, is a mitigating [circumstance]. The mitigating effect of the age of the defendant is for you to determine from all the facts and circumstances which you find from the evidence." Defendant argues that this language violates *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982), by allowing jurors to find the mitigator but to give it no weight. We rejected such an argument in *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252, stating that

> [t]he only requirement is that the jury may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. at 114, 71 L. Ed. 2d at 11. . . . We conclude that, in this case, the language "mitigating effect" did not allow the jury to "refuse to consider, as a matter of law," the evidence about age as a mitigating circumstance.

Skipper, 337 N.C. at 46-47, 446 S.E.2d at 277. Therefore, this assignment of error is without merit.

[12] Defendant contends in his next assignment of error that the trial court erred in rejecting his request that the jurors be instructed that

they could "base their recommendation upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." Defendant cites *California v. Brown*, 479 U.S. 538, 93 L. Ed. 2d 934 (1987), in support of this assignment of error. We encountered an instruction identical to the one in this case 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). We held in *Hill* that the trial court properly rejected the proposed instruction, as "the better and constitutionally safer course for trial courts is to avoid mentioning sympathy in instructions concerning mitigating circumstances in capital sentencing proceedings." *Id.* at 421, 417 S.E.2d at 782. This assignment of error is therefore without merit.

[13] In another assignment of error, defendant contends that the trial court erred in the capital sentencing proceeding by admitting the testimony of a court clerk with respect to information in an indictment concerning a prior conviction of defendant. During the State's presentation of evidence, defendant objected to the clerk's testimony with respect to defendant's prior conviction for assault with a deadly weapon inflicting serious injury. This testimony included the name of the victim and the fact that defendant shot the victim with a shotgun. Defendant argues that the testimony of the clerk was not competent evidence and that the trial court abused its discretion in overruling defendant's objections to this testimony.

This Court held in *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990), that the State may present any competent evidence with respect to defendant's character or record that will substantially support the imposition of capital punishment. Furthermore, while a prior conviction may be proved by stipulation or original certified copy of the court record, the State is not precluded from other methods of proof. *Id.* at 193, 372 S.E.2d at 549-50. However, the trial court may exercise discretion in controlling the State's presentation of the evidence to ensure that the proof of aggravating circumstances does not become a "mini-trial" of the previous charge or charges. *Jones*, 339 N.C. at 151, 451 S.E.2d at 845 (1994). A trial court may be reversed for abuse of discretion only upon the showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *State v. Kandies*, 342 N.C. 419, 446, 467 S.E.2d 67, 82 (1996).

In the present case, the trial court properly exercised its discretion in allowing the clerk to testify with respect to the assault con-

viction. The jury was clearly cognizant of defendant's having pleaded guilty to the assault due to his own admission to that effect on cross-examination. Furthermore, the trial court prevented a mini-trial of the previous charge. The victim's name and the type of firearm used was relevant, competent evidence properly admitted by the trial court. While defendant cites N.C.G.S. § 15A-1340.4(e) for the proposition that prior convictions may be proved only by certified copy of judgment or by stipulation of the parties, we held in *State v. Graham*, 309 N.C. 587, 593, 308 S.E.2d 311, 316 (1983), that those methods of proof are not exclusive and that prior convictions may be shown by other means as well. This assignment of error is without merit.

[14] Defendant next assigns error to the trial court's instructions to the jury with respect to mitigation, arguing that the trial court's definition of mitigation unfairly limited the range of evidence that a juror might find to be a basis for a sentence less than death. The trial court instructed the jury that a mitigating circumstance is a fact or group of facts that do not constitute a justification or excuse for a killing or reduce it to a lesser crime than first-degree murder, but that may be considered as extenuating or reducing the moral culpability of the killing or make it less deserving of extreme punishment than other first-degree murders. This instruction was drawn directly from the relevant pattern jury instruction. *See* N.C.P.I.—Crim. 150.10 (1990). It was not error. *Hill*, 331 N.C. at 420, 417 S.E.2d at 782. This assignment of error is without merit.

With commendable candor, defendant brings forward three additional assignments of error that he concedes have been previously decided contrary to his position by this Court. He raises these issues to give this Court the opportunity to reexamine its prior holdings, as well as to preserve these assignments of error for any potential 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. We therefore overrule these assignments of error.

[15] Having determined that defendant's trial and separate capital sentencing proceeding were free from error, we now 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 circumstance on which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prej-

udice, 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. Furthermore, 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 therefore turn to our final statutory duty of proportionality review.

In the instant case, defendant was convicted of first-degree murder based on both the theory of premeditation and deliberation and the theory of lying in wait. The jury found as an aggravating circumstance that defendant had been previously convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988). One or more jurors found the following circumstances to be mitigating: (1) defendant committed the murder while mentally or emotionally disturbed; (2) defendant was under the influence of marijuana at the time of the murder; (3) defendant was an illegitimate child whose father abandoned him financially and emotionally; (4) at age fifteen, defendant was shot by his stepfather Tim Harper; (5) defendant was physically abused by his stepfather Calvin Gardner, Sr.; (6) defendant was sexually abused by Gardner, Sr.; (7) during his childhood, defendant repeatedly witnessed his mother being beaten; (8) defendant's grandmother died in his arms when he was twelve years old; (9) defendant did not experience a stable childhood when he lived with his grandparents, aunt, and mother; (10) defendant was highly regarded by friends of the family, including the preacher at his church; (11) defendant possesses borderline intellectual functioning with an IQ of seventy-one; (12) defendant dropped out of school when he was in the ninth grade; (13) defendant has been diagnosed with chronic brain syndrome secondary to head trauma; (14) defendant experiences brain seizures as the result of a brain injury; and (15) defendant was brought up in an atmosphere of violence, abuse, and hate.

In our proportionality review, it is proper to compare the instant 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). This Court has 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 do not find this case to be substantially similar to any of those cases.

In this case, defendant ambushed and shot down an unarmed victim with an illegal machine gun. The jury found the aggravating circumstance that defendant had previously been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3). This aggravator is one of three most commonly found in cases in which juries return death sentences. *State v. Greene*, 324 N.C. 1, 27-29, 376 S.E.2d 430, 446-47 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

In carrying out our proportionality review, we have noted the significance of a murder perpetrated by lying in wait for the victim. *See State v. Buckner*, 342 N.C. 198, 247, 464 S.E.2d 414, 442 (1995); *State v. Ward*, 338 N.C. 64, 128, 449 S.E.2d 709, 745 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995); *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 *Brown*, the defendant was convicted of first-degree murder on the theory of lying in wait, and the jury found the (e)(3) circumstance in the sentencing phase. We concluded that the death penalty as imposed in *Brown* was not disproportionate, stating:

> The crime was as calculated and deliberate as a murder can be. In the lengthy, purposeful plotting, and in the execution of his crime, the defendant displayed a cold callousness and obliviousness to the value of human life. He had demonstrated those qualities before: his criminal record was replete with evidence of his dangerousness and propensity to act violently toward others . . . .
>
> In addition, defendant displayed absolutely no remorse or contrition for his act.

Brown, 320 N.C. at 231-32, 358 S.E.2d at 34-35.

Defendant spent the day at issue in this case implementing a plan by interrogating suspects, patrolling the neighborhood and surrounding areas, and finally ambushing Edward Wilson and murdering him

with an illegal weapon. Furthermore, defendant's televised exhibition of the technique by which he murdered Wilson was a cavalier demonstration of his callousness and obliviousness to the value of human life. While the jury in this case did find a number of mitigating circumstances, we cannot say that the death penalty as imposed in this case is excessive. The case *sub judice* is therefore distinguishable from the seven cases in which this Court has found the death sentence to be disproportionate and entered a sentence of life imprisonment.

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 bears repeating 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 at this time 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 death penalty to be disproportionate or those in which juries have consistently returned recommendations of life imprisonment. Accordingly, we conclude that the sentence of death recommended by the jury and ordered by the trial court in the present case is not disproportionate.

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

NO ERROR.

STATE OF NORTH CAROLINA v. CALVIN CHRISTMAS CUNNINGHAM

No. 232A91-3

(Filed 6 September 1996)

1. Constitutional Law § 277 (NCI4th)— waiver of right to counsel—misconduct—no loss of right to represent self

Defendant waived his right to counsel when he adamantly refused to allow the public defender or anyone whose name was

furnished by the public defender to represent him and stated that he would represent himself unless a specific member of the Michigan bar was appointed to represent him. Further, defendant did not lose the right to represent himself when his own outbursts caused him to be removed from the courtroom several times during the trial.

Am Jur 2d, Criminal Law §§ 758, 759, 764.

Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.

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

2. Constitutional Law § 252 (NCI4th)— deceased officer's personnel file—denial of in camera inspection—absence of prejudice

In a prosecution for the first-degree murder of a police officer, defendant was not prejudiced by the denial of his motion for an *in camera* inspection of the deceased officer's personnel file and delivery to him of materials pertaining to any actions against the officer involving assaults or the use of excessive force since the conduct of deceased as a police officer would not be relevant to the issue in the case of whether defendant shot the officer as the officer walked around a police vehicle.

Am Jur 2d, Depositions and Discovery § 440.

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

Validity, construction, and application of statutory provisions relating to public access to police records. 82 ALR3d 19.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case. 86 ALR3d 1170.

3. Criminal Law § 252 (NCI4th)— alleged illness of accused—denial of continuances

The trial court did not err by failing to grant several continuances and a recess requested by defendant during trial on the

ground that he was tired and too ill to continue where defendant was repeatedly examined by medical personnel and no medical basis was found for his complaints.

Am Jur 2d, Continuance § 110.

Continuance of criminal case because of illness of accused. 66 ALR2d 232.

4. Constitutional Law § 350 (NCI4th)— disruptive behavior—excusal of defendant from courtroom—waiver of right to confront witnesses

The trial court did not deny defendant his right to confront witnesses by excusing him from the courtroom where defendant waived his right by refusing to call witnesses and by repeatedly disrupting the court proceedings with unfounded complaints of illness.

Am Jur 2d, Criminal Law §§ 700, 730, 929, 966.

Absence of accused at return of verdict in felony case. 23 ALR2d 456.

5. Constitutional Law § 344.1 (NCI4th)— capital trial—removal of defendant—violation of right to presence—harmless error

The violation of defendant's constitutional right to be present at every stage of his capital trial when he was removed from the courtroom for disruptive behavior was harmless beyond a reasonable doubt where defendant was absent only for short periods of time; during his absences, he was able to observe all the court proceedings through an audio-video hookup in his cell; and when he returned to the courtroom, he was allowed to object to anything that occurred during his absence.

Am Jur 2d, Criminal Law § 692.

Accused's right, under Federal Constitution, to be present at his trial—Supreme Court cases. 25 L. Ed. 2d 931.

6. Criminal Law § 478 (NCI4th)— court's contact with prospective jurors—no error

There was no error in the trial judge's *ex parte* contact with the jury when selected and prospective jurors were sent from the courtroom and the judge led the prospective jurors to their room because of a shortage of deputies in the courtroom where the

judge did not speak to any of the prospective jurors during this time.

Am Jur 2d, Trial §§ 1569, 1573.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors. 41 ALR2d 288.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-*Parker* cases. 35 ALR4th 890.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.

7. Criminal Law § 263 (NCI4th)— denial of continuance to read transcript

The trial court did not err in the denial of defendant's motion for a continuance of his first-degree murder retrial to read a five-thousand page transcript of his first trial which was delivered to him three days before the retrial since it was not necessary for defendant to read the jury selection, closing arguments and instructions to prepare for a new trial; defendant could have read the transcript when he was not in court during the four days of jury selection; and during the retrial, defendant should have been able to read the previous testimony of each witness for help in dealing with his or her testimony at the new trial.

Am Jur 2d, Continuance § 107.

8. Evidence and Witnesses § 851 (NCI4th)— exclusion of hearsay

The trial court did not err by excluding defendant's question to a crime scene technician as to whether a report by another showed that some materials were not where the witness reported them to be because the question was designed to elicit hearsay testimony.

Am Jur 2d, Evidence § 659; Homicide § 329; Witnesses § 813.

9. Evidence and Witnesses § 2873 (NCI4th)— item not introduced into evidence—cross-examination not permitted

The trial court did not err by refusing to permit defendant to ask a witness on cross-examination if he could identify a flash-

light as the one he testified he had observed where the flashlight was not introduced into evidence.

Am Jur 2d, Witnesses § 813.

10. Searches and Seizures § 100 (NCI4th)— search warrant—federal firearms violation—subsequent decisions showing no violation—probable cause for warrant

A search pursuant to a warrant based upon a statement that defendant was a convicted felon who had a firearm in his home in violation of the federal firearms law was not unlawful, although subsequent federal decisions held that it is not a violation of federal law for a convicted felon in North Carolina to have a firearm in his home, where it was not clear that this was the law when the search was made in 1990, and there was thus probable cause to believe the federal law had been violated.

Am Jur 2d, Searches and Seizures § 114.

11. Evidence and Witnesses § 1767 (NCI4th)— experimental evidence—shot fired through glass—glass admissible to illustrate testimony

The trial court did not err in the admission of a piece of mounted windowpane glass through which an expert witness had fired a bullet to illustrate his testimony that a bullet had been fired from inside a police car based upon the coning effect the bullet had on the window glass of the car, although the coning was more pronounced in the glass which was introduced than in the police car glass, since this fact did not prevent the glass from illustrating the expert's testimony as to what it showed with respect to the direction of the bullet.

Am Jur 2d, Evidence §§ 997, 1014, 1016.

Admissibility of experimental evidence to show visibility or line of vision. 78 ALR2d 152.

12. Evidence and Witnesses § 1249 (NCI4th)— confession—Miranda warnings—use of statement against defendant—absence of "will"

Defendant's confession was not inadmissible because the interrogating officer warned him that anything he said could be used against him rather than that anything he said could "and will" be used against him.

Am Jur 2d, Criminal Law § 791; Evidence § 749.

Comment Note.—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

The progeny of *Miranda v Arizona* in the Supreme Court. 46 L. Ed. 2d 903.

13. Evidence and Witnesses § 1259 (NCI4th)— failure to answer questions—no invocation of right to silence

Defendant did not invoke his Fifth Amendment right to remain silent by refusing to answer certain questions and by remaining silent after certain questions were asked of him.

Am Jur 2d, Criminal Law § 796; Evidence § 749.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent. 23 ALR4th 563.

14. Evidence and Witnesses § 851 (NCI4th)— exclusion of double hearsay

In a prosecution for the murder of a police officer, testimony which defendant attempted to elicit from an investigator for the public defender's office that Dwight Johnson told the investigator that a friend of Charlie Bush accused Bush of having "just shot that cop" and Bush did not deny having done so was double hearsay and properly excluded by the trial court.

Am Jur 2d, Evidence § 661; Homicide § 329.

15. Evidence and Witnesses §§ 1980, 2750.1 (NCI4th)— reading search warrant affidavit to jury—door opened by defendant

Where defendant questioned an officer about the difference between a warrant to search his home and a warrant to procure blood and hair samples and had the officer read a part of the affidavit for the warrant to search the home, defendant opened the door for the State on cross-examination to have the officer read the entire affidavit for the warrant to search defendant's home which revealed that he had previously served a prison sentence for a felony.

Am Jur 2d, Evidence § 1324.

16. Constitutional Law § 346 (NCI4th)— defendant's refusal to continue presenting evidence—ruling defendant had rested case—no denial of right to present evidence

The trial court did not deny defendant the right to present evidence in a first-degree murder trial when it ruled that defendant had rested his case after defendant refused to continue presenting evidence where defendant told the court he was too sick and tired to continue; the court had defendant examined by a doctor who reported that he could find nothing wrong with defendant; defendant refused to examine two witnesses during a *voir dire* in the absence of the jury; when the jury returned to the courtroom, the court told defendant that it would hold he had rested his case if he refused to continue with his evidence; and defendant refused to call a witness or offer his exhibits into evidence.

Am Jur 2d, Criminal Law §§ 720, 730, 956, 966.

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L. Ed. 2d 1115.

17. Criminal Law § 418 (NCI4th)— jury arguments—court's admonition not prohibition of objections

The trial court did not prevent defendant from objecting to improper arguments by the prosecutor when it told defendant that it was "not going to let you interrupt the other side" since the court was merely instructing defendant that he could not continue to disrupt the proceedings as he had been doing, and defendant made several objections to the prosecutor's arguments.

Am Jur 2d, Trial § 705.

18. Criminal Law § 463 (NCI4th)— closing argument—crime by defendant—supporting evidence

The prosecutor's closing argument in a prosecution for first-degree murder of a police officer that defendant had committed the misdemeanor of communicating a threat was supported by evidence that defendant told the officer three times, "Hit me with that flashlight and I'll cut you a flip."

Am Jur 2d, Trial § 632.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR4th 810.

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.

19. Criminal Law § 447 (NCI4th)— closing argument—expectations of murder victim's family—no gross impropriety

The prosecutor's closing argument in a first-degree murder trial that the victim's mother, father, and widow "are counting on me to present this summation to you so that justice will be done" was not an improper appeal to the sympathy of the jury and was not grossly improper.

Am Jur 2d, Trial §§ 664-666.

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

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

20. Criminal Law § 463 (NCI4th)— closing argument—comment supported by evidence

The prosecutor did not argue facts not in evidence in this prosecution for the first-degree murder of a police officer when he argued that a crime lab chemist measured the density and refractive index of glass fragments taken from the victim's face and from a broken police car window and they were the same; rather, this argument was supported by the chemist's testimony.

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.

21. Criminal Law § 809 (NCI4th)— instruction on defendant's failure to testify—absence of prejudice

Defendant was not prejudiced by the trial court's instruction on defendant's failure to testify without a request by defendant for such an instruction.

Am Jur 2d, Criminal Law § 940; Trial § 1232.

22. Criminal Law § 747 (NCI4th)— instruction—evidence tending to show confession—no expression of opinion

The trial court did not express an opinion on the evidence by instructing the jury that there was evidence which tended to show that defendant confessed that he committed the crime charged in this case.

Am Jur 2d, Trial § 1355.

23. Homicide § 706 (NCI4th)— failure to submit voluntary manslaughter—error cured by verdict

Any error in the trial court's failure to submit voluntary manslaughter to the jury was harmless where the trial court submitted first-degree murder based on premeditation and deliberation and second-degree murder, and the jury returned a verdict of guilty of first-degree murder.

Am Jur 2d, Homicide § 530; Trial § 1427.

Automobile liability insurance: what are accidents or injuries "arising out of ownership, maintenance, or use" of insured vehicle. 15 ALR4th 10.

Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.

24. Arrest and Bail § 101 (NCI4th)— illegal arrest—no right to kill officer

In a prosecution for first-degree murder for the shooting death of a police officer who had arrested defendant for communicating a threat, the trial court did not err by failing to charge the jury that defendant's arrest was illegal as a matter of law and that he had a right to protect himself by any means, including the means he used, since a person who has been placed under arrest by an officer does not have a right to kill the officer. N.C.G.S. § 15A-401(f).

Am Jur 2d, Arrest § 115.

25. Homicide § 519 (NCI4th)— second-degree murder—instructions—intent to kill—error favorable to defendant

Any error in the trial court's instruction that required the jury to find an intent to kill rather than an intent to inflict a wound

which caused death in order to convict defendant of second-degree murder was favorable to defendant and not prejudicial.

Am Jur 2d, Homicide §§ 483, 498.

26. Criminal Law § 497 (NCI4th)— evidence sent to jury room—absence of defendant's consent—harmless error

Assuming it was error for the trial court to permit an unspent bullet, a cartridge casing, and a bullet which had been taken apart in a police laboratory to be sent to the jury room without defendant's consent in a prosecution for first-degree murder, this error could not have affected the outcome of the trial and was harmless in light of the strong evidence of defendant's guilt.

Am Jur 2d, Trial § 1665.

Propriety, at federal criminal trial, of allowing material, object, or model of object allegedly used in criminal act to be taken into jury room during deliberations. 62 ALR Fed. 950.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Jones (Julia V.), J., at the 7 March 1994 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 February 1996.

This is the second time this case has been in this Court. In *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), we granted the defendant a new trial after he had received a death sentence upon his conviction for first-degree murder.

At the second trial of this case, the evidence showed that the defendant shot and killed Charlotte-Mecklenburg Police Officer Terry Lyles on 5 August 1990. The defendant had been arrested by Officer Lyles for communicating threats to Officer Lyles when he and Officer Villines arrived at the defendant's girlfriend's home in response to a domestic disturbance call. At the time of the shooting, the defendant was seated in the back seat of Officer Lyles' patrol car. He first shot the officer twice in the back through the seat. However, the officer was wearing a bullet-proof vest and was not injured. The officer then exited the vehicle. As Officer Lyles went back to the front of the vehicle to call for help, the defendant shot him in the head through the window of the patrol car. Officer Lyles died as a result of this wound. The jury found the defendant guilty of first-degree murder.

The jury could not agree on a sentencing recommendation, and the defendant was sentenced to life in prison. The defendant appealed to this Court.

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

Thomas F. Loflin III for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the failure of the court to appoint counsel to represent him. He contends he did not unequivocally waive his right to counsel. The record contains two separate forms, signed by the defendant and a superior court judge, which recite that the defendant waived his right to counsel after being fully advised of his rights and fully understanding the consequences of his action as required by N.C.G.S. § 7A-457 and N.C.G.S. § 15A-1242.

The defendant says that the record shows that in spite of these written waivers of counsel, the defendant equivocated as to whether he wanted counsel to represent him. Prior to trial, there were three separate hearings in regard to appointing counsel for the defendant. At each of the hearings, the defendant was adamant that he did not want anyone from the public defender's office or anyone suggested by the public defender's office to represent him. The public defender furnished the defendant with the names of two attorneys who were on the capital list for Mecklenburg County. The defendant would not accept either of these attorneys. The defendant said he wanted Ms. Melissa El, a member of the Michigan bar, to represent him, which the court refused to do. The judge amended the form to say the defendant waived his right to counsel "unless the court appoints Ms. Melissa El."

An indigent defendant does not have the right to an attorney of his choice. When the defendant refused to accept available counsel, the court was not required to appoint counsel of the defendant's choosing. *State v. Weaver*, 306 N.C. 629, 641, 295 S.E.2d 375, 382 (1982), *overruled on other grounds State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976); *State v. Robinson*, 290 N.C. 56, 65, 224 S.E.2d 174, 179 (1976). When he said he would represent himself if the court would not appoint counsel he requested, the defendant waived his right to counsel.

State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (1993), *sentence vacated on other grounds*, 114 U.S. 1365, 128 L. Ed. 2d 42 (1994), upon which the defendant relies, is not helpful to him. In *Williams*, the defendant told the court that he wanted to represent himself, but on further questioning by the court, he said he would let his lawyers continue representing him if they would furnish him with certain information. We held the defendant's request to represent himself was equivocal. In this case, the defendant was adamant that he would not let the public defender or anyone whose name was furnished by the public defender represent him. He took this position after his rights and the consequences of representing himself had been fully explained to him at three separate hearings.

As an alternative argument, the defendant contends his conduct at the trial amounted to a waiver of his right to self-representation. Several times during the trial, outbursts by the defendant caused him to be removed from the courtroom. The defendant, relying on several cases from other jurisdictions, *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *State v. Jessup*, 31 Wash. App. 304, 641 P.2d 1185 (1982), argues that the defendant lost his right to represent himself. We know of no such rule in this jurisdiction. If the defendant because of his conduct lost his right of self-representation, he was not prejudiced when the court did not enforce this rule against him. He was allowed to continue representing himself, as he wanted.

This assignment of error is overruled.

[2] In his next assignment of error, the defendant contends the court should have conducted an *in camera* inspection of the personnel file of the deceased. The defendant made a motion for such an inspection, asking the court to deliver to him any materials which would be helpful to his case.

The defendant says complaints or disciplinary actions against the decedent involving assaults, threatened assaults, or the use of excessive force may have provided information to rebut evidence that the deceased did nothing untoward on the day he was killed. The City of Charlotte objected to the release of the decedent's personnel file, and the court did not require that it be released.

The defendant relies on *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L. Ed. 2d 40 (1987), and *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988), for the authority to support his position. Assuming the

defendant had a right to this *in camera* inspection, he was not prejudiced by the refusal of the court to allow it. The question in this case is whether the defendant shot Officer Lyles as Officer Lyles was walking around the police vehicle. The conduct of Officer Lyles as a police officer would have no relevance to this question.

This assignment of error is overruled.

[3] Next, the defendant assigns error to the trial court's failure to grant several continuances requested by him during the trial because he was too tired and ill to continue. He also contends that the trial court erred in failing to recess for the day at his request. He notes that the court admonished him and did not allow him to be heard. The defendant further says that the court's actions resulted in denial of his right to confront witnesses and that the court's disparaging treatment of him resulted in prejudice.

The defendant was repeatedly examined by medical personnel, and no medical basis was ever found for his complaints. Yet he continued to interrupt the proceedings and argue to the trial court that he did not feel well. The trial court did not err in refusing to grant continuances or recess since no medical basis could be found for his complaints.

Further, because the defendant was disrupting the proceedings, the trial court properly warned him to behave appropriately, or he would have to leave. When the defendant continued to disrupt the proceedings, the court properly excused him from the room. In fact, at one point, the defendant himself requested that he be allowed to leave the courtroom during the proceedings. The trial court's warnings were appropriate and not prejudicial. We further note that most of the trial court's warnings took place outside of the presence of the jury.

[4] The defendant further argues that by failing to grant his request and by excusing him from the courtroom, the trial court denied him his right to confront witnesses. The privilege of personally confronting witnesses may be lost by consent or misconduct. *Snyder v. Massachusetts*, 291 U.S. 97, 106, 78 L. Ed. 674, 678 (1934). The defendant waived his right by refusing to call witnesses and by repeatedly disrupting the court proceedings with unfounded complaints of illness.

We also conclude that the trial court did not treat the defendant in a disparaging manner. The court merely instructed the defendant that his motions to continue were denied and asked him to resume

with the trial. When the defendant continued to argue with the court, the court removed the jury, heard the defendant, and instructed him that the court had ruled on his motion and that the defendant must follow ordinary court procedure and etiquette, or he would be removed from the room. The trial court did not remove the defendant until, after repeated warnings, he insisted on disrupting the proceedings.

This assignment of error is overruled.

[5] In his next assignment of error, the defendant contends his constitutional right to be present at every stage of the trial was violated when the trial was conducted during his absence, even though the absence was because of his disruptive behavior and on one occasion was voluntary. We held in *State v. Huff*, 325 N.C. 1, 32, 381 S.E.2d 635, 653 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), that when a defendant in a capital case is removed from the courtroom for disruptive behavior, his constitutional right to be present at every stage of the trial is violated if the trial is continued in his absence. We held that in such a case, a harmless error analysis must be made. The error must be harmless beyond a reasonable doubt to avoid a new trial.

In this case, the defendant was absent for short periods of time. During his absences, he was in his cell and was able to observe all the court proceedings through an audio-video hookup. When he returned, he was allowed to object to anything that occurred during his absence. His exclusion from the courtroom was harmless beyond a reasonable doubt.

[6] The defendant also complains under this assignment of error that the judge had an *ex parte* contact with the jury. At one point in the selection of the jury, the court sent the jurors who had been selected to serve and those who were to be examined from the courtroom. The court directed that the prospective jurors not go to the same room as the jurors who had been selected. There was a shortage of deputies in the courtroom, so the judge led the prospective jurors to their room. The judge did not speak to any of the prospective jurors while she was leading them to their room. In this there was no error.

This assignment of error is overruled.

The defendant next assigns error to the denial of his motion for a mistrial made before the introduction of evidence. He says this motion should have been granted because the judge was biased, the

judge had an *ex parte* contact with the jurors, the defendant was denied his right to counsel, and the defendant was denied his right to be heard. We have ruled that there was no error in the judge's contact with the jury, the allowance of the defendant to represent himself, and the judge's ruling on his right to be heard. We cannot hold that the judge was biased. Indeed, we believe she exercised patience and restraint in dealing with the defendant's unruly behavior.

This assignment of error is overruled.

[7] The defendant next assigns error to the denial of his motion for a continuance in order to read a five-thousand page transcript of his first trial. The attorney who represented the defendant on his first appeal, and who also represents him on this appeal, did not deliver the transcript to the defendant until three days before the trial. The defendant says he was entitled under the Constitution of the United States to have the transcript of his previous trial, *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971), and forcing him to read such a voluminous record in such a short time virtually deprived him of this right.

There was no error in the denial of this motion to continue. The transcript included the jury selection, closing arguments, and jury instructions. It was not necessary to read these to prepare for a new trial. The jury selection took four days, during which time the defendant could be reading the transcript when he was not in court. During the trial, the defendant should have been able to read the previous testimony of each witness for help in dealing with his or her testimony at the new trial.

This assignment of error is overruled.

[8] In his next assignment of error, the defendant argues two errors which he says occurred while he was cross-examining witnesses. Mark Wilson, a crime scene search technician with the Charlotte-Mecklenburg Police Department, testified that he diagrammed the crime scene shortly after Officer Lyles was killed. On cross-examination, the defendant asked Mr. Wilson if a report by another did not show that some materials were not where Mr. Wilson reported them to be. The court sustained an objection to this question.

The question was designed to elicit testimony as to the statement of a third party to prove the truth of the matter asserted. This was hearsay testimony. N.C.G.S. § 8C-1, Rule 801(c) (1992). It was not error to exclude this testimony.

[9] The defendant's second argument under this assignment of error involves an attempt he made to cross-examine a witness in regard to a flashlight. G.C. Chapman, a police officer with the Charlotte-Mecklenburg Police Department, testified that he went to the scene of the shooting and observed a flashlight on the floor of the police vehicle. On cross-examination, the defendant asked that the flashlight be produced in order to find out if the witness could identify the flashlight. The flashlight had not been introduced into evidence, and the court held the defendant could not question the witness about it. The defendant did not offer the flashlight into evidence, and it was not error that the court did not let him ask the witness to identify it. The court was not obliged to act as defendant's attorney and put the flashlight into evidence. *Faretta v. California*, 422 U.S. 806, 834, 45 L. Ed. 2d 562, 581 (1975).

This assignment of error is overruled.

[10] The defendant next assigns error to the denial of his motion to suppress evidence found in a search of his home. The officers procured a search warrant based on their statement that the defendant was a convicted felon who had a firearm in his home in violation of the federal firearms law. He cites three cases which he says hold that it is not a violation of federal law for a convicted felon in North Carolina to have a firearm in his home. *United States v. Shoemaker*, 2 F.3d 53 (4th Cir. 1993), *cert. denied*, 510 U.S. 1047, 126 L. Ed. 2d 665 (1994); *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991); *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991).

These three cases deal with the question of when a person is guilty under the federal law of possessing a firearm by a person who has been convicted in any court of a felony. *McBryde* and *Essick* dealt with questions as to when a person could be convicted under the federal law for possessing a firearm after being convicted of a felony in North Carolina if the state conviction does not proscribe the possession of a firearm in this state. In each case, the Court of Appeals for the Fourth Circuit held that the defendant could not be so convicted. The court left open in those cases the question of whether a felon could be convicted under the federal statute if he has a firearm in his home, as he is allowed to under the law of North Carolina. N.C.G.S. § 14-415.1(a) (1993). In *Shoemaker*, the Court of Appeals held that a felon cannot be convicted of a violation of the federal firearms law for having a firearm in his home. The defendant says that because he

could not have been convicted of having a firearm in his home, there was not probable cause to issue a search warrant.

Although we know now that the defendant would not have been guilty under the federal law if he had possessed a firearm in his home, it was far from clear in 1990 when the search was made. It took three decisions by the Court of Appeals to reach this conclusion. When the search was made, there was probable cause to believe the federal law had been violated.

This assignment of error is overruled.

[11] The defendant next assigns error to the admission of a piece of glass mounted on two pieces of wood to illustrate the testimony of a witness. A witness testified as an expert that, in his opinion, a bullet had been fired from inside the patrol car. He based this opinion on the coning effect the bullet had on the window glass of the automobile. He used a piece of windowpane glass through which he had fired a bullet to explain his testimony. He testified that the coning effect would be more pronounced in the glass through which he fired the bullet than it would be in automobile safety glass.

The defendant argues this evidence was irrelevant and inadmissible under N.C.G.S. § 8C-1, Rules 401 and 402 because the coning was more pronounced in the glass that was introduced than it was in the glass in the police car. The glass which was introduced did in fact illustrate how the witness reached his conclusion. The fact that the coning was more pronounced did not prevent it from illustrating the witness' testimony as to what the glass showed in regard to the direction of the bullet.

This assignment of error is overruled.

In his next assignment of error, the defendant argues that it was error not to exclude his confession from evidence. The defendant made a motion to suppress any statement he made to the officers. After a hearing, the court denied the motion. The defendant says the evidence at the *voir dire* shows that the defendant was not properly warned of his constitutional rights and that the evidence showed the officers did not honor his assertion of his right to remain silent.

[12] The defendant says first that the interrogating officer warned him "that anything he said can be used against him," while *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), requires that he be warned that anything he says can and "will" be used against him. We

believe the defendant was adequately warned as to how his statement could be used against him. He knew it would be so used if the State thought it advisable. This satisfies the requirements of *Miranda*.

[13] The defendant next contends he asserted his right not to talk by refusing to answer certain questions and by remaining silent after certain questions were asked of him. The failure of a suspect to answer some of the questions he is asked is not sufficient to invoke his Fifth Amendment right to remain silent. *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985). The defendant must indicate that he wants all questioning to stop. *State v. Robbins*, 319 N.C. 465, 496, 356 S.E.2d 279, 298, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

This assignment of error is overruled.

[14] In the next assignment of error, the defendant's appellate counsel says that he brings a question forward under his duty under *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). His counsel says that the defendant wants him to argue to this Court that there was error in excluding proffered testimony. The defendant attempted to elicit testimony from an investigator with the public defender's office to the effect that Dwight Johnson told the investigator that a friend of Charlie Bush accused Charlie Bush of having "just shot that cop," and Charlie Bush did not deny having done so. Dwight Johnson was dead at the time of the trial. This testimony was at least double hearsay and was properly excluded. N.C.G.S. § 8C-1, Rule 802 (1992).

This assignment of error is overruled.

[15] The defendant next assigns error to the court's allowing a detective to read into evidence an affidavit used to obtain a search warrant. The defendant did not object to this, so we must examine this question under the plain error rule. *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983).

The defendant introduced into evidence two search warrants, one procured to search his home and the other to procure blood and hair samples from the defendant. The defendant examined Mr. J.H. Hollingsworth, a Charlotte-Mecklenburg Police Department Homicide Investigator, at length as to the difference between the two warrants, and the defendant had the officer read from the affidavits for the warrants. On cross-examination, Mr. Hollingsworth read the entire affidavit for the warrant to search the defendant's home, which revealed that he had previously served a prison sentence for a felony

conviction. The defendant says it was error to allow into evidence this evidence of bad character when he had not put his character in issue. *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

The defendant, by questioning Mr. Hollingsworth about the difference in the search warrants and having him read a part of the affidavit to procure the warrant to search his home, opened the door for the State to have the witness read all the affidavit. *See State v. Robinson*, 35 N.C. App. 617, 242 S.E.2d 197 (1978). The reading of the affidavit by Mr. Hollingsworth was not error or plain error.

This assignment of error is overruled.

[16] The defendant next assigns error to the action of the court in what he says was "resting" the defendant's case and denying him the right to call witnesses and introduce exhibits into evidence. While the defendant was putting on evidence, he told the court he was too sick and tired to continue. The judge had the defendant examined by a doctor, who reported he could find nothing wrong with the defendant.

The defendant insisted he was not able to continue because he was tired. The court had two of the witnesses under subpoena by the defendant take the stand out of the presence of the jury and asked the defendant to examine them in order to determine whether he would be prejudiced if he examined the witnesses before the jury. The defendant refused to do so. The judge observed that the defendant did not appear to be too tired to function. The judge then had the jury returned to the courtroom and told the defendant that if he refused to continue examining his witnesses and offer his exhibits into evidence, she would hold he had rested his case. The defendant refused to call a witness or offer his exhibits into evidence, and the court ruled he had rested his case.

The court was very patient with the defendant, who was uncooperative. The court was not required to conduct the defendant's case for him. All that is required is that the defendant have a fair chance to present his case. He had such a chance in this case. *McKaskle v. Wiggins*, 465 U.S. 168, 177, 79 L. Ed. 2d 122, 132 (1984).

This assignment of error is overruled.

The defendant next assigns error to the denial of his motion for a mistrial. He argues that a mistrial should have been granted based upon the arguments that he has already set forth: that he was denied the opportunity to be heard, to call witnesses, and to be present at all

nonrecorded contacts between the judge and jury. We have already found each of these contentions to be without merit. The motion for mistrial was properly denied.

This assignment of error is overruled.

[17] In his next assignment of error, the defendant deals with instructions of the court prior to arguments to the jury. The defendant contends that by instructing him that he could not interrupt the jury argument by the prosecutor, the court prevented him from objecting to improper arguments by the prosecutor. He also cites three instances of what he says were improper arguments by the prosecutor.

Shortly before the jury arguments began, the court stated:

> Mr. Cunningham, I am going to Rule according to the Law. I'm going to let you talk. I'm not going to let you interrupt me. I'm not going to let you interrupt the other side. I'm not going to let the other side interrupt you. If you are making an unlawful argument, I will stop you from making it.

The court did not instruct the defendant that he would not be allowed to make appropriate objections. The court was merely instructing the defendant that he could not continue to disrupt the proceedings as he had been doing for the duration of the trial. The defendant made several objections to the jury argument by the prosecutor.

[18] The defendant cites several arguments by the prosecutor in which he contends the court should have intervened *ex mero motu*. First, he complains that the prosecutor improperly argued that the defendant had committed the crime of communicating a threat when he stated to the police officer, "Hit me with that flashlight and I'll cut you a flip." He contends that he did not commit the crime of communicating a threat. All he was attempting to do was to assert his right to defend himself. He further notes that because he was unlawfully arrested, he had the right to resist the arrest; therefore, the prosecution's argument that he also committed the crime of resisting arrest was improper.

The argument that the defendant had committed the misdemeanor of communicating a threat was proper. The elements of communicating a threat are that the defendant threatened a person, that the defendant communicated the threat to that person, that the defendant made the threat in such a manner and under such circumstances that a reasonable person would believe the threat was likely

to be carried out, and that the person threatened believed that the threat was likely to be carried out. N.C.G.S. § 14-277.1 (1993); *State v. Evans*, 40 N.C. App. 730, 253 S.E.2d 590, *appeal dismissed*, 297 N.C. 456, 256 S.E.2d 809 (1979). The defendant made his threat three times. Officer Lyles asked the defendant if he was threatening him, and the defendant repeated his threat. Officer Villines, who was present at the time, testified to these facts. Clearly, the evidence supported the prosecutor's argument, and the circumstances supported arresting the defendant for the misdemeanor of communicating a threat.

[19] The second argument complained of by the defendant is the following:

> Terry Lyles' Mother, Father, his Widow and in a larger sense the people of the State of North Carolina are counting on me to present this summation to you so that justice will be done. As you've seen day after day in this case, Mr. and Mrs. Lyles and Terry Lyles' Widow have sat in this Courtroom and listened to evidence, testimony relating in graphic detail the last few minutes of life of their Son, their Husband and I think, I hope we can all agree that that's a hard thing to do. But they are counting on me. So, I'm going to give it my best.

The defendant contends that this was an improper appeal to the sympathy of the jury. However, the prosecutor further argued that:

> The Defendant said in his speech to you that this is all just a trumped up case, that Ms. Mason and I just want to be, how did he put it, "the baddest DA" or some such thing as that and in answer to that I'll tell you that I'm not a big Lawyer. Any illusions of grandeur I might have had as a Lawyer I left by the roadside a long time ago. But I'm going to give it my best shot.

Taken in its full context and in light of the defendant's argument, the prosecutor's argument was not grossly improper.

[20] The defendant also complains that the prosecutor argued facts not in evidence when he argued:

> You recall Mr. Whitlock, the Chemist from the Crime Lab, who testified that he received from Dr. Sullivan's office the little pieces of glass that Dr. Sullivan had obtained from Officer Lyles' face at Autopsy and he compared that glass with actual glass that Mr. Whitlock took himself from this broken window and he compared them, really, the only two ways that a Chemist could com-

> pare them—that is its density, which you can measure and it's [sic] refractive index, which you can measure. And lo and behold, they're identical. They're identical.

The prosecutor made this argument based upon the testimony of Mr. Whitlock. Mr. Whitlock testified that he had measured the density and refractive index of the glass fragments. He further stated:

> Both the density and the refractive index of the glass from Terry Lyles was the same as the density and the refractive index from the door.

Clearly, the argument was supported by the evidence.

The prosecution did not make any grossly improper arguments. This assignment of error is overruled.

[21] The defendant next assigns error to the trial court's instructing the jury on the defendant's failure to testify without a request by him to do so. We have previously held that giving the instruction without the defendant's request is not prejudicial error. *See State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975), *cert. denied*, 425 U.S. 971, 48 L. Ed. 2d 794 (1976); *State v. Bryant*, 283 N.C. 227, 195 S.E.2d 509 (1973); *State v. Rankin*, 282 N.C. 572, 193 S.E.2d 740 (1973).

This assignment of error is overruled.

[22] The defendant next assigns error to an instruction to the jury in regard to his confession. He says that by giving this charge, the court expressed an opinion on the evidence. The court charged as follows:

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

We have approved this charge in *State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989).

This assignment of error is overruled.

[23] The defendant next assigns error to the failure of the court to submit voluntary manslaughter to the jury as a possible verdict. The court submitted to the jury first-degree murder based on premeditation and deliberation and second-degree murder, and the jury found

the defendant guilty of first-degree murder. If there is error in the failure to submit voluntary manslaughter to the jury, it is harmless if the court submits first-degree murder based on premeditation and deliberation and second-degree murder, and the jury returns a verdict of guilty of first-degree murder. *State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995); *State v. Bowie*, 340 N.C. 199, 456 S.E.2d 771, *cert. denied*, 116 U.S. 529, 133 L. Ed. 2d 435 (1995); *State v. Shoemaker*, 334 N.C. 252, 271, 432 S.E.2d 314, 324 (1993); *State v. Tidwell*, 323 N.C. 668, 374 S.E.2d 577 (1989).

This assignment of error is overruled.

[24] The defendant next says it was error for the court not to charge the jury that the defendant's arrest was illegal as a matter of law and that he had a right to protect himself by any means, which would include the means he used. The defendant relies on several cases, *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); *State v. Fletcher*, 268 N.C. 140, 150 S.E.2d 54 (1966); *State v. Polk*, 29 N.C. App. 360, 224 S.E.2d 272 (1976), none of which are applicable. When a person has been placed under arrest by an officer, as happened in this case, the person does not have the right to kill the officer. *See* N.C.G.S. § 15A-401(f) (1988).

This assignment of error is overruled.

[25] In his next assignment of error, the defendant argues the court erred in its instruction to the jury in regard to second-degree murder. The court instructed the jury that "[i]n order for you to find the Defendant Guilty of Second-Degree Murder, the State must prove beyond a reasonable doubt that the Defendant . . . killed the Victim with a deadly weapon thereby proximately causing his death." He contends this confused the intent element of second-degree murder by requiring an intent to kill rather than an intent to inflict a wound which caused the death. *State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980). He says this blurred the distinction between first- and second-degree murder. He contends the jury could have felt that there was no distinction between the two crimes and thus convicted the defendant of first-degree murder because the victim was a police officer.

If there was error in this instruction, it was favorable to the defendant. It required the jury to find more than an intent to inflict an injury that caused death; it required the jury to find an intent to kill.

This assignment of error is overruled.

[26] The defendant next argues that it was error to let the jury have certain items of real evidence sent into the jury room. At the request of the jury, the court sent to the jury room an unspent bullet, cartridge casing, and a bullet which had been pulled apart in the police laboratory. The defendant did not object to letting the jury have these items. N.C.G.S. § 15A-1233(b) provides in part:

> 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.

Although the defendant did not object to the sending of the exhibits to the jury room, he did not consent to it as required by the statute. Assuming this was error, it was harmless. In light of the strong evidence against the defendant, letting the jury have these items of evidence in the jury room could not have affected the outcome of the trial. *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).

This assignment of error is overruled.

The last argument by the defendant consists of a statement by his counsel that pursuant to *Anders*, he informs us that the defendant wants him to argue that the defendant cannot be guilty of murder because it was the physician at the hospital who caused the death by removing the life support system.

This assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. CHRISTOPHER LUNORE ROSEBORO

No. 156A94

(Filed 6 September 1996)

1. Jury § 141 (NCI4th)— capital trial—jury voir dire—parole eligibility questions excluded

Defendant was not denied due process by the trial court's refusal to allow defendant, who would be eligible for parole if given a life sentence, to question prospective jurors in a capital

trial about their understanding of parole eligibility. The amendment to N.C.G.S. § 15A-2002 which requires 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" is to be applied prospectively after 1 October 1994 and was not applicable to defendant's trial where defendant committed the murder in 1992 and his trial began in February 1994.

Am Jur 2d, Jury §§ 193, 199, 205, 206, 208.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

2. Criminal Law § 1322 (NCI4th)— meaning of life imprisonment—questions by prospective jurors—response by court

Where two prospective jurors in a capital trial asked the trial court the meaning of life in prison, the trial court properly responded that "for the purposes of this trial, life imprisonment means life in prison."

Am Jur 2d, Trial §§ 1118, 1443, 1448.

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

Jury's discussion of parole law as ground for reversal or new trial. 21 ALR4th 420.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 ALR5th 700.

3. Evidence and Witnesses §§ 410, 663 (NCI4th)— conjectural identification testimony—motion to strike—absence of ruling

Assuming that the trial court erred in failing to rule on defendant's motion to strike conjectural identification testimony placing defendant at a topless bar the night of a murder, defendant was not prejudiced where the trial court sustained defendant's objection to the testimony in the jury's presence, and both defendant and another witness testified that the two of them had walked past the topless bar on the night of the murder.

Am Jur 2d, Evidence § 367; Trial § 163.

4. Appeal and Error § 504 (NCI4th)— limitation of evidence to corroboration—invited error

Where defendant unequivocally agreed that he offered an accomplice's out-of-court statements to a witness for purposes of corroboration, the trial court's limitation of the jury's consideration of the testimony to corroboration was invited error from which defendant cannot gain relief. Even if there was no invited error, defendant was not prejudiced where the same testimony was received from the witness on redirect examination without any limiting instruction. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Appellate Review §§ 749-752, 754.

5. Burglary and Unlawful Breakings § 150 (NCI4th)— first-degree burglary—instructions on occupancy—no plain error

Where all the evidence presented by the State and by defendant in a first-degree burglary prosecution showed that defendant was unaware of his codefendant's initial breaking and entering of the victim's apartment, and defendant disputed only whether the victim was alive at the time he subsequently broke and entered the apartment with the codefendant to take the victim's television set, the trial court's instruction which appeared to require the jury to find that defendant participated in the initial breaking and entering with the codefendant in order to find that the apartment was occupied was favorable to defendant and not plain error. Moreover, defendant was not prejudiced by such instruction where the jury was clearly instructed that if the victim was not alive at the time defendant broke and entered her apartment, it could not find that the apartment was occupied.

Am Jur 2d, Burglary §§ 67-69.

6. Criminal Law §§ 412, 463 (NCI4th)— rape of murder victim—time of death—opening statement and closing argument—supporting evidence

The prosecutor's opening statement that the pathologist's opinion would be that a murder victim "died right as the rape began or that she died during the rape," and his closing argument that if the victim was dead before the rape occurred, she had not been dead longer than five minutes, did not misconstrue the pathologist's testimony regarding the time of the victim's death as it related to the rape and was not improper where the pathologist

testified that, based on the small amount of blood present, the victim "was either dead at the time of the rape or died soon after the rape began," and that while he could not give an exact time frame, if the victim died "just before the rape" it would have been within a "minute, five minutes."

Am Jur 2d, Trial §§ 632-639.

7. Criminal Law § 465 (NCI4th)— prosecutor's closing argument—definition of reasonable doubt—error cured by instructions

Defendant's due process rights were not violated by any error in the prosecutor's definition of reasonable doubt when he stated in his closing argument that "too often jurors say, we know he's guilty, but the State didn't prove it" and that "If you know, then it was proved to you. That's beyond a reasonable doubt" where the trial court correctly instructed the jury as to reasonable doubt after the closing arguments.

Am Jur 2d, Trial §§ 632-639.

8. Larceny § 164 (NCI4th)— felonious larceny—omission of element in body of charge—inclusion in final mandate—no plain error

The trial court's omission of the fifth element of felonious larceny (knowledge by defendant that he was not entitled to take the property) in the body of the charge did not create an internal conflict in the instructions when the court fully instructed as to all six elements of felonious larceny in the final mandate and was not plain error.

Am Jur 2d, Larceny § 180.

9. Criminal Law § 1323 (NCI4th)— capital sentencing—statutory mitigating circumstances—mitigating weight—erroneous instruction

The trial court erred by instructing the jurors in a capital sentencing proceeding that they could elect to give a statutory mitigating circumstance no mitigating weight when it informed the jurors that if none of them "found the [statutory mitigating] circumstance to be mitigating," they would so indicate by instructing their foreman to write "no" in the space provided.

Am Jur 2d, Trial §§ 840, 841, 1448, 1449.

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

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 Gaines, J., at the 28 February 1994 Criminal Session of Superior Court, Gaston 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 was allowed by this Court 26 May 1995. Heard in the Supreme Court 11 December 1995.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

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

LAKE, Justice.

Defendant was tried capitally for the first-degree murder of Martha Edwards. The jury returned a verdict of guilty of first-degree murder on the theory of premeditation and deliberation and under the felony murder doctrine. The jury additionally returned verdicts of guilty of first-degree burglary, first-degree rape, felonious larceny and possession of stolen property. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death, and the trial court sentenced defendant accordingly. The trial court further sentenced defendant to consecutive terms of life imprisonment for the rape conviction, fourteen years for the burglary conviction and three years for the felonious larceny conviction. Judgment was arrested as to defendant's possession of stolen property conviction.

The State's evidence at trial tended to show the following. Roger Bell lived with defendant in a one-bedroom apartment on West Second Avenue beside the victim's apartment. On the evening of 13 March 1992, Bell and defendant were both at home, and Bell was in need of money to pay rent. He noticed the victim's apartment was dark, so he removed the window screen, reached inside and took two ceramic vases and a telephone. Bell brought these items to the apartment he shared with defendant and hid them. Bell then went back to the victim's apartment and crawled in through the window. As he looked for other items to take, he heard someone snoring and dis-

covered the victim asleep in her bed. This unnerved Bell, as he had previously thought no one was at home, so he unlocked the kitchen door and left. Bell explained to defendant what had happened, and together, they decided to go back to the victim's apartment and take a floor-model television set Bell had seen. They entered the apartment through the kitchen door and carried the victim's television back to their apartment. Upon returning again to the victim's apartment to wipe away their fingerprints, Bell noticed defendant walking toward the bedroom. Bell told defendant they needed to leave, but defendant "shushed" him. Bell left defendant in the apartment and went home; he fell asleep before defendant returned.

In the following days, defendant showed Bell a microwave, a radio, silverware and a pocketbook that he had taken from the victim's apartment after Bell left.

Defendant testified on his own behalf that on the night of 13 March 1992, he smoked crack cocaine and went to bed. He woke up later that evening and saw Bell carrying two ceramic vases and a telephone into their apartment. Defendant asked Bell what he was doing, but Bell told defendant not to worry about anything. Bell left and came back again with a microwave and a radio. This time, defendant asked Bell how he was able to take these things from someone's house without waking them up. Bell again told defendant not to worry about it. Bell left once more, and while he was gone, defendant smoked more crack cocaine. When Bell returned this time, he had a pocketbook and silverware. Bell gave defendant a twenty-dollar bill he found in the pocketbook, and together, they walked to Cherry Street so defendant could buy some more cocaine. On the way, they passed a topless bar known as "Leather and Lace," and Bell tossed the pocketbook into the bed of a blue truck in the parking lot.

Defendant decided to go with Bell to the victim's apartment and take the floor-model television set. When they returned to wipe away any fingerprints they might have left behind, defendant went into the victim's bedroom. The victim had a pillow over her face, and defendant thought she was dead. Defendant testified he then decided to have sex with the victim.

An autopsy of the victim revealed the presence of several recent bruises on her arms, nose and lips. Additionally, her shoulder bone was dislocated, and fluid was found in her lungs. The pathologist indicated that in his opinion, the cause of death was consistent with smothering. Based upon fluid and blood present in the vagina and lac-

erations on the vaginal wall, the pathologist concluded the victim had been raped. In the pathologist's opinion, because of the small amount of blood present in the vagina, the victim died just before she was raped or just after the rape began. According to DNA test results, the DNA banding patterns from the male fraction of the rectal and vaginal swabs taken from the victim were a visual match to the DNA banding patterns of the defendant; this visual match was confirmed by computer analysis. Bell's DNA banding patterns were a nonmatch. The probability of another unrelated individual having the same DNA banding patterns as defendant's is approximately 1 in 3.5 billion for the North Carolina black population. Other evidence introduced at trial will be discussed at later points in this opinion where relevant.

[1] In his first assignment of error, defendant contends he was denied due process when the trial court refused defendant's request to apply retroactively the 1995 legislative changes contained in N.C.G.S. § 15A-2002, refusing to allow defendant to question prospective jurors about their understanding of parole eligibility.

This Court has consistently held that prospective jurors should not be questioned about their understanding regarding parole eligibility during *voir dire*. *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 558 (1996). "[E]vidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense." *State v. Payne*, 337 N.C. 505, 516, 448 S.E.2d 93, 99 (1994), *cert. denied*, —— U.S.——, 131 L. Ed. 2d 292 (1995). We have further held that *Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133 (1994), "does not affect our position on this issue when, as here, the defendant remains eligible for parole if given a life sentence." *State v. Miller*, 339 N.C. 663, 676, 455 S.E.2d 137, 144, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 169 (1995); *accord State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995). Given our repeated holdings on this issue, it was not error for the trial court to refuse to allow defendant, who was clearly eligible for parole, to question prospective jurors regarding parole eligibility.

Defendant correctly notes that our legislature has amended N.C.G.S. § 15A-2002 to now require a trial court to instruct a jury during a capital sentencing proceeding "that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (Supp. 1995). However, 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 recognized that the effective date for this legislative change was 1 October 1994 and that "the General Assembly has decided that the legislation is to be applied prospectively." *Id.* at 43, 446 S.E.2d at 275; *accord State v. DeCastro*, 342 N.C. 667, 467 S.E.2d 653 (1996). In the present case, defendant committed his crimes in 1992, and his trial began in February 1994. Thus, the legislative changes contained in N.C.G.S. § 15A-2002, deemed only to have prospective force, are inapplicable to defendant, and the trial court did not err in refusing to apply the statute retroactively. Defendant has not been denied due process, and we hereby overrule this assignment of error.

[2] In a related assignment of error, defendant contends that the trial court erred in failing to properly respond to questions from prospective jurors regarding the meaning of a life sentence and parole. During jury selection, two prospective jurors asked the trial court the meaning of life in prison. The trial court responded to both prospective jurors as follows: "For the purposes of this trial, life imprisonment means life in prison." Defendant argues that the trial court's response was "untruthful," fundamentally unfair and amounted to a denial of due process.

Should a juror raise the question of parole eligibility, we have held that the trial court is to instruct the juror that he or she is to assume that life imprisonment means imprisonment for life. *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955). In the present case, the trial court instructed both prospective jurors correctly under the applicable laws of this state. Defendant advances no persuasive reason for us to reverse our prior holdings with respect to this issue, and this assignment of error is without merit and overruled.

[3] In his next assignment of error, defendant contends that the trial court erred by failing to sustain defendant's motion to strike vague and conjectural identification testimony placing defendant at a topless bar the night of the murder. Mark Thompson, a bouncer at Leather and Lace, testified that during the evening hours of 13 March 1992 or the early morning hours of 14 March 1992, he "could have swore [sic] . . . [defendant] would have been inside the bar." Defendant objected, and the trial court sustained defendant's objection. Defendant then made a motion to strike, and the trial court asked the jury to leave the courtroom. After hearing *voir dire* testimony, the trial court again sustained defendant's objection to the identification testimony on the grounds that it was conjectural and,

therefore, had no probative value. The jury was escorted back into the courtroom, and testimony continued without the trial court ruling on defendant's motion to strike. Defendant now argues the trial court's failure to rule on the motion to strike amounted to prejudicial error requiring a new trial.

Assuming, *arguendo*, the trial court erred in failing to rule on defendant's motion to strike, we nevertheless conclude that defendant was not prejudiced. The record reveals that by defendant's own testimony, he and Roger Bell walked past Leather and Lace on the night of the murder; Roger Bell also testified that the two walked past Leather and Lace on the night of the murder. This testimony, coupled with the trial court's sustaining of defendant's objection in the jury's presence, convinces us that there is no reasonable possibility that a different result would have been reached at trial had the trial court granted defendant's motion to strike. N.C.G.S. § 15A-1443(a) (1988). Accordingly, this assignment of error is overruled.

[4] By another assignment of error, defendant contends the trial court committed plain error by limiting to corroborative purposes defense witness Charles "Peanut" Damron's testimony regarding out-of-court statements made by Bell. Defendant argues that the out-of-court statements were only corroborative in the broadest sense of the word and that the statements were more properly relevant as substantive evidence and for impeachment purposes. The following occurred at trial:

> Q. All right. What did Roger Bell tell you about breaking in—about going into the home?
>
> . . . .
>
> THE COURT: . . . This evidence is offered for the purpose of corroborating?
>
> [DEFENSE COUNSEL]: Yes, sir, it is. Yes, sir.

Following this exchange, the trial court instructed the jury it was to consider Damron's testimony only for corroborative purposes. Damron then testified that Bell told him that it was Bell, and not defendant, who had taken the victim's pocketbook and had found twenty dollars inside.

Defendant contends on appeal that because the out-of-court statements contradict Bell's in-court testimony that it was the defendant who stole the victim's pocketbook, Damron's testimony was

admissible to impeach Bell and, therefore, demonstrate that Bell was not credible as a witness. Defendant, citing *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979), and *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973), argues that although Damron's testimony was technically hearsay, state evidentiary rules should not be applied mechanistically to bar evidence relevant to critical issues and, therefore, proposes that Damron's testimony regarding Bell's out-of-court statements was admissible as substantive evidence.

As noted above, defendant unequivocally agreed that he offered Damron's testimony for purposes of corroboration. Therefore, the trial court's limitation of the testimony's use by the jury was invited error from which defendant cannot gain relief. N.C.G.S. § 15A-1443(c) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). Even assuming, *arguendo*, there was no invited error, our review of the record reveals that during Damron's redirect examination, Damron again testified that Bell told him Bell stole the pocketbook and found twenty dollars inside. This testimony was received without any type of limiting instruction. As Bell's out-of-court statements were admitted into evidence twice, once with a limiting instruction and once without a limiting instruction, we conclude defendant was not prejudiced as there is no reasonable possibility that had the limiting instruction not been given, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a). This assignment of error is hereby overruled.

[5] In his next assignment of error, defendant argues the trial court committed plain error in its jury instructions regarding burglary. The trial court correctly instructed the jury that in order to find defendant guilty of first-degree burglary, it must find beyond a reasonable doubt that defendant broke and entered the occupied dwelling apartment of another without her consent in the nighttime with the intent to commit the felony of larceny. With regard to the requirement that the dwelling apartment be occupied, the trial court further instructed as follows:

> Now *if the apartment was occupied at the time Bell initially broke and entered and the defendant was acting in concert with Bell in the burglary at the time he entered* . . . the apartment . . . and the breaking and entering by Bell and the defendant were joined by time and circumstances as to be part of one continuous transaction, *then the building would be considered occupied* at the time the defendant . . . broke and entered the building.

> If you do not so find . . . or *if you find that Mrs. Edwards was dead at the time the defendant . . . entered the apartment and that he was not acting in concert with Bell at the initial breaking or entering, then the apartment would not have been occupied* at the time of the entry. If Mrs. [Edwards was] alive at the time of the entry . . . the building would be occupied.

(Emphasis added.)

Defendant failed to object to these instructions and, therefore, asks this Court to review the instructions for plain error. Specifically, defendant argues the instructions are susceptible to two erroneous interpretations. First, defendant contends that the jury could have understood the instructions to require a finding that defendant was acting in concert with Bell when Bell *initially* broke and entered the victim's apartment. Defendant argues that the evidence does not support this interpretation of the instructions, as all the evidence shows that defendant was unaware of Bell's initial breaking and entering of the victim's apartment until after the fact, and thus, defendant could not have acted in concert with Bell at that time. Second, defendant contends that the jury could have understood the instructions to require that it hold defendant accountable for Bell's initial breaking and entering if defendant *later* acted in concert with Bell. This interpretation of the instructions, defendant argues, amounts to an inaccurate statement of the law, and defendant cannot be held responsible for Bell's initial breaking and entering because defendant joined the criminal enterprise after Bell's initial breaking and entering.

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

From the record in the case *sub judice*, we cannot say that the trial court's instructions were actually prejudicial to defendant such that they "quite probably tilted the scales against him." *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. Any confusion resulting from the instructions was actually favorable to defendant, as the instructions appeared to require the jury to find that defendant participated in the

initial breaking and entering with Bell *in order to find the apartment occupied.* As defendant correctly points out, all the evidence presented by the State and defendant demonstrates that defendant was completely unaware of Bell's initial breaking and entering. Thus, the instructions, clearly favorable to defendant, cannot amount to plain error. *See State v. Harris*, 315 N.C. 556, 340 S.E.2d 383 (1986) (a mistaken instruction that was actually favorable to defendant did not amount to plain error as defendant was not prejudiced). Moreover, defendant does not dispute his breaking and entering the apartment with Bell to take the victim's television set; rather, the defendant disputes only whether the victim was alive when he broke and entered her apartment to take her television set. The jury was clearly instructed that if the victim was not alive at the time *defendant* broke and entered the victim's apartment, then it could not find the apartment occupied. *Cf. State v. Campbell*, 332 N.C. 116, 122, 418 S.E.2d 476, 479 (1992) ("[F]or purposes of the arson statute, a dwelling is 'occupied' if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction."); *State v. Pakulski*, 319 N.C. 562, 572, 356 S.E.2d 319, 325 (1987) ("A homicide victim is still a 'person,' within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short."). Because the alleged error was in defendant's favor and could not have been prejudicial, we decline to apply the plain error rule, and this assignment of error is overruled.

[6] Next, defendant argues that the trial court erred by denying defendant's objections to the prosecutor's opening statement and closing argument. Defendant first contends that the prosecutor misconstrued the pathologist's testimony regarding the time of the victim's death as it related to the rape.

In his opening statement, the prosecutor stated that the pathologist would be able to arrive at an approximate time period for the victim's death in relation to the rape and that the pathologist's opinion would be that the victim "died right as the rape began or that she died during the rape." In his closing argument, the prosecutor argued that if the victim was dead before the rape occurred, she had not been dead longer than five minutes.

With respect to opening statements, we have stated:

> "While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to

inform the court and jury of the nature of his case and the evidence he plans to offer in support of it."

State v. Paige, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (quoting *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied and appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984)). We have further stated that with regard to closing arguments, the arguments of counsel rest within the sound discretion of the trial court, and in the argument of hotly contested cases, counsel will be granted wide latitude. *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). Counsel may properly argue the facts in evidence as well as any reasonable inferences which can be drawn therefrom. *Id.* Based upon our review of the record, we cannot say the prosecutor made an improper opening statement or closing argument.

The record reveals the pathologist testified that based on the small amount of blood present, the victim "was either dead at the time of the rape or died soon after the rape began." Further, the pathologist testified that while he could not give an exact time frame, if the victim died "just before the rape," it would have been within a "minute, five minutes." The prosecutor's opening statement and closing argument in this regard were clearly in line with the testimony as presented to the jury and, therefore, were not improper. The trial court did not err in denying defendant's objections based thereon.

[7] Defendant additionally contends that the prosecutor misstated the law on reasonable doubt during his closing argument. The prosecutor argued to the jury that with regard to the concept of reasonable doubt, "too often jurors say, we know he's guilty, but the State didn't prove it." The trial court overruled defendant's objection. The prosecutor then continued, arguing, "If you know, then it was proved to you. That's beyond a reasonable doubt." Defendant did not object to this argument. Defendant proposes that the prosecutor's definition of reasonable doubt in the present case is much like the jury instruction found erroneous in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990) (per curiam), *disapproved as to standard of review in Estelle v. McGuire*, 502 U.S. 62, 116 L. Ed 2d 385 (1991). In *Cage*, the United States Supreme Court held that a jury instruction defining reasonable doubt as "an actual substantial doubt" or a "grave uncertainty" suggested a higher degree of doubt than that required for acquittal. Those phrases, when considered with the instruction's reference to "moral certainty" rather than "evidentiary certainty," could have allowed the jury to find the defendant guilty "based on a degree of proof below

that required by the Due Process Clause." *Id.* at 41, 112 L. Ed. 2d at 342.

We conclude, however, that *Cage* is inapplicable to the present case. "*Cage* . . . dealt with instructions the trial court gives to the jury. These cases 'are not controlling here, where the statements complained of were made by the prosecutor during jury arguments.' " *State v. Rose*, 339 N.C. 172, 197, 451 S.E.2d 211, 225 (1994) (quoting *State v. Jones*, 336 N.C. 490, 495, 445 S.E.2d 23, 25 (1994)), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995).

Even assuming in the case *sub judice* that the prosecutor's definition of reasonable doubt was erroneous, the trial court correctly instructed the jury after closing arguments as to reasonable doubt, stating:

> [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 you or entirely convinces you of the defendant's guilt.

This instruction, which followed the prosecutor's argument presently at issue, is a correct statement of the law. *See State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136 (1993); N.C.P.I.—Crim. 101.10 (1974). "In this context, any error of the prosecutor in defining the term 'reasonable doubt' could not have denied the defendant due process and did not require a new trial." *Jones*, 336 N.C. at 496, 445 S.E.2d at 26. This assignment of error is overruled.

[8] Lastly as to guilt/innocence phase issues, defendant argues the trial court committed reversible error by omitting an essential element from its charge on felonious larceny. The trial court instructed the jury that there were six elements of the crime of felonious larceny, but in listing and describing the elements in the body of the jury charge, the trial court omitted the fifth element, that "the defendant knew he was not entitled to take the property." However, in the trial court's final mandate, the trial court correctly and fully instructed as to all six elements, that in order to find defendant guilty of felonious larceny, the jury must find that defendant, acting alone or in concert with some other person, took and carried away another person's property, without such person's consent, from a building after a breaking and entering, knowing he was not entitled to take it and

intending to permanently deprive the victim of its use. *See* N.C.P.I.—Crim. 214.32 (1985) (replaced October 1994). Having failed to object to the omission of the fifth element from the body of the jury charge, defendant now argues the omission rises to the level of plain error. As we noted above, in order for an instructional error to amount to plain error, the error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *Collins*, 334 N.C. at 62, 431 S.E.2d at 193.

This Court was faced with an analogous situation in *State v. Stevenson*, 327 N.C. 259, 393 S.E.2d 527 (1990). In *Stevenson*, the trial court fully and properly instructed the jury as to the elements of first-degree murder, but in the final mandate, the trial court omitted the element that defendant have the intent to kill. Viewing the instructions in their entirety, we held that the omission did not create a conflict in the instructions requiring a new trial as the instructions were "not internally contradictory, but [were], at most, incomplete at one important point." *Id.* at 266, 393 S.E.2d at 530. We conclude here, as with *Stevenson*, that the omission of the fifth element of felonious larceny in the body of the jury charge did not create internally contradictory instructions. The jury was, through the final mandate, fully instructed as to all six elements of felonious larceny; thus, the instructions were only, "at most, incomplete at one important point." *Id.*

Even if we were to assume error, based on the record before us, in light of the overwhelming evidence against defendant demonstrating that defendant took the victim's television without her consent to his apartment intending to keep it for his own personal use, we cannot say that the assumed error was "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. The trial court's inadvertent omission did not rise to the level of plain error, and this assignment of error is overruled.

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

[9] As to sentencing phase assignments of error, defendant first argues the trial court improperly instructed the jury it could determine whether statutory mitigating circumstances had any mitigating value.

The trial court instructed the jury to consider three statutory mitigating circumstances, four nonstatutory mitigating circumstances and the catchall circumstance. With regard to the second statutory mitigating circumstance, the trial court stated:

> If one or more of you find by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form. If none of you find this circumstance to exist, you would so indicate by having your foreman write "no" in that space.
>
> Now you will note, [m]embers of the [j]ury, that after each of these mitigating circumstances there's a space for the foreperson to write "yes" if any juror finds that to be—or any of them to be a mitigating circumstance. *If none of the jurors find . . . the circumstance to be mitigating, then the . . . foreman of the jury would write "no" in the space provided.*

(Emphasis added.)

"The General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value." *State v. Jaynes*, 342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995), *cert. denied*, —— U.S.——, 135 L. Ed. 2d 1080 (1996); *accord State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991); *see* N.C.G.S. § 15A-2000(f) (Supp. 1995). Thus, if one or more jurors determine that a statutory mitigating circumstance exists by a preponderance of the evidence, then they must give that circumstance some weight in mitigation. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995). However, the amount of weight in mitigation to be given to a statutory mitigating circumstance is entirely for the jury to decide. *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); *see also State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994).

In contrast, as to nonstatutory mitigating circumstances, those jurors who find the circumstance to exist factually then decide whether to give that nonstatutory mitigating circumstance any weight in mitigation. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994). Indeed, "[j]urors . . . remain free to assign no mitigating value to a nonstatutory mitigating circumstance should they so choose, even if they find the circumstance

exists in fact." *State v. Simpson*, 341 N.C. 316, 347, 462 S.E.2d 191, 209 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 194 (1996).

State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448, and *State v. Howell*, 343 N.C. 229, 470 S.E.2d 38 (1996), presented this Court with similar instructions, and we conclude those cases must govern our decision here. In *Jaynes*, we found reversible error where the trial court instructed the jury that its duty was to determine "whether or not *any listed circumstance* has mitigating effect." *Jaynes*, 342 N.C. at 285, 464 S.E.2d at 470. Likewise, in *Howell*, we concluded the trial court's instruction that "if you [do not] deem [the circumstance] to have mitigating value . . . then you would answer 'no' " was reversible error. *Howell*, 343 N.C. at 239-40, 470 S.E.2d at 43-44.

The trial court's instructions in the present case informed jurors that if none of them "found the [statutory mitigating] circumstance to be mitigating," they would so indicate by instructing their foreman to write "no" in the space provided. This instruction, contrary to our settled case law, informed jurors they could elect to give a statutory mitigating circumstance no mitigating weight. Because it is simply impossible from the record to discern whether jurors found that the three statutory mitigating circumstances that were submitted existed factually, but then elected to give those circumstances no weight in mitigation, we cannot say this error was harmless beyond a reasonable doubt. *See Jaynes*, 342 N.C. at 286, 464 S.E.2d at 470; *Howell*, 343 N.C. at 240, 470 S.E.2d at 44.

Accordingly, we must vacate defendant's sentence of death and remand to the Superior Court, Gaston County, for a new capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

NO. 92CRS6770, FIRST-DEGREE MURDER: GUILT/INNOCENCE PHASE—NO ERROR; SENTENCING PHASE—NEW CAPITAL SENTENCING PROCEEDING.

NO. 92CRS6768, FIRST-DEGREE BURGLARY: NO ERROR; FELONIOUS LARCENY: NO ERROR.

NO. 92CRS6769, FIRST-DEGREE RAPE: NO ERROR.

STATE OF NORTH CAROLINA v. GEORGE A. BRUTON AND WILLIE TOWNSEND

No. 416A95

(Filed 6 September 1996)

1. Evidence and Witnesses § 1482 (NCI4th)— first-degree murder—ammunition found in defendant's home—probative value lacking for some—overwhelming weight of evidence—no error

The trial court did not err in a noncapital first-degree murder prosecution by admitting into evidence items seized from defendant Bruton's residence, including numerous nine-millimeter, twenty-two-caliber, and forty-caliber cartridges, shotgun shells, gun boxes, and a twenty-two-caliber gun. The evidence at trial did not link any of the items seized at defendant Bruton's residence with the killing of the victim; however, the extensive inventory of nine-millimeter cartridges found at defendant Bruton's residence supported the State's theory that defendant Bruton owned a nine-millimeter weapon, used it in the killing of the victim, and disposed of it after the killing. Assuming that the other items did not have any probative value, admitting the items was harmless in light of the overwhelming evidence of defendant's guilt.

Am Jur 2d, Homicide § 414.

2. Homicide § 256 (NCI4th)— noncapital first-degree murder—premeditation and deliberation—denial of motion to dismiss

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant Bruton's motion to dismiss the charge at the close of all the evidence; defendant waived his right to appeal the denial of his motion to dismiss at the close of the State's evidence by presenting evidence. Defendant Bruton confronted the victim armed with a loaded, semiautomatic pistol, began an argument, intentionally deceived the victim by telling the victim he did not have a gun, pointed his gun at the victim when the victim attempted to flee, shouted an obscenity-laced statement, and shot the victim in the back.

Am Jur 2d, Homicide § 425.

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

3. Homicide § 285 (NCI4th)— second-degree murder—sufficiency of evidence

The evidence in a noncapital first-degree murder prosecution was sufficient to support defendant Townsand's conviction of second-degree murder where the evidence is uncontested that defendant Townsend was present at the scene of the crime and substantial evidence supported a finding that he acted in concert with defendant Bruton pursuant to a common plan or purpose to murderously assault the victim. The evidence at trial permitted the jury to find that either defendant acted with premeditation and deliberation, but did not require that the jury either make that finding or find defendants not guilty.

Am Jur 2d, Homicide § 425.

4. Appeal and Error § 341 (NCI4th)— first-degree murder—jury verdict—no assignment of error

A defendant's argument concerning inconsistency in a jury verdict in a noncapital first-degree murder prosecution was not before the Supreme Court where defendant assigned error to the trial court's denial of his motion to dismiss on the ground of insufficient evidence, but did not make any assignment of error relating to his contention that the jury's verdict was inconsistent.

Am Jur 2d, Appellate Review §§ 615, 616; Trial §§ 424-429.

5. Constitutional Law § 293 (NCI4th)— first-degree murder—counsel representing both defendants—discrepancy in testimony—no denial of effective assistance of counsel

The rights of defendant Townsend to effective assistance of counsel and due process of law were not violated because both defendants were represented by the same attorney at a noncapital first-degree murder trial. Although defendant Townsend contends that an actual conflict of interest arose when his counsel failed to impeach testimony by defendant Bruton which was unfavorable to Townsend, Townsend did not show that counsel's failure to challenge defendant Bruton's testimony actually impaired Townsend's defense because questioning either defendant further about the discrepancy in their testimony may have only highlighted Townsend's role in shooting the victim.

Am Jur 2d, Criminal Law §§ 754-757.

Circumstances giving rise to conflict of interest between or among criminal codefendants precluding representation by same counsel. 34 ALR3d 470.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—state cases. 18 ALR4th 360.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases. 53 ALR Fed. 140.

6. Homicide § 357 (NCI4th)— first-degree murder—refusal to instruct on involuntary manslaughter

There was no error in the noncapital first-degree murder prosecution of two defendants where defendant Townsend contended that the trial court erred by refusing to instruct on involuntary manslaughter. The jury could not have found him guilty of involuntary manslaughter even if he committed a culpably negligent act by discharging his weapon because the evidence at trial was undisputed that defendant Bruton intentionally fired the shot which killed the victim. Defendant Townsend's discharge of his weapon did not proximately cause the victim's death.

Am Jur 2d, Homicide § 531.

7. Criminal Law § 1150 (NCI4th)— second-degree murder—aggravating factor—use of weapon normally hazardous to more than one person—nine-millimeter semiautomatic pistol—not element of offense

The trial court did not err in a noncapital first-degree murder prosecution in which defendant Townsend was convicted of second-degree murder by finding as to defendant Townsend the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, and the evidence essential to prove this factor was not necessary to prove an essential element of second-degree murder on the basis of acting in concert. The evidence showed that defendant Townsend fired more than one shot from a nine-millimeter, semiautomatic pistol, which in its normal use is hazardous to the lives of more than one person, in the direction of the victim and another person. In meeting its burden of proof with respect to second-degree murder based on acting in con-

cert, the State was not required to establish that defendant Townsend knowingly created a great risk of death to more than one person or that he did so by using a weapon which in its normal use is hazardous to the lives of more than one person. N.C.G.S. § 15A-1340.4(a)(1)(g).

Am Jur 2d, Criminal Law §§ 598, 599.

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

Appeal as of right by defendant Bruton pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Freeman, J., at the 4 April 1995 Criminal Session of Superior Court, Forsyth County, upon a jury verdict finding defendant Bruton guilty of first-degree murder. Defendant Townsend's motion to bypass the Court of Appeals as to his conviction for second-degree murder was allowed by this Court 2 October 1995. Heard in the Supreme Court 8 April 1996.

Michael F. Easley, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State.

Lisa S. Costner for defendant-appellant Bruton.

Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant Townsend.

PARKER, Justice.

Defendants were tried noncapitally on indictments charging them with the first-degree murder of Kurtis Legrant Mobley ("victim"). The jury returned verdicts finding defendant George A. Bruton guilty of first-degree murder and defendant Willie Townsend guilty of second-degree murder. The trial court sentenced defendant Bruton to life imprisonment and defendant Townsend to twenty years' imprisonment. For the reasons discussed herein, we uphold the convictions and sentences of both defendants.

The evidence tended to show that shortly after midnight on 30 March 1994, the victim and Derrick York walked towards an apartment building at 2783 Piedmont Circle in Winston-Salem. The victim shouted an obscenity [f--- you, bitch] at defendant Bruton's girlfriend, who was apparently sitting in or standing by an apartment

window. The victim and York then walked to the back of the apartment building.

Defendant Bruton located defendant Townsend and told Townsend that two "niggers" were at the back door. Defendant Bruton then went outside with a concealed nine-millimeter, semiautomatic pistol and confronted the victim. A heated argument ensued. The victim told defendant Bruton to put down his gun and fight. Defendant Bruton responded that he did not have a gun and pulled up his shirt in a manner suggesting that he was not armed.

When defendant Bruton told defendant Townsend that two "niggers" were at the back door, defendant Townsend retrieved his nine-millimeter, semiautomatic pistol and went out the back door. Defendant Townsend stood on the back porch and watched defendant Bruton argue with the victim. After a short period of time defendant Townsend shouted an obscenity ["f--- that" or "f--- that, let's do it"] and began firing his gun in the direction of the victim, York, and Holly Farley. When defendant Townsend fired his weapon, defendant Bruton also began shooting. As the victim attempted to flee, defendant Bruton pointed his gun at the victim; shouted "f--- that, you don't f--- with her"; and shot the victim in the back. This shot caused the victim's death.

After defendant Bruton shot the victim, Derrick York attempted to run. Defendant Bruton fired several shots in York's direction and gave chase. Defendant Bruton caught York, hit him on the head with the gun, and began kicking him. As defendant Bruton struck and kicked York, York saw defendant Townsend kicking the victim. Both defendants subsequently fled from the scene and disposed of their weapons.

Holly Farley, the victim's girlfriend, testified that she saw defendant Townsend showing his gun to a crack cocaine addict a short time before the shooting. Farley testified that defendant Townsend "cocked the gun back" and told her that "he don't cock it back unless he was going to use it."

Defendants' evidence suggested that the victim had a reputation for violence, that the argument started when the victim shouted an obscenity at defendant Bruton's girlfriend, and that defendants acted in self-defense. Defendant Bruton testified that he had seen the victim point a gun at his house on the day prior to the killing, that the victim had been threatening him and talking about his girlfriend all day on

the day prior to the killing, and that he believed that the victim "ran with a gang." Defendant Bruton stated that he thought the victim had a gun and that he shot the victim because he was afraid that the victim was reaching for it. Defendant Townsend testified that the victim and York had threatened him prior to the killing and that he had been told that the victim and York were planning on "jumping him." According to defendant Townsend, he fired his weapon only because York "pulled out a gun." Defendant Townsend testified that he fired only one shot and that this shot went into the ground.

Additional facts will be presented as necessary to address specific issues.

COMMON ISSUE

[1] In respective assignments of error, defendants contend that the trial court erred by admitting into evidence items seized at 2783 Piedmont Circle, which was defendant Bruton's temporary residence at the time of the killing. The contested items include numerous nine-millimeter, twenty-two-caliber, and forty-caliber cartridges; shotgun shells; gun boxes; and a twenty-two-caliber gun. Defendants argue that these items were irrelevant in that the State's evidence failed to link any of the items to the crime.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). This Court has consistently stated that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

"As a general rule weapons may be admitted in evidence 'where there is evidence tending to show that they were used in the commission of a crime.' " *State v. Crowder*, 285 N.C. 42, 46, 203 S.E.2d 38, 41-42 (1974) (quoting *State v. Wilson*, 280 N.C. 674, 678, 187 S.E.2d 22, 24 (1972)), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). The evidence at trial did not link any of the items seized at defendant Bruton's residence with the killing of the victim. However, the extensive inventory of nine-millimeter cartridges found at defendant Bruton's residence supported the State's theory that defendant Bruton owned a nine-millimeter weapon, used it in the killing of the

victim, and disposed of it after the killing. For this reason the nine-millimeter cartridges were relevant and admissible. *See State v. Levan*, 326 N.C. 155, 168, 388 S.E.2d 429, 436 (1990).

Assuming *arguendo* that the other items seized at defendant's residence did not have any probative value, the error in admitting these items was harmless. The items seized at defendant Bruton's residence were not needed to link either defendant to this crime. Eyewitness testimony tended to show that both defendants were present at the crime scene, that defendant Townsend fired the first shot, and that defendant Bruton shot and killed the victim. At trial defendant Townsend testified that he fired the first shot, and defendant Bruton admitted that he subsequently fired a shot at the victim. In light of the overwhelming evidence of defendants' guilt, we conclude that defendants cannot show that, had the contested items not been admitted into evidence, a different result would have been reached at trial. *See* N.C.G.S. § 15A-1443(a) (1988); *State v. Sierra*, 335 N.C. 753, 762, 440 S.E.2d 791, 796 (1994). Accordingly, this assignment of error is overruled.

DEFENDANT BRUTON

[2] In his next assignment of error, defendant Bruton contends that the trial court erred in denying his motions to dismiss the charge of first-degree murder at the close of the State's evidence and at the close of all evidence. Defendant Bruton argues that the evidence is insufficient to support a finding of premeditation and deliberation.

By presenting evidence defendant waived his right to appeal the denial of his motion to dismiss at the close of the State's evidence. *State v. Mash*, 328 N.C. 61, 66, 399 S.E.2d 307, 311 (1991). Accordingly, we review defendant's assignment of error only with respect to the trial court's ruling denying his motion to dismiss at the close of all the evidence.

> In ruling on a motion to dismiss a first-degree murder charge, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. *State v. Jackson*, 317 N.C. 1, 22, 343 S.E.2d 814, 827 (1986), *judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Substantial evidence must be introduced tending to prove the essential elements of the crime charged and that defendant was the perpetrator. *Id.* The evidence may contain contradictions or discrepancies; these are for the

jury to resolve and do not require dismissal. *Id.* at 22-23, 343 S.E.2d at 827.

State v. Truesdale, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995).

First-degree murder "is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836.

"Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Circumstances to be considered in determining whether a killing was committed with premeditation and deliberation include the following:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and 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.

Id. at 59, 337 S.E.2d at 823.

When viewed in the light most favorable to the State, the evidence supported submitting first-degree murder to the jury. Armed with a loaded, semiautomatic pistol, defendant Bruton confronted the victim, began an argument, and intentionally deceived the victim by telling the victim he did not have a gun. When the victim attempted to flee, defendant Bruton pointed his gun at the victim, shouted an obscenity-laced statement, and shot the victim in the back. This evi-

dence was sufficient to permit the jury to conclude that defendant Bruton formed an intent to kill before shooting the victim and carried out that intent in a cool state of blood. The jury was not required to believe that defendant Bruton acted out of fear of being shot or that the words or conduct of the victim aroused sufficient passion to negate deliberation. Accordingly, this assignment of error is overruled.

DEFENDANT TOWNSEND

[3] By an assignment of error, defendant Townsend contends that the trial court erred in denying his motion to dismiss at the close of all evidence. Defendant Townsend argues that there is no evidence that defendant acted together with another to commit a second-degree murder. He argues that the evidence only supported a verdict of either first-degree murder or not guilty. We disagree.

Second-degree murder "is the unlawful killing of a human being with malice but without premeditation and deliberation." *Fleming*, 296 N.C. at 562, 251 S.E.2d at 432. 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 jury may find a defendant guilty of second-degree murder on the basis of acting in concert. *See State v. Williams*, 299 N.C. 652, 654-57, 263 S.E.2d 774, 776-78 (1980).

The evidence is uncontested that defendant Townsend was present at the scene of the crime, and substantial evidence supported a finding that he acted in concert with defendant Bruton pursuant to a common plan or purpose to murderously assault the victim. After defendant Bruton told defendant Townsend that two "niggers" were at the back door, Townsend followed defendant Bruton outside and observed the argument between Bruton and the victim. Defendant Townsend subsequently shouted "f--- that" or "f--- that, let's do it" and fired his weapon. When defendant Townsend fired his weapon, defendant Bruton began shooting and shortly thereafter fired the shot which killed the victim. After the shooting defendant Townsend kicked the victim as he lay on the ground. This evidence was suffi-

cient to show that defendant Townsend acted in concert with defendant Bruton pursuant to a common plan or purpose to assault the victim with murderous intent.

Defendant Townsend argues that the evidence supported only verdicts of first-degree murder or not guilty. We note that defendant did not object to the submission of second-degree murder at trial. The evidence at trial permitted the jury to find that either defendant acted with premeditation and deliberation, but it did not require that the jury either make this finding or find defendants not guilty. Defendant Townsend testified that he fired one shot into the ground when Derrick York "pulled out a gun." Defendant Bruton testified that he shot "at" the victim because he was afraid the victim was going to shoot him. The shooting followed a heated argument between the victim and defendant Bruton, and the evidence suggested that the parties exchanged "fighting words" during this argument. The evidence supporting premeditation and deliberation was either circumstantial or contested. Substantial evidence at trial supported each and every element of the crime of second-degree murder, and the evidence permitted the jury to find that defendant Townsend committed this crime on the basis of acting in concert. Accordingly, the trial court did not err in denying defendant Townsend's motion to dismiss.

[4] Defendant Townsend further argues that the jury determined that he did not share a common plan to commit a second-degree murder by acquitting him of first-degree murder. He argues that the jury's determination that no plan existed as to first-degree murder is inconsistent with its finding that he acted in concert with Bruton pursuant to a common plan to commit second-degree murder. Defendant assigned error to the trial court's ruling denying his motion to dismiss on the ground that the evidence did not support each and every element of the offense charged. Defendant did not make any assignment of error relating to his contention that the jury's verdict was inconsistent. Accordingly, defendant's argument is not before this Court. N.C. R. App. P. 10(a).

This assignment of error is overruled.

[5] By another assignment of error, defendant Townsend contends that his rights to effective assistance of counsel and due process of law were violated because both defendants were represented by the same attorney at trial. Prior to trial the trial court conducted a hearing on the possible conflict of interest. During this hearing defendants' counsel stated that no conflict of interest existed. The trial court

informed both defendants that a conflict could possibly arise and that each defendant had a right to his own lawyer. The court explained that a future course of action might be to one defendant's advantage and to the other defendant's disadvantage. Both defendants assented to the joint representation. At the conclusion of the hearing, the trial court found that there was no actual conflict and that both defendants voluntarily, knowingly, and intelligently waived the right to separate counsel.

Defendant Townsend nevertheless contends that an actual conflict of interest arose at trial and that the trial court should have declared a mistrial when the conflict became apparent. A defendant in a criminal case has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). The right to effective assistance of counsel includes the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981). In order to establish a violation of this right, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346-47 (1980); *accord State v. Walls*, 342 N.C. 1, 39-40, 463 S.E.2d 738, 757 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 794 (1996).

Permitting a single attorney to represent two or more codefendants in the same trial is not a *per se* violation of the right to effective assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 482, 55 L. Ed. 2d 426, 433 (1978). Accordingly, the mere possibility of conflict inherent in counsel's joint representation of defendants is not sufficient to impugn defendant Townsend's criminal conviction. *See Cuyler*, 446 U.S. at 350, 64 L. Ed. 2d at 348; *Walls*, 342 N.C. at 40, 463 S.E.2d at 758.

Defendant Townsend argues that his counsel failed to impeach testimony by defendant Bruton which was unfavorable to Townsend. The record shows that defendant Bruton testified on cross-examination that defendant Townsend yelled "f--- that, let's do it" before firing his weapon. Defendant Townsend subsequently denied using the exact words attributed to him by Bruton. Defendant Townsend contends that defendant Bruton's testimony tended to support the State's theory that Townsend was involved in a plan to shoot the victim or that his statement was a signal to Bruton to begin shooting. Townsend

argues that counsel declined to impeach defendant Bruton because he did not want to challenge Bruton's credibility.

We conclude that defendant Townsend has not shown that counsel's failure to challenge defendant Bruton's testimony actually impaired Townsend's defense. Defendant Bruton testified that defendant Townsend's statement was not a signal to begin shooting. In his testimony defendant Townsend denied only using the exact words attributed to him by defendant Bruton. He admitted making some remarks, admitted firing his weapon after doing so, and did not specifically deny shouting an obscenity. The State presented eyewitness testimony that defendant Townsend shouted an obscenity before firing his weapon; hence, questioning either defendant further about the discrepancy in their testimony may have only highlighted Townsend's role in shooting the victim.

The essence of both defendants' testimony was that the victim provoked the confrontation and that they acted in self-defense. Defense counsel's cross-examination of witnesses, presentation of defendants' evidence, and jury argument supported this testimony. The United States Supreme Court has recognized that " '[a] common defense often gives strength against a common attack.' " *Holloway*, 435 at 482-83, 55 L. Ed. 2d at 433 (quoting *Glasser v. United States*, 315 U.S. 60, 92, 86 L. Ed. 680, 710-11 (1942) (Frankfurter, J., dissenting)). We conclude that defendant Townsend has failed to show that an actual conflict of interest adversely affected his lawyer's performance. This assignment of error is overruled.

[6] By his next assignment of error, defendant Townsend contends that the trial court erred by refusing to instruct the jury on involuntary manslaughter. A trial judge must instruct the jury as to a lesser-included offense when there is evidence from which the jury could find that the defendant committed that offense. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994). We have also defined involuntary manslaughter as "the unintentional killing of a human being without malice proximately caused by (1) an unlawful act [neither] amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *Id.*

Defendant argues that his conduct in discharging his weapon amounted to culpable negligence. Even if defendant Townsend committed a culpably negligent act by discharging his weapon, the jury could not have found Townsend guilty of involuntary manslaughter because this act did not result in the victim's death. As defendant Townsend acknowledges in his brief, the evidence at trial was undisputed that defendant Bruton intentionally fired the shot which killed the victim. Defendant Townsend's act in discharging his weapon did not proximately cause the victim's death. Accordingly, we conclude that the trial court correctly declined to instruct the jury on involuntary manslaughter. This assignment of error is overruled.

[7] Defendant Townsend next assigns error to the finding of the aggravating factor that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.4(a)(l)(g) (1988) (repealed effective 1 October 1994; reenacted as N.C.G.S. § 15A-1340.16(d)(8) effective 1 October 1994). Defendant argues that the evidence was insufficient to support a finding that he knowingly created a great risk of death to more than one person and that evidence essential to prove this factor was necessary to prove an essential element of second-degree murder on the basis of acting in concert.

To find the aggravating factor at issue here, "the sentencing judge must focus on two considerations: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created." *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990); *accord State v. Carver*, 319 N.C. 665, 667, 356 S.E.2d 349, 351 (1987). The evidence in this case tended to show that defendant Townsend fired a nine-millimeter, semiautomatic pistol. A semiautomatic pistol is normally used to fire several bullets in rapid succession and in its normal use is hazardous to the lives of more than one person. *See Carver*, 319 N.C. at 667-68, 356 S.E.2d at 351. The State's evidence suggested that defendant Townsend intentionally fired more than one shot in the direction of the victim, Holly Farley, and Derrick York. Accordingly, the evidence permitted the trial court to find that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person.

Defendant Townsend also argues that the evidence used to prove this factor was necessary to prove second-degree murder on the basis

of acting in concert. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." N.C.G.S. § 15A-1340.4(a)(1); *State v. Wilson*, 338 N.C. 244, 257, 449 S.E.2d 391, 399 (1994). Defendant Townsend argues that the evidence that he fired a semiautomatic pistol was necessary to prove that he acted in concert with defendant Bruton. We disagree.

This Court has recognized that the statutory factors in N.C.G.S. § 15A-1340.4(a)(1) "contemplate a duplication in proof without violating the proscription that 'evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.' " *State v. Thompson*, 309 N.C. 421, 422 n.1, 307 S.E.2d 156, 158 n.1 (1983) (quoting N.C.G.S. § 15A-1340.4(a)(1)). Discrete evidence in this case supported both acting in concert and the aggravating factor. In meeting its burden of proof with respect to second-degree murder on the basis of acting in concert, the State was not required to establish that defendant Townsend knowingly created a great risk of death to more than one person or that he did so by using a weapon which in its normal use is hazardous to the lives of more than one person. We conclude, therefore, that the trial court did not err in finding the aggravating factor. This assignment of error is overruled.

For the foregoing reasons defendants received a fair trial free from prejudicial error.

NO ERROR.

FRANK ROBERTS v. MADISON COUNTY REALTORS ASSOCIATION, INC., JEANNE T. HOFFMAN, CATHERINE DICKINSON, AND DIANA SCHOMMER

No. 25A96

(Filed 6 September 1996)

1. Injunctions § 7 (NCI4th)— merger of associations of realtors—mandatory injunction—sufficiency of complaint

Where plaintiff's complaint prayed for a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the proposed merger of the Madison County Realtors Association and the Asheville Board of Realtors as well as costs and such further relief as the court deemed just and proper, and plaintiff argued at the summary judgment hearing for a rescission

of the merger that had already occurred, the complaint was sufficient to allow the trial court to order a mandatory injunction if plaintiff prevailed on the merits and the court deemed a mandatory injunction just and proper.

Am Jur 2d, Injunctions §§ 29, 291.

2. Injunctions § 7 (NCI4th)— accomplished merger of associations of realtors—mandatory injunction available—claim for equitable relief not moot

A mandatory injunction was not automatically unavailable to plaintiff in an action involving the merger of the Madison County Realtors Association and the Asheville Board of Realtors once the merger occurred, and plaintiff's claim for equitable relief was thus not rendered moot by the merger, where plaintiff presented genuine issues of material fact as to whether defendants violated his rights as a member and shareholder of defendant Association by following merger procedures that violated the Nonprofit Corporation Act, the articles of incorporation, and the bylaws and that constituted a breach of fiduciary duty. If plaintiff successfully proves that his rights have been violated, the trial court must apply principles of equity to determine whether any equitable relief is available on the facts of this particular case.

Am Jur 2d, Injunctions §§ 29, 291.

Appeal by plaintiff 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. 233, 465 S.E.2d 328 (1996), affirming the order of summary judgment entered in favor of defendants by Smith (Claude D., Jr.), J., on 15 July 1994 in District Court, Madison County. Heard in the Supreme Court 15 May 1996.

Manning, Fulton & Skinner, P.A., by Cary E. Close, for plaintiff-appellant.

Moore & Van Allen, PLLC, by George V. Hanna III and Mary Elizabeth Erwin, for defendant-appellees.

ORR, Justice.

This case arises from a dispute concerning the validity of a merger of the Madison County Realtors Association, Inc., ("defendant Association") with the Asheville Board of Realtors. The facts occurred as follows.

Plaintiff, who had been a member of defendant Association for approximately ten years, was appointed to a special committee charged with the negotiation of the proposed merger of defendant Association with the Asheville Board of Realtors. Before the terms of the merger were finalized, defendant Diana Schommer, at a 30 March 1993 membership meeting, made a motion for members to vote on the proposed merger. Edward Krause, attorney for defendant Association, intervened, informing the membership that the statutory prerequisites to an official merger vote had not been satisfied, and therefore, a vote could not be taken at that time. Defendant Schommer then amended her motion to call for a tentative vote to show the "sense of the membership." This vote resulted in a count of six members in favor of and five members opposed to the terms of the proposed merger.

Thereafter, on 14 May 1993, defendant Jeanne Hoffman, defendant Association's president, and defendant Catherine Dickinson, defendant Association's secretary, submitted an application for the merger of defendant Association and the Asheville Board of Realtors, which would be voted on at a board meeting of the North Carolina Association of Realtors, Inc. ("North Carolina Association") on 4 June 1993. As a part of the application, defendants Hoffman and Dickinson were required to submit a copy of the minutes from the general membership meeting of defendant Association showing official approval of the proposed merger. The minutes of the 30 March 1993 membership meeting submitted by defendants Hoffman and Dickinson, however, reflected only the tentative vote, taken to show the "sense of the membership." Despite this defect in the application, the merger was approved by the board of directors of the North Carolina Association on 4 June 1993 and by the board of directors of the National Association of Realtors on 15 November 1993.

On 8 November 1993, the board of directors of defendant Association approved the "Plan of Merger" of defendant Association and the Asheville Board of Realtors. Defendant Association's board of directors' resolution approving the Plan of Merger directed that the Plan of Merger be submitted to a vote at a meeting of the members of defendant Association. Subsequently, defendant Hoffman called for an official vote of the membership on the merger. Twenty-five members of defendant Association were represented in person or by proxy at this 23 November 1993 meeting. Under N.C.G.S. § 55A-40, adoption of the proposed merger required an affirmative vote by two-thirds of the members represented in person or by proxy at the meeting. Thus,

adoption required seventeen members to vote in favor of the Plan of Merger. Eighteen members voted in favor of the Plan of Merger; seven members voted against the Plan of Merger. Therefore, the Plan of Merger was adopted by defendant Association.

Plaintiff alleges that, contrary to the requirements delineated in N.C.G.S. §§ 55A-40(a)(1) and 55A-31, several members of defendant Association, including plaintiff himself, had not received a copy of the Plan of Merger or a summary of the Plan of Merger ten days in advance of the 23 November 1993 meeting. Additionally, plaintiff contends that, contrary to the bylaws of defendant Association, he was not allowed to convey to defendant Association's membership important information that he had recently obtained regarding the National Association of Realtors' new "Board of Choice" policy. This new policy allowed members of defendant Association to transfer their memberships from defendant Association to the Asheville Board of Realtors. Under the prior policy, a realtor was allowed to join only the realtors' association located in the county in which the realtor's business was located. According to plaintiff, this policy change had not been shared with members of defendant Association at any time during the discussions about the proposed merger, despite the fact that its implementation negated one of the primary reasons for considering a merger of defendant Association with the Asheville Board of Realtors.

On 28 December 1993, plaintiff filed a *pro se* complaint alleging that the actions taken by defendant Association and the individual defendants to accomplish the merger were not in compliance with the articles of incorporation and bylaws of defendant Association and that the merger was the result of a breach of fiduciary duty of defendant Association's board of directors. The complaint prayed for a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the proposed merger, as well as costs and such further relief as the court deemed just and proper. Plaintiff was granted an *ex parte* temporary restraining order on 29 December 1993, enjoining defendants from consummating the merger with the Asheville Board of Realtors. Defendants filed an answer and counterclaim on 25 February 1994. Plaintiff was granted a second *ex parte* temporary restraining order on 25 March 1994, enjoining the consummation of the merger.

On 8 April 1994, Judge Robert H. Lacey found that plaintiff had failed to show that there was a reasonable apprehension of irrepara-

ble loss, injury, or harm if injunctive relief was not granted. Therefore, Judge Lacey dissolved the temporary restraining order and denied plaintiff's motion for a preliminary injunction. On 29 April 1994, "Articles of Merger" of defendant Association with the Asheville Board of Realtors were filed with the Secretary of State.

On 31 May 1994, defendants filed a motion for summary judgment. On 8 June 1994, during the hearing on defendants' motion for summary judgment, Judge Claude D. Smith, Jr., orally granted a motion by plaintiff to amend the complaint to add the Asheville Board of Realtors as a defendant. In an order entered 15 July 1994, Judge Smith found that there was no genuine issue as to any material fact in dispute as to the issue of defendants' liability under the claims set forth in the complaint, and he granted summary judgment in favor of defendants. Plaintiff appealed to the Court of Appeals.

In a split decision, the Court of Appeals majority recognized that the affidavits filed by plaintiff tended to show "that there were questionable events which occurred during the merger." *Roberts v. Madison Co. Realtors Ass'n*, 121 N.C. App. 233, 239, 465 S.E.2d 328, 332 (1996). The Court of Appeals majority also acknowledged "defendants' rather transparent circumvention of procedural and statutory protections, set in place to guard against the very thing that has occurred." *Id.* However, the Court of Appeals majority held that because the merger had already occurred at the time of the summary judgment hearing, plaintiff's claim had become moot, and summary judgment in favor of defendants was proper. Judge Wynn dissented, arguing that plaintiff's claim was not moot and that since genuine issues of material fact existed, summary judgment should be reversed and the case remanded for trial.

"When an appeal is taken pursuant to N.C.G.S. § 7A-30(2), the scope of this Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from the opinion of the majority." *State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987). Because no cross-assignment of error has been filed and because the Court of Appeals majority and dissent agreed that plaintiff raised issues of fact concerning the propriety of the procedures followed leading up to the merger, our review is limited to the issue dissented on: whether plaintiff's claim was rendered moot by the merger. We hold that the merger did not render plaintiff's claim moot.

A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the exist-

ing controversy. *Black's Law Dictionary* 1008 (6th ed. 1990). "[C]ourts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Thus, the case at bar is moot if the merger had the effect of leaving plaintiff with no available remedy. We note that the proper procedure for a court to take upon a determination that a case has become moot is dismissal of the action, rather than a grant of summary judgment. "If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *Id.* at 148, 250 S.E.2d at 912.

In turning to our consideration of the mootness issue, a general review of the law of injunctive relief is necessary.

> Injunctions may be granted to prevent violation of rights or to restore the plaintiff to rights that have already been violated. . . . No general principle limits injunctive relief to any particular kind of case or constellation of facts.
>
> Injunctions are denied in particular cases when the plaintiff fails to establish any underlying right. They are also denied in individual cases when the judge concludes that some other remedy ought to be used instead. Otherwise, the injunction is a potential remedy in any case in which it may provide significant benefits that are greater than its costs or disadvantages. Limitations on the injunction come when the judge weighs benefits or disadvantages in particular cases, not by dint of any general subject matter limitation.

1 Dan B. Dobbs, *Law of Remedies* § 2.9(2), at 227 (2d ed. 1993) [hereinafter *Dobbs*]. When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public and of third persons. *Dobbs*, § 2.4(1), at 91.

> Injunctions . . . may be classified as "prohibitory" and "mandatory." The former are preventive in character, and forbid the continuance of a wrongful act or the doing of some threatened or anticipated injury; the latter are affirmative in character,

> and require positive action involving a change of existing conditions—the doing or undoing of an act.

42 Am. Jur. 2d *Injunctions* § 9 (1969); *accord Seaboard Air Line R.R. Co. v. Atlantic Coast Line R.R. Co.*, 237 N.C. 88, 94, 74 S.E.2d 430, 434 (1953) (a court of equity " 'may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts.' 28 A.J. 211. . . . A mandatory injunction based on sufficient allegations of wrongful invasion of an apparent right may be issued to restore the original situation"); *Black's Law Dictionary* 784 (6th ed. 1990); *Dobbs*, § 2.9 at 224; John F. Dobbyn, *Injunctions In a Nutshell* 163 (1974) [hereinafter *Dobbyn*].

> Permanent injunctions are those issued as complete injunctive relief to the petitioner (so far as this is possible) after a full hearing on the merits of the petition. Interlocutory injunctions are those issued at any time during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the time that the court will be in a position to either grant or deny permanent relief on the merits.

Dobbyn at 150. Mandatory injunctions are disfavored as an interlocutory remedy. "As a general rule, since the purpose of an interlocutory injunction is solely to retain the status quo [pending final resolution on the merits], only a prohibitory injunction is proper [as opposed to a mandatory injunction, which would alter the status quo]." *Dobbyn* at 163; *see also Seaboard Air Line R.R. Co. v. Atlantic Coast Line R.R. Co.*, 237 N.C. at 96, 74 S.E.2d at 436 (temporary restraining order in the form of a mandatory injunction was improper because it would determine by an interlocutory order the ultimate relief sought in the action). However, we note that under circumstances which indicate "serious irreparable injury to the petitioner if the injunction is not granted, no substantial injury to the respondent if the injunction is granted, and predictably good chances of success on the final decree by the petitioner[,] a mandatory interlocutory injunction could properly be issued." *Dobbyn* at 167-68.

[1] Defendants argue that plaintiff sought only a preventive injunction to enjoin the merger and that once the merger occurred, there was no action left to enjoin. Plaintiff's complaint prayed for a temporary restraining order, a preliminary injunction and a permanent injunction to enjoin the proposed merger, as well as costs and such further relief as the court deemed just and proper. At the summary

judgment hearing, plaintiff argued for a rescission of the merger. Under our notice theory of pleading, the complaint was sufficient to allow the court to order a mandatory injunction if plaintiff prevailed on the merits and the court deemed a mandatory injunction just and proper. A court of equity traditionally has discretion to shape the relief in accord with its view of the equities or hardships of the case. *See Dobbs,* § 2.4(6) at 113.

[2] Defendants also argue that a mandatory injunction was automatically unavailable once the merger occurred. The record shows that plaintiff presented to the trial court a question of material fact about whether defendants violated his rights as a member and a shareholder of defendant Association by following merger procedures that violated the Nonprofit Corporation Act, the articles of incorporation, and the bylaws and that constituted a breach of fiduciary duty. This is sufficient for the case to survive the summary judgment stage. The question of whether there is an appropriate equitable remedy in this case is left to the discretion of the trial court, after a hearing on the merits. Therefore, plaintiff's claim for equitable relief is not automatically rendered moot by the merger. If plaintiff successfully proves that his rights have been violated, the trial court must apply principles of equity to determine whether any equitable relief is appropriate on the facts of this particular case. Also, we note that when a trial court makes its decision whether to grant equitable relief, the court should make appropriate findings of fact and conclusions of law, sufficient to allow appellate review for abuse of discretion. *See Dobbyn* at 238 (trial judge has discretion in determining what remedy will accomplish the most fair and just result between the petitioner, the respondent, and the public, and the standard for review is abuse of discretion).

Our research reveals that the cases relied on by the Court of Appeals majority are distinguishable on various grounds. In *Fulton v. City of Morganton,* 260 N.C. 345, 132 S.E.2d 687 (1963), the Court dismissed plaintiff's appeal from the trial court's denial of a restraining order because the action sought to be restrained was accomplished while the appeal was pending. The Court declined to review the propriety of the trial court's substantive decision not to issue the restraining order because even if it found the decision improper, it could not be reversed since the nonsensical result would be a restraining order enjoining defendants from conducting an election that had already been held. The Court reasoned that it is obvious that a court cannot restrain the doing of an act which already has been

consummated. *Id.* at 347, 132 S.E.2d at 688. This statement does not say that a court cannot issue a mandatory injunction ordering relief from an act that has already taken place if such a remedy is appropriate. In *Fulton*, the trial court could not prohibit an election from taking place when it had already occurred. However, we find no authority that a court cannot take action to remedy a wrong resulting from an action that has taken place.

In *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939), the plaintiff sought a preventive injunction to protect his property and possessory rights pending the final determination of a proceeding to establish the dividing line between the lands of the parties. The *Jackson* Court held that a preventive injunction was not available because defendant had already destroyed plaintiff's crop, and a preventive injunction cannot be used to redress a consummated wrong or to undo what has been done. This decision did not address whether a permanent mandatory injunction would be available if plaintiff was ultimately determined to be the owner of the land in question.

In *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 168 S.E.2d 401 (1969), the Court cited *Jackson v. Jernigan* for the authority that an injunction cannot prevent that which has already been done. The *Nicholson* Court then held that a mandatory injunction could not be issued in that case because such a remedy would require employees and other nonparties to refund salaries and other items paid to them. The critical factor in *Nicholson* was that nonparties could not be enjoined.

Ratcliff v. Rodman, 258 N.C. 60, 127 S.E.2d 788 (1962), also provides no assistance to defendant's position. *Ratcliff* dealt with a request for a writ of mandamus rather than a mandatory injunction, and the holding was based on equitable principles as they related to the specific facts of the case. Therefore, *Ratcliff* is not binding in the case at bar on the trial court's decision of whether principles of equity would allow a mandatory injunction on the specific facts of this case.

In the case at bar, the Court of Appeals majority opinion included a paragraph that apparently concluded that a balancing of the equities favored denial of relief to plaintiff. However, such a conclusion is improper at the summary judgment stage. Summary judgment shall be rendered if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). As the Court of Appeals majority and dissenting opinions agreed, plaintiff presented to the trial court genuine

issues of material fact about whether defendants violated his rights as a member and a shareholder of defendant Association by following merger procedures that violated the Nonprofit Corporation Act, the articles of incorporation, and the bylaws and that constituted a breach of fiduciary duty. This is sufficient for the case to survive the summary judgment stage. The question of whether there is an appropriate equitable remedy in this case is left to the discretion of the trial court, after a hearing on the merits and findings of fact and conclusions of law.

Therefore, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for further remand to the District Court, Madison County, for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

GABRIELLA MURRAY HIEB AND ROBERT NELSON HIEB v. WOODROW LOWERY

No. 540A95

(Filed 6 September 1996)

1. Workers' Compensation § 85 (NCI4th)— workers' compensation lien—UIM damages—motion to modify

The trial court did not act under the authority of N.C.G.S. § 1A-1, Rule 60(b) in modifying and enforcing a judgment setting a workers' compensation lien against UIM damages where plaintiff's motion referred to Rule 60, but the order was devoid of Rule 60 considerations and specifically stated that the basis for granting the motion was N.C.G.S. § 97-10.2.

Am Jur 2d, Workers' Compensation § 451.

2. Workers' Compensation § 85 (NCI4th)— workers' compensation—UIM damages—order reducing lien—previously decided

The issue of the amount of a workers' compensation lien against UIM damages had been decided three times prior to plaintiffs filing this motion and presenting the matter to Judge Sitton. Although plaintiffs contended that the matter previously decided

by Judges Gaines and Johnston was whether the workers' compensation carrier could assert a lien in this situation, Judge Gaines' conclusions in the original judgment explicitly state that the workers' compensation carrier is entitled to a lien for all amounts paid or to be paid as workers' compensation benefits and the Court of Appeals issued a unanimous opinion affirming that portion of Judge Johnston's order relating to the workers' compensation lien. Judge Sitton's order, setting a lesser amount to be repaid, does not address a different issue.

Am Jur 2d, Workers' Compensation §§ 451, 456.

3. Workers' Compensation § 85 (NCI4th)— workers' compensation—UIM damages—lien

The trial court did not have the authority under N.C.G.S. § 97-10.2(j) to modify previous judgments where a jury returned a verdict for plaintiffs arising from an automobile accident; plaintiff is permanently and totally disabled and is receiving lifetime workers' compensation benefits; prior judgments held that the workers' compensation insurer was entitled to a lien against the proceeds of the UIM policy for all amounts paid or to be paid as workers' compensation benefits; plaintiffs contend that the only possible source of funds to satisfy the judgment is the UIM policy and that it is substantially certain that the workers' compensation lien will exceed the amount of available funds in the future; and plaintiffs obtained an order under N.C.G.S. § 97-10.2 setting a lesser amount of the lien to be repaid. The word judgment in N.C.G.S. § 97-10.2 is undefined and, although plaintiffs argue that judgment must be construed to mean the proceeds actually available to satisfy the lien, the language is unambiguous. "Judgment" is the final decision of the court; in a negligence action, the final decision of the court does not include a determination of the proceeds to satisfy the judgment finally entered. If the legislature had intended insufficient proceeds to be the trigger for a judge's invocation of the discretion provided in the statute, it would have specified "proceeds" within the statute.

Am Jur 2d, Judgments §§ 775 et seq.; Workers' Compensation § 451.

Justice FYRE dissenting.

Appeal by plaintiffs 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. 33, 464

S.E.2d 308 (1995), reversing an order entered by Sitton, J., on 28 July 1994 in Superior Court, Mecklenburg County. Heard in the Supreme Court 16 May 1996.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for plaintiff-appellants.

Dean & Gibson, by Rodney Dean and D. Christopher Osborn for unnamed defendant-appellee St. Paul Fire and Marine Insurance Company.

LAKE, Justice.

On 20 July 1990, plaintiffs Gabriella Hieb (plaintiff) and her husband, Robert Hieb, filed suit against defendant Woodrow Lowery and unnamed defendant Hartford Accident and Indemnity Company ("Hartford"), plaintiff's underinsured motorist ("UIM") insurance carrier, seeking damages for personal injury and loss of consortium arising from a 17 October 1989 automobile collision. The action was tried to a jury during the 12 October 1992 Civil Session of Superior Court, Mecklenburg County, Judge Robert E. Gaines presiding. The jury returned a verdict against defendants and awarded plaintiff the sum of $1,279,000 and plaintiff's husband the sum of $40,000.

In his 20 November 1992 judgment, Judge Gaines made findings of fact, in part, as follows:

> 7. The Plaintiffs have instituted a second action against St. Paul Fire and Marine and Hartford Insurance Company . . . to determine the respective rights of the parties to the benefits of the Hartford underinsured motorist coverage and to determine the amount of such coverage.
>
> 8. That on or about August 28, 1992, an order was entered in that action by the Honorable Robert P. Johnston which holds that the Hartford is allowed to reduce its limits by the amount of worker[s'] compensation *paid or to be paid* to Plaintiff and further holding that the proceeds of the Hartford underinsured policy are subject to the lien of St. Paul Insurance Company pursuant to North Carolina General Statute Section 97-10.2. That action is now on appeal to the North Carolina Court of Appeals. This Court is bound by the Order of Judge Johnston unless and until said Order is modified by the Court of Appeals or any other Court of competent jurisdiction. This Court has not addressed the issues raised in that action.

(Emphasis added.) Based on these findings of fact, Judge Gaines ordered that St. Paul Fire and Marine Insurance Company ("St. Paul") was entitled to a lien against the proceeds of the Hartford UIM policy for *all amounts paid or to be paid* to plaintiff as workers' compensation benefits.

As noted in Judge Gaines' judgment, set forth above, plaintiffs filed a second action on 4 March 1991 against Hartford and St. Paul, the workers' compensation carrier for plaintiff's employer, seeking a declaratory judgment to determine the rights of the parties to the benefits of the Hartford UIM coverage. Hartford contended the UIM policy contained language allowing it to reduce its policy limits by the amount of any workers' compensation benefits paid or to be paid to the plaintiff. St. Paul disagreed, contending it was entitled to a lien against the Hartford policy benefits.

The plaintiffs' motion for summary judgment in this second action was heard by Judge Robert P. Johnston, who entered an order on 28 August 1992 granting summary judgment for defendants. This order held that Hartford was allowed to reduce its limits by the amount of workers' compensation paid or to be paid to plaintiff and that proceeds of the Hartford UIM policy were subject to the lien of St. Paul for *all amounts paid or to be paid to plaintiff.* Plaintiffs appealed to the Court of Appeals, which reversed that portion of the order allowing Hartford to reduce its UIM limits and affirmed the portion of the order allowing St. Paul to assert a workers' compensation lien against the Hartford UIM benefits. *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993) (*Hieb I*). This action was appealed no further.

On or about 20 December 1993, Hartford tendered its UIM policy limit of $475,000 pursuant to the orders of Judges Johnston and Gaines. The plaintiffs and St. Paul were unable to agree as to how the Hartford UIM benefits were to be distributed, and on 7 March 1994, plaintiffs moved for an order modifying and enforcing the judgment entered by Judge Gaines in the first action with respect to the workers' compensation lien. Specifically, plaintiffs requested that the court, in its discretion, determine the amount of St. Paul's workers' compensation lien, approve the disbursement of that amount to St. Paul and approve the disbursement of the balance of any funds remaining from the Hartford UIM proceeds to plaintiffs.

Judge Claude S. Sitton allowed plaintiffs' motion by order signed 14 July 1994 and entered 28 July 1994. Exercising his discretion under

N.C.G.S. § 97-10.2, Judge Sitton held that St. Paul was entitled to recover $241,677.77, as full satisfaction of any workers' compensation lien it may have on benefits *paid or to be paid* to plaintiff, and that the remainder of the Hartford UIM proceeds be paid to plaintiffs.

Defendant St. Paul appealed to the Court of Appeals. In a divided opinion, the Court of Appeals reversed, holding that the trial judge was without authority, under N.C.G.S. § 97-10.2, to modify another superior court judge's order because the "judgment" exceeded the amount necessary to reimburse the workers' compensation insurance carrier. *Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995) (*Hieb II*). Plaintiffs appeal to this Court based upon the dissent below. For the reasons which follow, we affirm the Court of Appeals.

Ordinarily, one superior court judge may not modify or overrule the judgment of another superior court judge in the same case on the same issue. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972); *see also Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626 (1995). Plaintiffs assert that the Court of Appeals erred by applying this general rule to the facts of the present case.

[1] First, plaintiffs argue that the Court of Appeals erred by holding that the trial judge did not act under the authority of Rule 60(b) of the North Carolina Rules of Civil Procedure. Plaintiffs' motion to modify and enforce the judgment setting the workers' compensation lien begins: "Plaintiffs . . . respectfully move this Court pursuant to Rule 60(b)(5) and (6) of the North Carolina Rules of Civil Procedure . . . ." Plaintiffs argue that their motion was filed pursuant to Rule 60(b), and therefore the trial court acted pursuant to Rule 60(b).

However, notwithstanding plaintiffs' reference to Rule 60(b) in their motion, we agree with the Court of Appeals' conclusion that "plaintiff made no Rule 60(b) motion, nor did Judge Sitton purport to act pursuant to Rule 60(b)." *Hieb II*, 121 N.C. App. at 38, 464 S.E.2d at 312. Judge Sitton's order is devoid of any mention of Rule 60(b) considerations. The order neither mentions Rule 60(b) nor contains language that Judge Sitton ruled as he did because "justice demands it" or any other language showing the order was based on Rule 60(b). Rather, the order specifically states that Judge Sitton's exclusive basis for granting the motion was N.C.G.S. § 97-10.2:

> 4. That the Court should exercise its discretion under the provisions North Carolina General Statute Section 97-10.2 to determine the amount of St. Paul's workers' compensation lien.

Accordingly, we find no error with the Court of Appeals' holding that Judge Sitton acted solely under the provisions of N.C.G.S. § 97-10.2.

[2] Next, plaintiffs contend that Judge Sitton's order did not modify or overrule an issue that was previously considered and thus does not offend the general rule. Plaintiffs argue that the issue previously decided by Judges Gaines and Johnston was whether a workers' compensation carrier could *assert* a lien, pursuant to N.C.G.S. § 97-10.2, against the proceeds of UIM insurance purchased by someone other than the insured party's employer, while the issue before Judge Sitton was the *amount* of such workers' compensation lien that should be allowed. We disagree.

In the original judgment, Judge Gaines' conclusions of law explicitly state in accordance with Judge Johnston's order that "St. Paul Fire and Marine Insurance Company is entitled to a lien against the proceeds of the Hartford underinsured motorist policy *for all amounts paid, or to be paid, to Plaintiff* Gabriella Murray Hieb as worker[s'] compensation benefits." (Emphasis added.) From the plain language of this judgment, it is clear that the amount of the lien is to be the total of all amounts *paid or to be paid* to plaintiff as workers' compensation benefits. Additionally, the Court of Appeals issued a unanimous opinion affirming that portion of Judge Johnston's order relating to the workers' compensation lien of St. Paul. The Court of Appeals stated:

> Plaintiffs argue in their second assignment of error that the trial court erred when it determined that St. Paul was entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage. We cannot agree.
>
> . . . St. Paul is entitled to a workers' compensation lien against all amounts paid or to be paid to Mrs. Hieb by Hartford pursuant to its UIM coverage.

Hieb I, 112 N.C. App. at 506-07, 435 S.E.2d at 828. Thus, the issue of amount was dealt with and decided three times prior to plaintiffs presenting the matter to Judge Sitton. Judge Sitton's order, setting a lesser amount of the lien to be repaid, does not address a different issue than that previously decided by Judges Johnston and Gaines.

[3] Lastly, plaintiffs argue that the provisions of N.C.G.S. § 97-10.2(j) give Judge Sitton the authority to set the amount of the lien. Section 97-10.2(j) provides in pertinent part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien . . . .

N.C.G.S. § 97-10.2(j) (1991).

Under the statute, the two events which will trigger the authority of a judge to exercise discretion in determining or allocating the amount of lien or disbursement are (1) a judgment insufficient to compensate the subrogation claim of the workers' compensation insurance carrier or (2) a settlement. Plaintiffs contend that Judge Sitton's use of the discretion provided by N.C.G.S. § 97-10.2 was triggered in this case because the judgment obtained is insufficient to satisfy St. Paul's workers' compensation lien.

Plaintiffs argue that "judgment" within the context of N.C.G.S. § 97-10.2 must be construed to mean the proceeds actually available to satisfy the lien. Plaintiffs point out that the only possible source of funds available to satisfy plaintiff's $1,279,000 verdict is the $475,000 proceeds of the Hartford UIM policy. Plaintiff is permanently and totally disabled and therefore receiving lifetime benefits. St. Paul's workers' compensation lien presently exceeds $266,400, compensation already paid to plaintiff. Thus, plaintiffs contend it is substantially certain that the workers' compensation lien will exceed the amount of available funds in the future. We disagree with plaintiffs' contention in this regard.

In resolving issues of statutory construction, we look first to the language of the statute itself. It is a well-established rule of statutory construction that "[w]hen language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995).

The word "judgment" is undefined in N.C.G.S. § 97-10.2. As this language is unambiguous, we shall accord it its plain meaning. Judgment is "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties." *Black's Law Dictionary* 841-42 (6th ed. 1990). Further, this Court has long held that " '[t]he rendering of a judgment is a judicial act, *to be done by the court only.*' " *Eborn v. Ellis*, 225 N.C. 386, 389, 35 S.E.2d 238, 240 (1945) (quoting *Mathews & McKinnish v. Moore*, 6 N.C. 181, 182 (1812)) (emphasis added).

In a negligence action, the final decision of the court does not include a determination as to the availability of *proceeds* to satisfy the judgment finally entered. It is significant that the word "proceeds" does not appear in N.C.G.S. § 97-10.2(j). We thus conclude that if the legislature had intended insufficient "proceeds" to be the trigger for a judge's invocation of the discretion provided in the statute, it would have specified "proceeds" within subsection (j) of this statute.

The jury returned a verdict in favor of plaintiff Gabriella Hieb in the amount of $1,279,000 and plaintiff's husband in the amount of $40,000. This verdict modified by appropriate adjustments, including interest and a reduction by the amount of workers' compensation benefits received by plaintiff up to the date of trial, constitutes the judgment as referred to in N.C.G.S. § 97-10.2. This judgment is greater than the amount of St. Paul's lien at the time of Judge Sitton's order and therefore is not "insufficient to compensate the subrogation claim." On this record, we hold that the Court of Appeals did not err in concluding that Judge Sitton did not have authority under the provisions of N.C.G.S. § 97-10.2(j) to modify the previous judgments.

For the reasons stated herein, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice FRYE dissenting.

This case represents a triumph of form over substance. After being permanently and totally disabled in 1989 as the result of an automobile accident, Mrs. Hieb convinced a jury that she was entitled to damages in excess of $1.2 million and judgment was entered by the trial court accordingly. After two trips to the Court of Appeals and further review in this Court, the majority now concludes that, by interaction of two statutory provisions and various procedural bars,

Mrs. Hieb is not legally entitled to access to any of the funds available under her own underinsured motorist (UIM) coverage policy. I dissent.

The result of the majority's holding in this case is that because Mrs. Hieb obtained a judgment in excess of $1.2 million rather than settling the claim with her own insurance company, the superior court judge had no authority under N.C.G.S. § 97-10.2(j) to "determine, in his discretion, the amount, if any, of the employer's lien and the amount of cost of the third-party litigation to be shared between the employee and employer." Under N.C.G.S. § 97-10.2(j), Mrs. Hieb could have settled with her UIM carrier for $475,000, the amount available under her UIM coverage. Had she done so, she could have applied to the superior court for a determination of the amount of the subrogation lien for the workers' compensation carrier. The court then, in its discretion, could have divided the sum of $475,000 between Mrs. Hieb and the workers' compensation carrier. Even after the jury verdict, Mrs. Hieb and her UIM carrier could have agreed on a settlement of the claim in the amount available under the UIM coverage, and the trial court would then have been authorized to determine the subrogation amount. However, having the court enter a judgment in the amount of the jury verdict essentially deprived Mrs. Hieb of access to any of the funds awarded to her by the jury which were available under her own insurance policy. I believe that such a result was not intended by the legislature in the enactment of N.C.G.S. § 97-10.2(j) or under Rule 60(b) of the North Carolina Rules of Civil Procedure. Accordingly, I cannot join the majority opinion.

STATE OF NORTH CAROLINA EX REL. LEA ANNA LEFEAVERS TUCKER v. CARL FRINZI

No. 306A95

(Filed 6 September 1996)

Judgments § 237 (NCI4th)— paternity—reimbursement for public assistance—State and county DSS not in privity—res judicata and collateral estoppel inapplicable

Where the State brings an action seeking to establish paternity and recover public assistance paid on behalf of a State-

administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program. Therefore, the doctrines of *res judicata* and collateral estoppel do not bar the State's action to establish paternity, set child support, and recover past public assistance where a similar action against defendant by the Forsyth County DSS had been voluntarily dismissed with prejudice.

Am Jur 2d, Judgments § 697.

Justice WEBB dissenting.

Justice FRYE joins in this dissenting opinion.

Appeal by plaintiff 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. 389, 458 S.E.2d 729 (1995), affirming an order by Bragg, J., entered 2 August 1994 in District Court, Union County. On 27 July 1995, the Supreme Court allowed discretionary review of an additional issue. Heard in the Supreme Court 14 December 1995.

Michael F. Easley, Attorney General, by Elizabeth J. Weese, Assistant Attorney General, for plaintiff-appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellee.

PARKER, Justice.

Plaintiff State of North Carolina filed this action against defendant Carl Frinzi seeking to establish paternity, set child support, and recover reimbursement for public assistance paid to support the minor child. The trial court concluded that the action was barred by the doctrine of *res judicata*, and the Court of Appeals affirmed. For the reason discussed herein, we conclude that the doctrine of *res judicata* does not apply and reverse the decision of the Court of Appeals.

Lea Anna Lefeavers Tucker is the mother of the minor child, born 19 July 1976, who is the subject of this action. Unmarried at that time, Ms. Tucker applied for and received public assistance benefits in order to provide for the needs of the minor child. On or about 15 December 1978 Ms. Tucker and the Forsyth County Department of Social Services ("Forsyth County DSS") filed an action against defendant seeking to establish paternity, set child support, and

recover reimbursement for public assistance paid to support the minor child. On 29 February 1979 defendant filed an answer denying paternity, denying any obligation to support the minor child, and denying any obligation to make reimbursement for past public assistance. On 17 February 1981 the Forsyth County DSS voluntarily dismissed the action with prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a).

Ms. Tucker resided in Union County in 1993. The Union County Child Support Enforcement Program was administered by the State of North Carolina at that time. On 7 October 1993 the State filed this action against defendant, seeking to establish paternity, set child support, and recover reimbursement for past public assistance paid to the minor child. Defendant asserted the defenses of *res judicata* and collateral estoppel. In an order entered 2 August 1994, the trial court determined that the State is in privity with Forsyth County, concluded that the doctrine of *res judicata* applied to bar the State's action, and dismissed the State's action with prejudice.

A divided panel of the Court of Appeals affirmed. *State ex rel. Tucker v. Frinzi*, 119 N.C. App. 389, 458 S.E.2d 729 (1995). The Court of Appeals held that the State is in privity with the Forsyth County DSS because

> the State and Forsyth County DSS share "a mutual or successive relationship to the same rights of property[,]" that being the reimbursement of public assistance funds expended for the prior maintenance of the minor child . . . .

Id. at 393, 458 S.E.2d at 731 (alteration in original). In his dissent Judge Greene concluded that the State is not in privity with the Forsyth County DSS because "the State had no control over the first action filed by the County, and nothing in this record indicates that the interest of the State was represented in the first action." *Id.* at 394, 458 S.E.2d at 732. We conclude that the State is not in privity with the Forsyth County DSS. For this reason we reverse the decision of the Court of Appeals and hold that the doctrine of *res judicata* does not bar the State's action against defendant.

Under the doctrine of *res judicata*, or claim preclusion, "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). For *res judicata* to apply, a party

must "show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting *res judicata* and the party against whom *res judicata* is asserted] were either parties or stand in privity with parties." *Id.* at 429, 349 S.E.2d at 557.

Under the doctrine of collateral estoppel, or issue preclusion, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Id.* at 428, 349 S.E.2d at 557. A party asserting collateral estoppel is required to

> show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [the party asserting collateral estoppel and the party against whom collateral estoppel is asserted] were either parties to the earlier suit or were in privity with parties.

Id. at 429, 349 S.E.2d at 557.

The State contends that the trial court erred in dismissing the State's action on the basis of *res judicata* because the State is not in privity with the Forsyth County DSS. We agree and conclude that where the State brings an action seeking to establish paternity and recover public assistance paid on behalf of a State-administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program.

Ms. Tucker's acceptance of public assistance benefits on behalf of the minor child created a debt owing to the State in the amount of public assistance paid. N.C.G.S. § 110-135 (1995). By accepting public assistance on behalf of the minor child, Ms. Tucker is deemed to have assigned her right to receive any child support to the State or to any county from which such assistance was received. N.C.G.S. § 110-137 (1995). Defendant contends that privity is established because both the 1978 Forsyth County DSS action and the instant action depend upon Ms. Tucker's statutory assignment of her right to child support. Defendant also argues that privity is established because Ms. Tucker is entitled to a portion of any monies recovered from defendant for child support and all monies recovered from defendant for child support in excess of public assistance paid. *See* 42 U.S.C. § 657(b) (1994). We disagree.

In *Settle ex rel. Sullivan v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983), the prior action had been commenced against the defendant by the Child Support Enforcement Agency of Johnston County in the name of the mother of the child. *Id.* at 617, 308 S.E.2d at 289. The trial court in the prior action concluded that the defendant was not the father of the child. *Id.* The child subsequently brought an action against the defendant seeking support, and this Court concluded that the child was not estopped from relitigating the issue of paternity because the child was not in privity with Johnston County. *Id.* at 620-23, 308 S.E.2d at 290-92.

Even though the prior action had been brought in the name of the mother, this Court determined that Johnston County was the real party in interest in the prior action because the mother's acceptance of public assistance assigned her right to child support to Johnston County and because the County's action was for its own economic benefit. *Id.* at 618, 308 S.E.2d at 289. The Court concluded that the minor child was not in privity with Johnston County, emphasizing that the child's personal interests in the action were not adequately represented by the County in the prior action because the County's interests in that action had been solely economic. *Id.* at 620-21, 308 S.E.2d at 290-91.

In *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976), this Court held that a prior criminal adjudication did not estop the defendant from denying paternity in a civil action brought by the mother for child support. *Id.* at 114, 225 S.E.2d at 826. The trial court in *Tidwell* concluded that the defendant's earlier conviction finally adjudicated the issue of paternity and denied the defendant the right to relitigate that issue. *Id.* at 103, 225 S.E.2d at 819. This Court reversed, holding that the defendant was not estopped to deny paternity of the minor child because the State was not in privity with the mother or the child. *Id.* at 113-14, 225 S.E.2d at 825-26. The Court noted that even though the mother initiated and presumably was a witness for the State in the trial of the earlier action, the mother did not control the State's prosecution of that action. *Id.* at 114, 225 S.E.2d at 826. Further, the State had been represented at the earlier action by its attorney, not an attorney employed by the mother. *Id.*

The Court of Appeals considered the relationship between the State and a county-administered child support enforcement program in *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990). In *Rutherford*, Rutherford County adminis-

tered its child support enforcement program and filed an action against the defendant seeking to recover public assistance paid on behalf of the defendant's child. *Id.* at 72, 394 S.E.2d at 264. In an earlier action the State prosecuted the defendant for criminal nonsupport, and the trial court in that action found as fact that the defendant was not the father of the minor child. *Id.* The trial court in *Rutherford* determined that Rutherford County was in privity with the State and was barred from relitigating the issue of paternity. *Id.* at 73, 394 S.E.2d at 264.

The Court of Appeals reversed, reasoning that while both the State and the County were interested in proving that the defendant was the child's father, Rutherford County had no control over the prior criminal action. Further, nothing in the record indicated that the interest of the County was legally represented in the earlier action. *Id.* at 76, 394 S.E.2d at 266. Accordingly, the court concluded that the State and Rutherford County were not in privity and that the doctrine of collateral estoppel did not bar the County's action. *Id.* at 76-77, 394 S.E.2d at 266.

The Court of Appeals distinguished our decision in *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984). In *Lewis* the State, through its New Bern Child Support Agency, filed an action seeking indemnification for public assistance paid on behalf of the defendant's minor children. *Id.* at 728, 319 S.E.2d at 147. In an earlier criminal action prosecuted by the State, the defendant had been convicted of willful neglect and refusal to support his minor children. *Id.* at 727-28, 319 S.E.2d at 146. This Court concluded that collateral estoppel applied to bar the defendant from relitigating the issue of paternity because the State was the same party which challenged the defendant in the prior criminal action, "pursuing its same financial interest in securing support payments by a parent for his children in both actions." *Id.* at 733-34, 319 S.E.2d at 149-50.

In the instant case the State is not the same party which challenged defendant in the 1978 Forsyth County DSS action. For *res judicata* to apply, defendant must show that the State is in privity with the Forsyth County DSS.

> As this Court has recognized, the meaning of "privity" for purposes of *res judicata* and collateral estoppel is somewhat elusive. *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983). Indeed, "[t]here is no definition of the word 'privity' which can be

> applied in all cases." *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962). The prevailing definition that has emerged from our cases is that "privity" for purposes of *res judicata* and collateral estoppel "denotes a mutual or successive relationship to the same rights of property." *Settle*, 309 N.C. at 620, 308 S.E.2d at 290[.]

Hales v. N.C. Ins. Guar. Ass'n, 337 N.C. 329, 333-34, 445 S.E.2d 590, 594 (1994). In general, "privity involves a person so identified in interest with another that he represents the same legal right." 47 Am. Jur. 2d *Judgments* § 663 (1995); *accord Masters*, 256 N.C. at 525-26, 124 S.E.2d at 577-78; *Rutherford*, 100 N.C. App. at 76, 394 S.E.2d 266. "Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action." 47 Am. Jur. 2d *Judgments* § 663; *accord Masters*, 256 N.C. at 525, 124 S.E.2d at 577; *Rutherford*, 100 N.C. App. at 76, 394 S.E.2d at 266.

In their respective actions the Forsyth County DSS and the State sought to prove that defendant is the father of the minor child and to recover past public assistance paid to support the minor child. However, the State had no control over the first action, and nothing in the record indicates that the interest of the State was represented in the first action. *See Tidwell*, 290 N.C. at 114, 225 S.E.2d at 826; *Rutherford*, 100 N.C. App. at 76, 394 S.E.2d 266. For this reason the State was not in privity with the Forsyth County DSS, and the doctrines of *res judicata* and collateral estoppel do not bar the State's action in the instant case.

We conclude that where the State brings an action seeking to establish paternity and recover public assistance paid on behalf of a State-administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program. For this reason we hold that the doctrines of *res judicata* and collateral estoppel do not preclude the State's action against defendant.

The State also contends that the trial court erred in determining that the doctrine of *res judicata* precluded the State's action because the voluntary dismissal with prejudice in the 1978 action did not constitute a final judgment on the merits of the claim. Having concluded that the State is not in privity with the Forsyth County DSS, we do not

need to address this issue. We conclude that discretionary review was improvidently allowed.

Accordingly, the decision of the Court of Appeals affirming the order of the trial court is reversed, and this case is remanded to the Court of Appeals for further remand to the District Court, Union County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice WEBB dissenting.

I dissent. This cause was brought under Article 3 of Chapter 49 of the General Statutes, which provides for actions to establish paternity. The persons or entities who may bring the action are the mother, father, child, personal representative of the mother or child, or the director of social services or such person who by law performs the duties of such official if the child or mother is likely to become a public charge. N.C.G.S. § 49-16 (1984).

The first action was brought by the Forsyth County Department of Social Services. This second action was brought by the State of North Carolina, which was the entity performing the duties of the director of social services for Union County. The plaintiff in the first case was authorized to bring the action by the statute. The authority of the plaintiff in this second case to bring the action is based on the same provision of the statute, that is he must be the director of social services or someone performing his duties. The plaintiffs in both cases are virtually identical.

I do not believe the General Assembly intended that a person can lose an action to establish paternity in one county and go to another county and bring the same action. That is what we hold in this case. I would hold that the plaintiff in this case is in privity with the plaintiff in the Forsyth County case and the case is *res judicata*.

I vote to affirm.

Justice Frye joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOYCE HINNANT HALES

No. 81A95

(Filed 6 September 1996)

1. Criminal Law § 641 (NCI4th)— felony murder—State's announcement—court's submission of premeditation and deliberation

The trial court did not err by submitting to the jury a charge of first-degree murder based on premeditation and deliberation after the district attorney announced at the pretrial and charge conferences that the State would not ask for a conviction based on premeditation and deliberation but would try defendant only for felony murder. The State did not make a binding election to proceed only on the theory of felony murder, and the trial court was not deprived of its right and duty to determine what bases for the offense the evidence would support because the district attorney had a different opinion.

Am Jur 2d, Criminal Law §§ 512 et seq.; Homicide §§ 47, 112, 442, 474.

2. Homicide § 477 (NCI4th)— instruction on motive—failure to include absence of motive

The trial court did not commit prejudicial error in a first-degree murder case by failing to include in its charge on motive an instruction that "the absence of motive is equally a circumstance to be considered on the side of innocence."

Am Jur 2d, Homicide §§ 498, 502.

3. Evidence and Witnesses § 2363 (NCI4th)— fire intentionally set—expert testimony

A witness accepted as an expert in the field of incendiary fires was qualified to render an opinion that a fire was intentionally set. Furthermore, the jury was not as able as the witness to form the opinion that the fire was purposely set, and the opinion of the witness was helpful to the jury in reaching its decision. N.C.G.S. § 8C-1, Rule 702.

Am Jur 2d, Arson §§ 49, 50; Expert and Opinion Evidence § 407.

4. Homicide § 686 (NCI4th)— failure to instruct on accident—no plain error

The trial court did not commit plain error by failing to charge on accident in a first-degree murder prosecution arising from the burning of a mobile home where the court gave an instruction on first-degree murder based upon an intentional killing with premeditation and deliberation, the jury found these elements beyond a reasonable doubt, and it is not likely the jury would have found that the killing occurred by accident.

Am Jur 2d, Homicide §§ 498, 502, 506.

Homicide: burden of proof on defense that killing was accidental. 63 ALR3d 936.

5. Homicide § 709 (NCI4th)— failure to instruct on involuntary manslaughter—error cured by verdict

Where the jury was properly instructed on first-degree and second-degree murder and thereafter returned a verdict of first-degree murder based on premeditation and deliberation, any error in the court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction.

Am Jur 2d, Homicide §§ 498, 531-533.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

When should jury's deliberation proceed from charged offense to lesser-included offense. 26 ALR5th 603.

6. Homicide § 278 (NCI4th)— felony murder—underlying felony—gasoline and fire as deadly weapon

There was sufficient evidence that the underlying felony of willfully setting fire to a dwelling of which defendant was an occupant was committed with a deadly weapon so as to support defendant's conviction of felony murder where evidence that defendant used gasoline and fire to burn a mobile home while it

was occupied would support a finding that the gasoline and fire were used in combination as a deadly weapon.

Am Jur 2d, Homicide §§ 47, 112, 442, 474.

7. Homicide § 478 (NCI4th)— transferred intent—propriety of instruction

The trial court did not err by instructing the jury that defendant would be guilty of first-degree murder under the doctrine of transferred intent if the jury found beyond a reasonable doubt that "defendant intended to kill another person with premeditation and deliberation and that by mistake she killed the deceased in this case" since the court's use of the word "mistake" related to the identity of the person intended to be killed and not to the manner of the killing.

Am Jur 2d, Homicide §§ 498, 501.

8. Criminal Law § 775 (NCI4th)— voluntary intoxication—instruction in first-degree murder case—refusal to instruct in willful burning case

In a prosecution for first-degree murder and willfully setting fire to a dwelling of which defendant was an occupant wherein the trial court instructed on voluntary intoxication as it affected defendant's ability to form an intent to kill, any error in the court's refusal to also instruct on intoxication in the burning case was harmless where the jury rejected defendant's contention that he was unable to form an intent to kill by finding her guilty of first-degree murder based on premeditation and deliberation, and it is unlikely the jury would have found that defendant did not have the ability to act willfully in the burning case had the instruction been given in that case.

Am Jur 2d, Homicide §§ 128, 129, 498.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Farmer, J., at the 24 October 1994 Mixed Session of Superior Court, Johnston County, upon a verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed 15 November 1995. Heard in the Supreme Court 14 March 1996.

The defendant was tried for first-degree murder and for setting fire to the dwelling house of which she was an occupant. The State did not seek the death penalty. The State's evidence tended to show that the defendant poured gasoline on the mobile home in which she was living and set it on fire. Two men were in the mobile home at the time; one left the home, and the other died of carbon monoxide poisoning. The evidence showed that shortly before the fire, the victim communicated her intent to burn one of the victims in her mobile home. The defendant presented evidence that the burning was accidental.

The jury found the defendant guilty of felony murder and first-degree murder based on premeditation and deliberation. The jury also found the defendant guilty of willfully and wantonly setting fire to a dwelling place of which she was an occupant. The defendant was sentenced to life in prison for the murder and three years in prison to be served concurrently for the conviction on the burning charge.

The defendant appealed.

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

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

WEBB, Justice.

[1] In her first assignment of error, the defendant says the court should not have submitted to the jury the charge of first-degree murder based on premeditation and deliberation. She bases this argument on the action of the district attorney who announced at the pretrial conference that the State would not try the defendant for murder based on premeditation and deliberation, but would try her solely for felony murder. After the evidence had been presented, the district attorney said again at the charge conference that the State would not ask for a conviction based on premeditation and deliberation. The court stated that it would submit premeditation and deliberation to the jury as the basis for convicting the defendant of first-degree murder.

The defendant contends, relying on *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986), and *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986), that the State made a binding election to proceed only on the theory of felony murder when it announced it would do so at the

pretrial conference and did not change its position. *Jones* and *Hickey* are not precedents for this case. In those two cases, we dealt with the question of whether the State could proceed with a prosecution for a crime after the State had announced it would seek a conviction only of a lesser degree of the crime. In this case, the State did not say it would seek a conviction of a lesser degree of a crime, but said it would not proceed on one theory to support the crime. The defendant in this case was not exposed to a greater degree of punishment by being tried for first-degree murder based on premeditation and deliberation as well as felony murder. The evidence and defense tactics should have been the same whether the theory of premeditation and deliberation was or was not submitted to the jury. The court was not deprived of its right and duty to determine what bases for the offense the evidence would support because the district attorney had a different opinion. Furthermore, we agree that there was sufficient evidence of premeditation and deliberation for the court to submit this theory. The defendant has not shown how she was prejudiced during the trial by this action of the court.

This assignment of error is overruled.

[2] The defendant next assigns error to the jury charge. The defendant says the court's "instruction on motive was incomplete, inadequate, inaccurate, and erroneous in law." The court charged the jury as follows:

> Now, motive in this case is not an essential element. It's something you may consider, but the State is not required to prove a motive in this case.

The defendant contends the court should have added to this instruction that "[t]he absence of motive is equally a circumstance to be considered on the side of innocence." The defendant says the court's charge contained all the law on motive favorable to the State and none of the law on absence of motive favorable to the defendant.

We cannot hold there was prejudicial error in the trial court's charge. When the court instructed the jury it could consider motive, the members could infer that absence of motive could be considered in determining guilt or innocence. The evidence against the defendant was strong. She told six people that she had burned the mobile home. This lapse in the charge could not have affected the jury verdict.

This assignment of error is overruled.

[3] The defendant next assigns error to the admission of testimony by Sanford West, Johnston County Fire Marshall and Emergency Management Officer. Mr. West testified that he had previously worked at Johnston County Community College as the fire and rescue training coordinator, that he had been a volunteer fire fighter for twenty-seven years, that he had several hundred classroom hours of fire and arson training, that he had investigated more than three hundred fires in the last six years, and that he had passed a state examination and had been certified as an arson investigator by the North Carolina Fire and Rescue Commission. The State then tendered and the court accepted Mr. West "as an expert in the field of incendiary fires, their causes and origins."

Mr. West testified as follows:

Q. And do you have an opinion as well, based on your investigation and analysis and your experience, as to the cause of this fire?

A. I would classify this as an incendiary fire or a human hands fire.

Q. And what do you mean by that?

A. That it was purposely started.

Q. And why is it that you say that?

A. Well, number one, there was no other reason for the fire to start in that area. There was no accidental causes that we could determine that would cause that fire . . . .

The defendant contends it was error to admit this testimony because Mr. West was not qualified to render an opinion on this subject, and his opinion was not of assistance to the jury. N.C.G.S. § 8C-1, Rule 702 (1992). The defendant concedes that the witness could opine as to the fire's point of origin, the pattern of burning, the physical cause of the fire such as the ignition of spilled gasoline, and his belief that it was a "human hands fire." She argues that Mr. West could not know any better than the jury whether the fire was accidental or intentional.

We believe Mr. West had sufficient knowledge to form an opinion that the fire was intentionally set. The fire started in an area in which an accident would not occur. It is unlikely that gasoline would accidentally be spilled in that area and that someone would then acci-

dentally set the gasoline ablaze. Mr. West could conclude the fire was set intentionally.

The defendant also contends that when Mr. West testified to the matters revealed in his investigation, including his opinion that it was a "human hands fire," the jury was as able to form the opinion that the fire was purposely set as the witness, and his opinion was not helpful to it. *State v. Cuthrell*, 233 N.C. 274, 63 S.E.2d 549 (1951).

The testimony of Mr. West was in regard to matters not within the knowledge of the average person, and it was helpful to the jury in reaching a decision. The witness stated his opinion as to the cause of the fire and then testified as to the matters upon which he based his opinion. In this we find no error. *State v. Eason*, 328 N.C. 409, 402 S.E.2d 809 (1991).

This assignment of error is overruled.

[4] The defendant next assigns error to the court's failure to charge the jury on accident. The defendant did not request the court to charge on accident or object to its failure to do so. We must examine this assignment of error under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

Although the court did not charge on accident, it charged on first-degree murder based on premeditation and deliberation. In this charge, the court instructed the jury that it must find the defendant intentionally killed the victim with premeditation and deliberation. Because the jury found these elements beyond a reasonable doubt, it is not likely it would have found the killing occurred by accident. There was not plain error in the failure to give this charge. *State v. Riddle*, 316 N.C. 152, 340 S.E.2d 75 (1986).

This assignment of error is overruled.

[5] The defendant next assigns error to the failure of the court to submit to the jury a charge of involuntary manslaughter. In *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. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990); and *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), we held that when a jury is properly instructed on the elements of first- and second-degree murder and thereafter returns a verdict of first-degree murder based on premeditation and deliberation, any error in the court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an in-

struction. The jury in this case was properly instructed on first- and second-degree murder. The defendant was found guilty of first-degree murder. If there was error in not charging on involuntary manslaughter, it was harmless.

This assignment of error is overruled.

[6] In her next assignment of error, the defendant contends that her murder conviction based on the felony murder rule must be vacated because there was insufficient evidence that the underlying felony was committed with a deadly weapon. The defendant says that this Court should hold that fire cannot be a deadly weapon and, alternatively, that fire was not a deadly weapon in this case.

Under N.C.G.S. § 14-17, "a killing occurring during the commission of a felony not specified in the statute is murder in the first degree only if the felony was committed or attempted with the use of a deadly weapon." *State v. Davis*, 305 N.C. 400, 423-24, 290 S.E.2d 574, 588 (1982). A deadly weapon is any article, instrument, or substance that is likely to produce great bodily harm or death. *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). We have held that fire can be a deadly weapon according to its manner of use. *State v. Riddick*, 315 N.C. 749, 760, 340 S.E.2d 55, 61 (1986). In this case, there was evidence that the defendant used the gasoline and fire to burn the mobile home while it was occupied. The evidence clearly supports a finding that the gasoline and fire were used in combination as a deadly weapon.

This assignment of error is overruled.

[7] In her next assignment of error, the defendant argues that the trial court committed error by incorrectly instructing the jury on transferred intent. The trial court instructed as follows:

> [M]embers of the jury, if you are satisfied beyond a reasonable doubt that the defendant intended to kill another person with malice and with premeditation and deliberation and that by mistake she killed the deceased in this case, then the defendant would still be guilty of first degree murder under this particular theory. That is called transferred intent.

The defendant contends that this instruction permitted the jury to find the defendant guilty even when the victim's mistaken death did not result from the act prompted by or originating from malice

toward the intended victim. She says that the trial court's use of the term "mistake" relieved the jury of its responsibility to determine the defendant's *mens rea* toward the victim and caused the jury to believe it could convict her of both offenses "even if . . . the fire and killing [were] a mistake."

> We have stated that under the doctrine of transferred intent,
>
> it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law.

State v. Locklear, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992). The trial court in this case properly instructed the jury that the theory of transferred intent is applicable only after a finding that the defendant intended to kill another person with premeditation and deliberation. The court's use of the word "mistake" related to the identity of the person intended to be killed, not the manner of killing. There was not error in this charge.

This assignment of error is overruled.

[8] In her last assignment of error, the defendant contends the court should have given her requested instruction on voluntary intoxication as it affected her ability to form an intent to kill and to willfully and wantonly burn a dwelling house. The court charged on intoxication as it affected the murder case, but refused to charge on intoxication in the burning case. The defendant argues that it was error not to charge on intoxication in both cases.

Assuming it was error not to charge on intoxication in the burning case, the defendant cannot show prejudice. In *State v. Kyle*, 333 N.C. 687, 430 S.E.2d 412 (1993), we held that it was harmless error not to charge on intoxication as it affected the defendant's ability to form the required intent for burglary and kidnapping when the court charged on intoxication as it affected the defendant's ability to form an intent to kill on a first-degree murder charge. We said a finding of guilty of first-degree murder based on premeditation and deliberation showed the jury had rejected the defendant's contention that he was unable to form an intent to kill, and it was not likely that the jury would have found the defendant incapable of forming intent on the burglary and kidnapping charges. *Id.* at 699, 430 S.E.2d at 418-19.

Pursuant to *Kyle*, we hold it was not prejudicial error not to charge on intoxication as it affected the burning case.

This assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. DAVID ALLEN SOKOLOWSKI

No. 498A94

(Filed 6 September 1996)

1. Indigent Persons §§ 19, 23, 24 (NCI4th)— noncapital first-degree murder—funds for a psychiatrist, ballistics expert, and behavioral pharmacologist—denied

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for funds to hire a psychiatrist or psychologist, a forensic pathologist, a firearms and ballistics expert, and a behavioral pharmacologist. Defendant testified that he did not want to plead insanity and self-defense, upon which he relied, was inconsistent with an insanity plea; testimony presented at trial was substantially the same testimony which defendant argues that his forensic pathologist and ballistics expert would have presented; defendant fails to show how these experts could have aided him in his self-defense theory; and expert testimony from a behavioral pharmacologist on the victim's cocaine use and violent nature would have been cumulative. Defendant did not show that retention of the experts would materially assist in the preparation of his case.

Am Jur 2d, Expert and Opinion Evidence §§ 13, 14.

2. Searches and Seizures § 60 (NCI4th)— noncapital first-degree murder—warrantless search of defendant's home—defendant's consent

The trial court did not err in a noncapital first-degree murder prosecution by overruling defendant's motion to suppress evidence seized in a warrantless search of his home and evidence seized during a search pursuant to warrants based on evidence

obtained in the warrantless search. The taking of eight deputies to a rural area where someone is burning body parts as a result of a possible homicide is not imprudent or excessive, especially in light of the information that defendant had stated that he would shoot any law enforcement officers who came to his house; the officers drew their weapons and yelled only when the defendant reached for his gun; the officers holstered their weapons once defendant was disarmed; the actions of the officers could not have coerced the defendant into consenting to the search; defendant twice consented; and defendant's argument that the consent was meaningless because it was not explained to him that he could not possibly negate the discoveries in the fire unless he then consented has been rejected by the U.S. Supreme Court.

Am Jur 2d, Searches and Seizures § 83.

Validity of consent to search given by one in custody of officers. 9 ALR3d 858.

Constitutionality of searching premises without warrant as incident to valid arrest—Supreme Court cases. 108 L Ed 2d 987.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Battle, J., at the 14 March 1994 Criminal Session of Superior Court, Orange County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 March 1996.

The defendant was tried for first-degree murder in a case in which the State did not seek the death penalty. The State's evidence showed that the defendant shot and killed Rubel Hill. He then cut the body into several parts and put them in a fire in his backyard. The crime was discovered when a house guest of the defendant's called Major Don Truelove of the Orange County Sheriff's Department and reported he had seen several body parts in the defendant's home and had seen the defendant put body parts in the fire.

Major Truelove and seven other deputy sheriffs went to the defendant's home and removed a partially burned skull and human torso from the fire. The defendant told Major Truelove that the body was that of Rubel Hill. He said that Mr. Hill had tried to shoot him and that he had shot Mr. Hill.

The defendant was convicted of first-degree murder and sentenced to life in prison.

The defendant appealed.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

William M. Sheffield for defendant-appellant.

WEBB, Justice.

[1] The defendant's first assignment of error deals with his motion that he be furnished funds to retain experts and that the case be continued to allow him time to confer with the experts. The defendant made a motion pursuant to N.C.G.S. § 7A-450(b) that he be furnished funds to hire a psychiatrist or a psychologist, a forensic pathologist, a firearms and ballistics expert, and a behavioral pharmacologist. The court conducted an *ex parte* hearing on the motion.

The defendant testified at the hearing that he did not want to plead insanity. He said he did not trust Dr. Rollins, the State's psychiatrist. His attorney argued that there was a substantial basis for pleading insanity and that he needed the assistance of an expert who was not employed by the State to develop this defense. The court noted that the defendant had not pleaded insanity as a defense and had not made a showing that sanity at the time of the offense was likely to be a significant factor in the trial.

The defendant argued that he needed a forensic pathologist and a ballistics expert because the State had recently filed an amended answer to a request for a bill of particulars, in which it said the State would contend the deceased had been shot in the chest with a shotgun and in the head with a pistol. The State had previously said it would rely only on evidence that the deceased was shot in the chest with a shotgun. The defendant says the claim by the State that the deceased had been shot in the head as well as the chest could affect the proof of premeditation and deliberation, and he needed experts to meet this proof. The superior court held "that the defendant has failed to demonstrate that he will be deprived of a fair trial without the expert[s'] assistance or that there is a reasonable likelihood that they will materially assist the defendant in the preparation of his case."

The defendant argued that he needed a behavioral pharmacologist to develop a self-defense plea. He says that there was evidence

that the deceased used crack cocaine and that a behavioral pharmacologist could testify that consistent ingestion of cocaine leads to more violent mood swings. The court held the defendant had not made a showing "that there is a reasonable likelihood that such an expert would materially assist him [the defendant] in the preparation of his case."

The superior court denied the defendant's motion for the retention of experts. We hold that the superior court was not in error by denying the motion to provide funds for the hiring of experts.

As to the retention of a psychiatrist or psychologist to develop an insanity defense, the defendant testified he did not want to plead insanity. Self-defense, upon which defendant relied, was inconsistent with an insanity plea. Insanity was not a "significant factor" in his defense. *State v. Moore*, 321 N.C. 327, 344, 364 S.E.2d 648, 657 (1988).

As to the retention of a forensic pathologist and a ballistics expert, the defendant contends he needed them to rebut the State's evidence that the deceased was shot in the head as well as the chest. The pathologist who testified for the State said the cause of death was the shotgun wound to the neck and chest, and she could not tell when the bullet wound to the head was inflicted. The SBI ballistics expert who testified for the State said the bullet which was removed from the victim's head was too deformed to determine if it came from the defendant's gun.

This testimony is substantially the same testimony which the defendant argues that his own experts would have presented. We also note that there was no significant controversy as to whether the defendant shot the victim. He admitted that he did. He only contended that he did it in self-defense. The defendant fails to show how these experts could have aided him in this theory. He also fails to show how he could have refuted, challenged, or contradicted the testimony presented at trial or why he would have wanted to do so. Any additional experts would have been repetitious. The defendant was not prejudiced by the denial of his request for funds for either of these experts.

The State argues, and we agree, that expert testimony on the victim's cocaine use and violent nature would have been cumulative. The defendant was able to prove the victim's violent nature through the testimony of the victim's wife and the victim's extensive criminal record, which included convictions for breaking and entering, felo-

nious assault and battery, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious drug charges. The defendant also introduced the victim's prison records showing numerous infractions, including possession of weapons and assaults. This evidence clearly demonstrated the victim's own violent tendencies. Testimony that cocaine use could make a person violent was not necessary.

The defendant did not show the retention of the experts would materially assist in the preparation of his case, and it was not error to deny his motion to furnish funds to hire the experts. *State v. Parks*, 331 N.C. 649, 658, 417 S.E.2d 467, 472 (1992). When the court denied the defendant's motion to retain the experts, the defendant did not need time to confer with them. Thus, it was not error to overrule his motion for a continuance.

This assignment of error is overruled.

[2] The defendant next assigns error to the overruling of his motion to suppress evidence seized in a warrantless search of his home. He also moved to suppress evidence seized during a search pursuant to warrants which were procured based on the evidence obtained as a result of the warrantless search. He also moved for the suppression of any statements he made when confronted with the evidence seized as a result of the warrantless search. The defendant contends he was coerced into giving his consent.

The court had a hearing on the defendant's motion. The evidence at the hearing showed that when Major Truelove received the call telling him about the burning of the body, the caller also told him the defendant was armed and had said he would shoot any law enforcement officer who came on his property. Major Truelove had seven deputy sheriffs accompany him to the defendant's home.

When the officers arrived at the defendant's home, he was standing in the driveway with a pistol in his belt. The defendant reached for his pistol, but after being told not to do so by the officers, who had drawn their weapons, the defendant did not touch his pistol. The officers disarmed the defendant.

The officers requested permission to search the house, and the defendant said, "I don't care." The defendant accompanied the officers when they searched his house. While some of the officers were searching the house, two officers reported to Major Truelove that they had found a fire in the backyard with a human head and torso in

it. At that time, the defendant was handcuffed and warned of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

At this time, Major Truelove instructed two deputies to get a statement from the defendant. The two deputies took the defendant to a patrol car where he signed a consent to search form and a waiver of his *Miranda* rights. The defendant then asked for an attorney, and the interrogation ceased.

The court found facts consistent with the evidence and denied the defendant's motions. The defendant concedes that there was no purposeful coercion of the defendant but argues that the eight officers who arrived at the defendant's home acted in a manner which had a coercive effect. He says several of the officers shouted at the defendant and pointed guns at him.

We hold that the warrantless search was based upon consent and, therefore, was valid. The taking of eight deputies to a rural area where someone is burning body parts as a result of a possible homicide is not imprudent or excessive, especially in light of the information that the defendant had stated that he would shoot any law enforcement officers who came to his house. Further, the officers drew their weapons and yelled only when the defendant reached for his gun. Once the defendant was disarmed, the officers holstered their weapons. The actions of the officers could not have coerced the defendant into consenting to the search. The defendant twice consented to the search. First, he consented orally, then in writing by signing the consent to search form. The defendant's argument that the written consent was "meaningless" because it was not "explained to him that he could [not] possibly negate the discoveries in the fire unless he then consented" has been rejected by the United States Supreme Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973). In that case, the Court held that "neither this Court's prior cases[] nor the traditional definition of 'voluntariness' requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search." *Id.* at 234, 36 L. Ed. 2d at 867.

The facts found by the court support the conclusion that the consent to search was voluntarily given. Hence, the search was valid, and the trial court properly refused to suppress the evidence.

This assignment of error is overruled.

NO ERROR.

ACT-UP TRIANGLE v. COMMISSION FOR HEALTH SERVICES

No. 328PA96

Case below: 123 N.C. App. 256

Petition by plaintiffs for writ of supersedeas allowed 5 September 1996. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question denied and notice of appeal retained 5 September 1996. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

ADAMS v. MOORE

No. 321P96

Case below: 122 N.C. App. 752

Notice of appeal by plaintiffs (Pro Se) (substantial constitutional question) dismissed 5 September 1996. Petition by plaintiffs (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

BAKER v. MECKLENBURG COUNTY

No. 253P96

Case below: 122 N.C. App. 398

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 5 September 1996. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

BARGER v. McCOY HILLARD & PARKS

No. 262PA96

Case below: 120 N.C. App. 326

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

BARRETT KAYS & ASSOC. v. COX

No. 263P96

Case below: 122 N.C. App. 398

Petition by defendant (Mark C. Kirby d/b/a/ The Law Offices of Mark C. Kirby) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

BROWER v. KILLENS

No. 322PA96

Case below: 122 N.C. App. 685

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

BROWN v. BOOKER

No. 23P96

Case below: 121 N.C. App. 366

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

CAROLINA BEVERAGE CORP. v. COCA-COLA BOTTLING CO.

No. 259P96

Case below: 122 N.C. App. 398

Petition by defendant (Coca-Cola Bottling Co. Affiliated, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

CATES v. N.C. DEPT. OF JUSTICE

No. 111PA96

Case below: 121 N.C. App. 243

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 September 1996.

CITY OF FAYETTEVILLE v. M. M. FOWLER, INC.

No. 284P96

Case below: 122 N.C. App. 478

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

CRABTREE v. JONES

No. 302P96

Case below: 122 N.C. App. 577

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

DAVIS v. RAYMARK FRICTION CO.

No. 288P96

Case below: 122 N.C. App. 577

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

EPPS v. DUKE UNIVERSITY

No. 230P96

Case below: 122 N.C. App. 198

Petition by defendants (Duke University and Hjelmstad) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

GARRISON v. CONNOR

No. 314P96

Case below: 122 N.C. App. 702

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

HIGGS v. SOUTHEASTERN CLEANING SERVICE

No. 289PA96

Case below: 122 N.C. App. 457

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals dismissed as moot 5 September 1996.

IN RE AYERS

No. 266P96

Case below: 122 N.C. App. 398

Petition by respondent (Dennis Martin Hall) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

IN RE ESTATE OF LEVY v. BROADWELL

No. 307P96

Case below: 108 N.C. App. 788

Petition by petitioners (Levy and White) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

IN RE WHITLEY

No. 197P96

Case below: 122 N.C. App. 290

Petition by respondent (Keith Whitley) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

KING v. BENNETT

No. 318P96

Case below: 122 N.C. App. 752

Petition by plaintiff (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

LANKFORD v. WRIGHT

No. 308PA96

Case below: 122 N.C. App. 746

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

MAHONEY v. RONNIE'S ROAD SERVICE

No. 171A96

Case below: 122 N.C. App. 151

Notice of appeal by plaintiffs (substantial constitutional question) dismissed 5 September 1996. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 5 September 1996.

MEYER v. WALLS

No. 271PA96

Case below: 122 N.C. App. 507

Petition by defendants (Buncombe County Social Services, Calvin E. Underwood, Jr., Kay Barrow & Mackey Miller) for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

MINTON v. LOWE'S FOOD STORES

No. 169P96

Case below: 121 N.C. App. 675

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

MOORE v. FLORIDA POWER & LIGHT CO.

No. 319P96

Case below: 122 N.C. App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

MORTENSEN v. MAGNETI MARELLI U.S.A.

No. 286P96

Case below: 122 N.C. App. 486

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

NATIONWIDE MUTUAL INS. CO. v. PREVATTE

No. 220P96

Case below: 122 N.C. App. 396

Petition by defendant (Prevatte) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

N.C. CENTRAL UNIVERSITY v. TAYLOR

No. 282PA96

Case below: 122 N.C. App. 609

Petition by Attorney General for writ of supersedeas allowed 5 September 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

N.C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

No. 317PA96

Case below: 123 N.C. App. 163

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

PACCAR FINANCIAL CORP. v. G&G TRUCKING, INC.

No. 231P96

Case below: 122 N.C. App. 396

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

PARKER v. TURNER

No. 225P96

Case below: 122 N.C. App. 381

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

PHILLIPS v. GRAND UNION CO.

No. 320P96

Case below: 122 N.C. App. 753

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

STATE v. ADAMS

No. 293PA96

Case below: 122 N.C. App. 538

Notice of appeal by Attorney General (substantial constitutional question) retained 5 September 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

STATE v. CROSS

No. 118PA96

Case below: 121 N.C. App. 788

Petition by Attorney General for writ of supersedeas allowed 5 September 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

STATE v. DAVIDSON

No. 369A96

Case below: 123 N.C. App. 326

Motion by Attorney General for temporary stay allowed 23 August 1996.

STATE v. EVERETT

No. 291P96

Case below: 122 N.C. App. 579

Notice of appeal by defendant (Everett) (substantial constitutional question) dismissed 27 August 1996. Petition by defendant (Everett) for discretionary review pursuant to G.S. 7A-31 dismissed 27 August 1996.

STATE v. GODFREY

No. 333P96

Case below: 123 N.C. App. 355

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

STATE v. HUDSON

No. 356P96

Case below: 123 N.C. App. 336

Motion by Attorney General for temporary stay allowed 20 August 1996.

STATE v. JOHNSTON

No. 249P96

Case below: 122 N.C. App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

STATE v. McGIRT

No. 198A96

Case below: 122 N.C. App. 237

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied and notice of appeal retained 5 September 1996.

STATE v. MISENHEIMER

No. 310P96

Case below: 123 N.C. App. 156

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

STATE v. MUNDINE

No. 323P96

Case below: 122 N.C. App. 707

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 September 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

STATE v. RICHARDSON

No. 255P96

Case below: 122 N.C. App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

STATE v. ROGERS

No. 367P96

Case below: 123 N.C. App. 359

Motion by Attorney General for temporary stay allowed 23 August 1996.

STATE v. SMITH

No. 309PA96

Case below: 123 N.C. App. 162

Notice of appeal by Attorney General (substantial constitutional question) retained 5 September 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 5 September 1996.

STATE v. WEAVER

No. 368P96

Case below: 123 N.C. App. 276

Motion by Attorney General for temporary stay allowed 23 August 1996.

STATE EX REL. ALBEMARLE CHILD SUPPORT
ENF. v. LAMBERT

No. 141P96

Case below: 121 N.C. App. 628

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 5 September 1996. Petition by defendant (Pro Se) for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

TAHA v. THOMPSON

No. 33P96

Case below: 120 N.C. App. 697

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

THOMPSON v. PILSON

No. 276P96

Case below: 122 N.C. App. 581

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

VESTAL v. NEWMAN

No. 172P96

Case below: 122 N.C. App. 196

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

WARD v. DOE

No. 256P96

Case below: 122 N.C. App. 401

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 September 1996.

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

WINTERBERG v. BURNS AEROSPACE CORP.

No. 254P96

Case below: 122 N.C. App. 401

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

YOUNG v. FUN SERVICES-CAROLINA, INC.

No. 203P96

Case below: 122 N.C. App. 157

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 September 1996.

PETITION TO REHEAR

EDWARD VALVES, INC. v. WAKE COUNTY

No. 34PA95

Case below: 343 N.C. 426

Petition by defendants to rehear pursuant to Rule 31 denied 5 September 1996.

STATE OF NORTH CAROLINA v. EDWARD ERNEST HARTMAN

No. 531A94

(Filed 11 October 1996)

1. Constitutional Law § 344 (NCI4th)— capital murder—jury selection—judge's private conversation with juror—excusal for medical reasons

A trial court's private, unrecorded conversation with a prospective juror outside defendant's presence in a capital first-degree murder prosecution was harmless beyond reasonable doubt. Assuming through inference that such a conversation occurred outside defendant's presence, defendant failed to object to the trial judge's reconstruction of his communications with the prospective juror and the prospective juror was properly excused for medical reasons.

Am Jur 2d, Constitutional Law § 695.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.

2. Jury § 190 (NCI4th)— capital murder—jury selection—denial of challenge for cause—preservation for appeal

A defendant in a capital first-degree murder prosecution satisfied the mandates of N.C.G.S. § 15A-1214(h) for preserving an assignment of error from a denial of a challenge for cause during jury selection where defendant challenged a prospective juror for cause; the trial court denied the challenge; defendant exhausted his peremptory challenges and renewed his challenge for cause as to that juror; and the trial court also denied that challenge.

Am Jur 2d, Jury § 335.

3. Jury § 205 (NCI4th)— capital murder—jury selection—acquaintance of victim and witnesses—ability to be fair and impartial—rejection of challenge for cause

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution where a prospective juror was acquainted with the victim and prospective witnesses but never fluctuated in her clear and decisive answers to both the trial court and the prosecutor that she could remain a fair and impartial juror; when asked by defense counsel if she had

any opinion as to what defendant's punishment should be, she responded, "No, because I don't know all the facts"; and the trial court in its discretion made the decision to reject defendant's challenge for cause after hearing the juror's responses, observing her demeanor, and assessing her credibility.

Am Jur 2d, Jury § 300.

4. Criminal Law § 395 (NCI4th)— capital murder—jury selection—remarks by judge—clarification of ambiguous answer—not expression of opinion

The trial court did not express an opinion which might have improperly influenced other jurors and did not by its demeanor discourage other prospective jurors from disclosing any possible influence from factors outside the evidence during jury selection for a capital murder prosecution where one of the first twelve jurors seated stated that extrajudicial information could possibly influence his verdict. The trial judge alluded only to appropriate sources of evidence, in no way suggested how such evidence should be considered by the jurors, and did not convey any personal opinion which he may have had concerning the juror's sources of influence. The trial judge was simply clarifying an ambiguous admission by a prospective juror; it is mere speculation that the other prospective jurors were discouraged from disclosing any possible influence outside the evidence admitted at trial due to the trial judge's remarks.

Am Jur 2d, Trial §§ 276, 277, 280.

5. Criminal Law § 370 (NCI4th)— capital murder—scars on witness's wrists—judge's comment on relevancy

There was no prejudicial error in a capital murder prosecution where defendant's mother testified that she had attempted suicide by slitting her wrists thirty times, defense counsel requested permission for defendant's mother to show the jury her wrists, and the trial court said, "I guess so. I don't see how that's relevant, but step down and show them your wrists." Whether the witness had scars on her wrists was not a question of fact for the jury to decide and the trial court's comment was not directed at the relevance of her alleged suicide attempts as mitigating evidence, but more likely at the relevance of the witness having to show the jury the scars on her wrists as evidence of her suicide attempts. Furthermore, the trial court submitted and the jury

found as a mitigating circumstance that defendant witnessed physical and verbal abuse of his mother, her abuse of drugs and alcohol, and an attempted suicide; thus it is obvious that the trial court did not persuade the jury that the suicide attempts were irrelevant at the sentencing phase.

Am Jur 2d, Trial § 280.

6. Criminal Law § 1363 (NCI4th)— capital sentencing—requested instructions—nonstatutory mitigating circumstances

There was no prejudicial error in a capital sentencing proceeding by refusing to submit specific requested nonstatutory mitigating circumstances where defendant was not denied the benefit of any of his proposed nonstatutory mitigating circumstances. Those that were supported by the evidence were submitted to the jury in substance and those that were not supported by the evidence were not submitted to the jury. Viewed contextually, the substance of the mitigating circumstances that defendant requested were subsumed into other submitted mitigating circumstances, including the catchall mitigating circumstance, and the jury was not precluded from considering any of defendant's mitigating evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked. 65 ALR3d 1100.

What constitutes playing "mitigating role" in offense allowing decrease in offense level under United States Sentencing Guideline § 3B1.2, 18 USCS Appendix. 100 ALR Fed. 156.

7. Evidence and Witnesses §§ 764, 714 (NCI4th)— capital murder—questions as to defendant's sexual orientation—not answered—instruction to disregard statement

There was no prejudicial error in a capital first-degree murder prosecution where the prosecutor asked the first twelve veniremembers whether someone's sexual persuasion would have any bearing on their decision and the court sustained defendant's immediate objection; the prosecutor asked defendant's aunt on cross-examination whether she had heard that

defendant was a homosexual; the trial court sustained defendant's objection and instructed the jury to disregard the statement; the prosecutor asked whether the aunt knew defendant's sexual persuasion; defense counsel objected and the trial court sustained the objection. The prosecutor's questions were never answered; moreover, our system is based upon the assumption that trial jurors are women and men of character and sufficient intelligence to fully understand and comply with proper instructions of the court not to consider certain evidence and they are presumed to have done so.

Am Jur 2d, Trial § 1120.

8. Robbery § 138 (NCI4th)— capital murder and armed robbery—charge on larceny denied—no error

The trial court did not err in a prosecution for first-degree murder and robbery with a firearm by failing to submit the lesser included offense of larceny where the State introduced substantial evidence of defendant's guilt of robbery with a firearm and there is no evidence to support defendant's contention that he formed the intent to take the victim's property at a time which could not be part of a continuous transaction.

Am Jur 2d, Robbery § 75.

9. Criminal Law § 1357 (NCI4th)— capital sentencing—mitigating circumstances—mental or emotional disturbance—instructions—use of conjunctive

There was no plain error in a capital sentencing proceeding in the trial court's use of the conjunctive in listing supporting evidence when instructing on the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance. The instruction clearly comported with defendant's evidence, and the court also instructed the jury that it was enough that 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. The instruction did not preclude the jury from considering mitigating evidence.

Am Jur 2d, Criminal Law § 599.

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

What constitutes playing "mitigating role" in offense allowing decrease in offense level under United States Sentencing Guilldeline § 3B1.2, 18 USCS Appendix. 100 ALR Fed. 156.

10. Criminal Law § 1160 (NCI4th)— robbery—Fair Sentencing—aggravating factor—age of victim

The trial court did not err when sentencing defendant for robbery by finding the aggravating factor that the victim was very old. Although defendant contended that there was no evidence that the victim was more vulnerable to the commission of the offense by reason of his age, the victim was somewhere between seventy-two and seventy-seven years old at the time of the murder; he suffered from emphysema and relied on inhalers at all times; he had limited use of one arm and weighed only ninety-three pounds at the time of the autopsy; and the victim had provided defendant with shelter, food, cigarettes, beer, and transportation when defendant had nowhere else to go. The victim's age, physical disabilities, and stature made him vulnerable and an inviting target for the physically superior twenty-eight-year-old defendant. N.C.G.S. § 15A-1340.4(a)(1)j (1988).

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 1373 (NCI4th)— death sentence—proportionate

A sentence of death for a first-degree murder was not disproportionate where the evidence fully supports the aggravating circumstance 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, the sentence of death was not disproportionate based on the nature of the crime, and this case is more similar to cases in which the death sentence was found proportionate than to those in which the sentence was found disproportionate or those in which juries have consistently returned recommendations of life imprisonment. The evidence tended to show that the victim, an elderly man with poor health, had befriended the twenty-eight-year-old defendant, taken him into his home, and offered him respect and goodwill; defendant took the victim's belongings and attained money by using his personal checks throughout several days following the murder while leaving the victim's body in the recliner in which he was murdered; and the victim was killed in the solace of his own home.

Am Jur 2d, Criminal Law § 628.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Brown (Frank R.), J., at the 10 October 1994 Criminal Session of Superior Court, Northampton 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 firearm was allowed 21 November 1995. Heard in the Supreme Court 16 May 1996.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

ORR, Justice.

On 3 June 1993, twenty-eight-year-old defendant, Edward Ernest Hartman, shot Herman Smith, Sr., at close range in the back of the head while Mr. Smith was sitting in his recliner watching television. Mr. Smith was between seventy-two and seventy-seven years old, was in poor health, weighed only ninety-three pounds, and was suffering from emphysema at the time he was killed.

Defendant was indicted for first-degree murder and armed robbery and was tried capitally. Defendant was found guilty of first-degree murder based upon premeditation and deliberation and under the felony murder rule with robbery as the underlying felony. Defendant was also found guilty of robbery with a firearm.

Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court sentenced defendant

accordingly. The trial court also entered a prayer for judgment continued with respect to the robbery conviction. On 13 January 1995, judgment was entered on the robbery conviction, and the trial court imposed a sentence of forty years' imprisonment to run consecutive to the sentence of death for the first-degree murder conviction.

Defendant appeals to this Court, asserting sixteen assignments of error. For the reasons stated herein, we conclude that defendant's trial and capital sentencing proceeding were free from prejudicial error and that defendant's sentence of death is not disproportionate.

During the guilt-innocence phase of defendant's trial, the State presented evidence tending to show the following: Defendant and Smith became acquainted through defendant's mother, Dot Simpson, who had lived with and cared for Smith some years earlier in Virginia and then later in Northampton County, North Carolina. One year prior to the murder, after Ms. Simpson moved back to Virginia, defendant, who apparently had no place else to live, moved in with Smith.

In February or March 1993, defendant told a friend, Emory K. Phipps, that Smith was a millionaire and always carried between four and five thousand dollars with him. Defendant also told Phipps that he wanted to kill Smith in order to get some of his money.

Defendant was arrested for Smith's murder on 24 June 1993. Defendant gave two statements to the police after his arrest. In his first statement, defendant indicated to the police that Smith's death was the result of an accidental shooting. Defendant later recanted that statement and confessed in a second statement to murdering Smith.

In this second statement, defendant stated that on Thursday, 3 June 1993, he had been working in the yard and drinking beer all afternoon. Around 7:00 p.m., having consumed a twelve-pack of beer, he bought another twelve-pack and ate dinner with Smith. Smith showed defendant his .38-caliber revolver, and they discussed repairing the gun. At approximately 11:00 p.m., Smith was sitting in a recliner watching the news, and defendant was at a table with the loaded revolver about five to six feet behind him. By this time, defendant had consumed four beers from the second twelve-pack. Defendant stated:

> Herman was sitting in a recliner in the den. I picked the gun up off the table, walked up behind Herman, pointed the gun at the back of Herman's head. The sight of blood makes me sick so I

turned my head and at very close range, pulled the trigger and shot Herman Smith in the back of the head.

Thereafter, defendant stated that he considered and decided against calling his mother or the police. Instead, he gathered the gun, the remaining beer, a change of clothes, his dog, and Smith's car keys, and leaving Smith's body in the recliner, drove in Smith's car to his (defendant's) mother's house in Norfolk, Virginia, for one day. Defendant's mother later testified that on 4 June 1993, the day after the murder, defendant asked her, "If Herman was to die, do you think you'd get anything?"

On Saturday, 5 June 1993, defendant returned home. Smith's body was still in the recliner. Defendant then headed to Roanoke Rapids, North Carolina, to play bingo. On three separate occasions between Saturday, 5 June 1993, and Tuesday, 8 June 1993, defendant used Smith's personal checks to write checks to himself. He cashed three of Smith's checks in the amount of $50.00 each at the bingo site and attempted to cash one for $2,500 at a bank, but the teller refused after the signature did not match the signature on file at the bank.

On Tuesday, 8 June 1993, defendant awoke at 3:00 a.m. to the smell of Smith's body, which was still in the recliner. After digging a hole in the stables in the backyard, defendant covered Smith's body in a blanket, dragged it out to the hole, and buried him. Before he buried the body, defendant removed a diamond ring from Smith's hand because defendant "did not have any money." He then drove Smith's car back to Norfolk, Virginia.

On 9 June 1993, defendant drove to Augusta, Georgia, to visit some friends. Defendant's friends testified that defendant drove Smith's car to Georgia. Defendant tried to sell to his friends several items belonging to Smith including the diamond ring, the car, a shotgun, and the .38-caliber pistol with which defendant had shot Smith. Defendant's friends in Augusta, Carlos Petersen and James Yanak, testified that they also saw defendant with Smith's television, VCR, leather jacket, and "a large . . . lump of money."

The following Monday, 14 June 1993, defendant returned to Norfolk, where he pawned Smith's ring. Defendant was later arrested in Norfolk on 24 June 1993.

Beginning on Saturday, 8 June 1993, Smith's relatives could not get in touch with him and soon became concerned. On 10 June 1993,

SBI Agent Malcolm McLeod found in a trash can located in defendant's home a ripped-up personal check of Smith's and a piece of paper on which Smith's name was written several times where defendant had apparently practiced Smith's signature in order to forge Smith's name on his personal checks. Agent Dennis Honeycutt, SBI crime technician, processed Smith's residence, and a luminal test revealed an uninterrupted blood line running from the recliner in the den out a side door towards the backyard. Smith's body was recovered from the grave in the stables in the backyard. Additionally, SBI Agent Jennifer Elwell, a forensic serologist, testified that she examined the gun recovered from under Smith's car seat after defendant was arrested. When she wiped the inside of the gun barrel, she found a positive reaction for blood.

Dr. Marcella F. Fierro, who at the time was a professor of pathology at East Carolina University, performed an autopsy on Smith's body and concluded that the contact gunshot wound to the back of Smith's head was the cause of Smith's death.

Defendant did not present any evidence at the guilt-innocence phase.

During the capital sentencing proceeding, defendant's evidence tended to show from previous psychiatric evaluations that defendant has an adjustment disorder with depressed mood, conversion disorder, a closed head injury, and a history of alcohol abuse. Dr. Billy W. Royal, a medical doctor specializing in psychiatry and forensic psychiatry, testified that his psychological evaluation of defendant revealed that defendant also has a personality disorder with immaturity, impulsivity, and identity problems. Defendant also suffers from chronic depression and an anxiety disorder. Defendant's mother testified that defendant had been sexually abused in the past by his sixteen-year-old uncle and one of his mother's stepsons and had been physically assaulted by one of his six stepfathers. In addition, defendant witnessed his mother attempt suicide and suffer numerous beatings at the hand of her husbands.

I.

[1] In his first assignment of error, defendant contends that the trial court erred by holding a private, unrecorded conversation outside his presence with prospective juror Sarah White, in violation of his nonwaivable constitutional right to be present at all stages of his capital trial.

> It is well settled that a defendant in a capital trial has an unwaivable right to be present at every stage of his trial. "This Court has repeatedly held that nothing should be done prejudicial to the rights of a person on his trial for a capital felony unless he is actually present . . . ." *State v. Jacobs*, 107 N.C. 772, 779, 11 S.E. 962, 964 (1890). This right to presence derives from the Confrontation Clause of our State Constitution. Significantly, however, any violation of a defendant's right to be present is subject to a harmless error analysis.

State v. Hudson, 331 N.C. 122, 135, 415 S.E.2d 732, 738 (1992) (citations omitted), *cert. denied*, 506 U.S. 1055, 122 L. Ed. 2d 136 (1993). "When a trial court conducts private unrecorded conferences with prospective jurors, the trial court commits reversible error unless the State can show that the error was harmless beyond a reasonable doubt." *State v. Lee*, 335 N.C. 244, 262, 439 S.E.2d 547, 555, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994).

At the end of the first day of jury selection, the following exchange, which is a memorialization of the alleged *ex parte* conversation, transpired involving prospective juror White:

> THE COURT: Ms. Sarah White, please come around.
>
> (SHE DID AS REQUESTED.)
>
> THE COURT: Gentlemen, this is a juror by the name of Sarah H. White. She was not here at the time the jurors were called. She has brought to me a statement from a doctor. I filed the statement with the clerk and the court is going to defer her service to the next session of Superior Court for Northampton County.
>
> You'll be notified when to return for your services as a juror.
>
> A. I don't have to come back tomorrow?
>
> THE COURT: No, Ma'am.
>
> A. I'll be notified when?
>
> THE COURT: When you're to come back. Anything else?

The State first argues that defendant has not established that an *ex parte* conversation took place. The State suggests that prospective juror White could have brought the doctor's note directly to the clerk and never talked to the judge personally. However, as quoted above, the trial judge uses phrases in the first person, such as "brought *to me*

a statement from a doctor," and "*I* filed the statement with the clerk." (Emphasis added.) Accordingly, we will assume through inference that such a conversation occurred outside defendant's presence.

Defendant argues that this case is guided by *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), in which we found prejudicial error where the judge, in defendant's absence, had an *ex parte* conversation with a prospective juror at the bench without any record of what specifically transpired. *Smith* is distinguishable from this case, however, because in *Smith*, we were unable to conduct a harmless error analysis because there was no reconstruction of the questioned conversation's substance.

In resolving this issue, we find that *Lee*, 335 N.C. 244, 439 S.E.2d 547, is analogous to the case at bar. In *Lee*, *ex parte* conversations between the trial judge and two prospective jurors were found to be harmless error. The following conversation transpired when the trial judge in *Lee* instructed the clerk to place twelve jurors in the jury box:

> CLERK: Leonard Fisher, please take the back row seat in the corner, in the orange seat. Sherrill Johnson; Ronda Tatum; Roma Gragg, Your Honor I think that's one you excused—
>
> THE COURT: Yes, sir, I have excused her for medical reasons.

Later during jury selection, the trial court instructed the clerk to call three more prospective jurors to the jury box. At that point, the following transpired:

> CLERK: Karen Holtzclaw take seat number one.
>
> CLERK TAYLOR: Your Honor, she's the one that called this morning and said she had the flu.
>
> THE COURT: Okay, lay her aside.

Id. at 262, 439 S.E.2d at 555. These recorded exchanges reveal the substance of the communications between the court and prospective jurors Gragg and Holtzclaw. Consequently, we then held that the trial court properly excused these jurors for medical reasons and that defendant's absence from these communications was harmless beyond a reasonable doubt. *Id.* at 263, 439 S.E.2d at 556.

Here, defendant failed to object to the trial judge's reconstruction of his communications with prospective juror White. As we noted in *Hudson*, "We have no reason to doubt the completeness or accuracy

of the trial court's memorialization, and the lack of any objection by defendant in this regard lends support to this view." *Hudson*, 331 N.C. at 137, 415 S.E.2d at 739-40.

The memorialization in the record facilitates our harmless error review. Like the excused juror in *Lee* and as the trial judge in this case stated, prospective juror White was properly excused based upon medical reasons. Therefore, we hold that defendant's absence from the trial court's private communication with prospective juror White was harmless beyond a reasonable doubt. This assignment of error is overruled.

II.

[2] Next, defendant contends that the trial court erred in denying defendant's challenge for cause of prospective juror Susan Parker. Defendant argues that Parker's responses to questions regarding her acquaintance with the victim and approximately eight potential witnesses were not candid and demonstrated her inability "to render a fair and impartial verdict" as required by N.C.G.S. § 15A-1212(9). Therefore, defendant contends that he must be given a new trial.

On the second day of jury selection, prospective juror Parker was called to the jury box to be questioned. On initial questioning by the trial court, Parker stated that she had known the victim: "He was a friend of one of my best friends and she kept a pony out there. And we went out there and let the kids ride the pony at his house." In response to the trial court's question regarding whether her acquaintance with Smith would make any difference to her or keep her from being impartial, Parker stated, "No." Parker also stated that she had seen television reports about the case and had discussed it with others but that nothing she had seen or heard would prevent her from fairly considering the evidence. In response to the prosecutor's questioning, Parker indicated that, although she knew people on the list of witnesses who might testify at the trial, her acquaintance with them would have no effect on her and that she would base her verdict on what she heard "from the witness stand and the laws as given to [her] in the case."

After the prosecutor passed Parker to the defense, defense counsel questioned her about the eight potential witnesses whom she stated that she knew. She indicated that some of them were close friends with whom she had discussed the case at different times. The defense counsel asked:

Q. When you were discussing it, did you form any opinion or did you give any opinion?

A. No.

Q. Did the other person, did they give an opinion to you?

A. Yes.

Q. *Do you recall what those opinions were? I'm not asking you what they were. I'm asking you do you recall?*

A. *No, sir.*

(Emphasis added.) Defense counsel next questioned Parker about the extent of her exposure to media coverage. Parker stated that she had followed the case closely in the media and had last read about it in the paper four days before jury selection for the trial began. Defense counsel then returned to the question of Parker's friends and her memory of their opinions about the case.

Q. Do you recall the different positions that the people took that you discussed it with or discussed it with you; is that correct?

A. *Maybe some.*

(Emphasis added.) Parker further testified that her friends were also friends of Smith's, if not related to him. Defense counsel concluded his questioning of Parker as follows:

Q. When your friends or the people that you know come before this stand and the people that you've discussed this matter with, when they come before the court and testify on that jury (sic) stand there, do you feel that you must give more weight to their testimony?

A. No.

Q. You kind of know what they're going to say because you've heard them discuss it, do you not?

A. Yes.

Q. You pretty much know their position on the matter; is that right?

A. Yes.

Q. There's nothing wrong with you having an opinion, but do you have an opinion in this matter?

A. No.

Q. No opinion whatsoever?

A. No.

Q. Do you have any opinion as to what the punishment should be in the matter?

A. No, because I don't know all the facts.

Q. Have you thought about what the punishment should be?

A. No.

Following questioning by defense counsel, defendant challenged Parker for cause, which the trial court again denied. Defendant then exercised one of his fourteen peremptory challenges, and Parker was excused. Defendant subsequently exhausted his peremptory challenges and renewed his challenge for cause of Parker, which the trial court again denied.

It has long been held that 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). "As a rule, we will therefore not disturb the trial court's ruling on a challenge for cause absent a showing of an abuse of that discretion." *Id.* at 754, 429 S.E.2d at 723. "In order to preserve an assignment of error from a denial of a challenge for cause, defendant must follow the procedures set out in N.C.G.S. § 15A-1214(h)." *Id.* at 746, 429 S.E.2d at 719. "The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986).

N.C.G.S. § 15A-1214(h) states as follows:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and

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

N.C.G.S. § 15A-1214(h) (1988). N.C.G.S. § 15A-1214(i) provides:

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(i).

"A defendant must show both an abuse of discretion *and* prejudice to establish reversible error relating to *voir dire*." *State v. Frye*, 341 N.C. 470, 494, 461 S.E.2d 664, 675 (1995) (emphasis added), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996). If defendant is able to establish that the trial judge abused his discretion in denying defendant's challenge for cause, as mandated by N.C.G.S. § 15A-1214(h) and (i), he then must establish that he was prejudiced by such error.

In *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984), we restated the common law rule for establishing prejudice:

"Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it."

Id. at 396, 312 S.E.2d at 456 (quoting *State v. Allred*, 275 N.C. 554, 563, 169 S.E.2d 833, 838 (1969)). Moreover, this Court further explained the common law rule by stating that "no ruling relating to the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror." *State v. Levy*, 187 N.C. 581, 587, 122 S.E. 386, 390 (1924), *quoted in State v. Young*, 287 N.C. 377, 389, 214 S.E.2d 763, 772 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). The purpose for challenging the additional juror is to establish prejudice by show-

ing that appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges.

Having thoroughly reviewed the transcript of the jury selection phase, we find that defendant has satisfied the mandates of N.C.G.S. § 15A-1214(h) by (1) challenging prospective juror Parker for cause, which the trial court denied; (2) exhausting his peremptory challenges; and (3) renewing his challenge for cause as to Parker, which the trial court also denied. *Cunningham*, 333 N.C. at 746, 429 S.E.2d at 719.

In challenging a juror for cause:

> N.C.G.S. § 15A-1212, entitled "Grounds for challenge for cause," provides in pertinent part:
>
> > A challenge for cause to an individual juror may be made by any party on the ground that the juror:
> >
> > . . . .
> >
> > (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
> >
> > (9) *For any other cause is unable to render a fair and impartial verdict.*
>
> N.C.G.S. § 15A-1212(8) codifies the rule of the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987).

Cunningham, 333 N.C. at 746, 429 S.E.2d at 719 (emphasis added). Thus, it is only when "a juror's answers show that he could not follow the law as given to him by the judge in his instructions to the jury[] [that] it is error *not* to excuse such a juror." *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992) (emphasis added).

[3] Defendant argues that Parker's *voir dire* responses demonstrate her inability to be an impartial juror based on her conflicting testimony regarding her knowledge of her friends' "positions" about the case. In *State v. Benson*, 323 N.C. 318, 324, 372 S.E.2d 517, 520 (1988), we held that mere acquaintance with witnesses alone was not a sufficient basis for a challenge for cause.

In support of his argument that Parker's acquaintance with Smith and the potential witnesses demonstrates her inability to render a fair and impartial verdict, defendant relies on *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977). In *Lee*, the *voir dire* examination of prospective juror Norvell revealed that Norvell was married to a police officer, knew most of the police officers in the area, was a friend of other officers and their wives, and knew the State's chief investigating officer. When asked whether she would possibly believe certain police officers' testimony more than somebody she did not know, Norvell stated, "I would have a tendency to." *Id.* at 620, 234 S.E.2d at 576. Norvell answered that she thought she could be a fair and impartial juror, but again reiterated that there was a "possibility" that she might give more weight to the testimony of the police officers with whom she was acquainted over that of a witness whom she did not know. *Id.* at 621, 234 S.E.2d at 576-77. This Court found an abuse of discretion in the trial court's failure to grant defendant's challenge for cause as to Norvell. We based this decision on Norvell's inability to serve as a disinterested and impartial juror because of her relationships with witnesses. Because defendant had already exhausted his peremptory challenges, he was forced to accept Norvell as a juror at his trial.

In the case *sub judice*, regardless of whether Parker recalled the witnesses' positions or opinions, the issue is whether Parker could remain a fair and impartial juror. The record shows that Parker never fluctuated in her clear and decisive answers with both the trial court and the prosecutor that she could remain a fair and impartial juror. While defendant never asked Parker if her acquaintance with the potential witnesses and Smith would impair her ability to be fair and impartial, when asked by defense counsel if she had any opinion as to what defendant's punishment should be, she responded, "No, because I don't know all the facts." The trial court, after hearing Parker's responses, observing her demeanor, and assessing her credibility, in its discretion, made the decision to reject defendant's challenge for cause of Parker. Thus, defendant has failed to demonstrate that the trial court abused its discretion in denying defendant's challenge for cause of Parker.

As we previously stated, "In a criminal appeal the burden is on the appellant to show *both* error and prejudice." *Young*, 287 N.C. at 389, 214 S.E.2d at 772 (emphasis added). However, defendant having failed to establish that the trial court abused its discretion in denying his challenge for cause of Parker, we are not now required to perform a prejudice analysis.

This assignment of error is overruled.

III.

[4] In his third assignment of error, defendant contends that the trial judge erred while questioning a prospective juror during *voir dire*. Defendant argues that the trial judge's questioning constituted an impermissible expression of opinion in violation of N.C.G.S. § 15A-1222. Defendant also argues that the judge's comments violated his constitutional right to an impartial jury by discouraging other prospective jurors from disclosing any possible influence outside the evidence admitted at trial. We find no merit in defendant's argument.

During *voir dire* by the prosecutor, prospective juror Jones Wheeler, one of the first twelve jurors called to the jury box, testified that he had discussed the case with three potential witnesses whom he knew because they all served together on the rescue squad and fire department. The following exchange ensued:

Q. Have you formed an opinion based on what they said as to the guilt or innocence of the defendant?

A. I haven't formed an opinion. I haven't heard all the facts.

Q. What you've heard—would you feel like that would influence your decision in this case? Would that have a bearing on your decision in this case or not?

A. Possibly.

THE COURT: You understand that what you've heard was not under oath at this trial?

A. I realize that.

THE COURT: And it's not evidence in the case?

A. But when you are associated with people you work with—

THE COURT: Just answer my questions, sir. Do you understand that it's not evidence in the case?

A. Yes, sir.

THE COURT: What you heard was at the rescue squad or from rescue squad members. And you're saying you're going to let that enter into your deliberations and your decision as to whether or not this defendant's guilty or not guilty? Is that what you're telling me?

A. It's pretty hard sometimes to separate the things.

THE COURT: Well, are you saying that you're going to—if you're selected, that you're likely to make up your verdict based on what you heard down on the street corner rather than the evidence in the courtroom?

A. I didn't say that, but it could influence it.

THE COURT: Well, how would it influence you, sir, if it's not going to affect your verdict? If you're not going to consider it in your—as to your verdict, how would it influence you?

A. From what the witnesses may say here on the witness stand along with what I've already heard.

THE COURT: All right. Go ahead, Mr. Beard.

N.C.G.S. § 15A-1222 provides: "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). Defendant concedes that the trial court's opinion did not relate to any question of fact to be decided by the jury. However, he argues nonetheless, in reliance on *State v. Canipe*, 240 N.C. 60, 81 S.E.2d 173 (1954), that the statute should be construed broadly to reach beyond expressions of opinion regarding questions of fact. We find *Canipe* distinguishable from the case at bar. In *Canipe*, the trial judge alluded to the facts and outcomes of other first-degree murder trials, and this Court found that these comments would have implied to the jurors the trial judge's opinion on the propriety of the death penalty in the case before them. We held that the trial judge's comparison between the case at issue and other cases necessitated a new trial.

Here, the trial judge alluded only to appropriate sources of evidence, in no way suggesting how such evidence should be considered by the jurors. After carefully reviewing the transcript, we hold that the trial judge's statements did not convey any personal opinion which he may have had concerning Wheeler's sources of influence. The only purpose which the judge was trying to serve through his communications was an earnest effort to clarify prospective juror Wheeler's intentions when Wheeler said that extrajudicial information could "possibly" influence his verdict. *See State v. Rogers*, 316 N.C. 203, 217, 341 S.E.2d 713, 722 (1986) (holding that the trial court's questioning of a prospective juror was not an expression of opinion but rather an attempt to clarify the prospective juror's actual position on the issue of capital punishment), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v.*

Simmons, 286 N.C. 681, 685, 213 S.E.2d 280, 284 (1975) (holding that "the trial judge in the exercise of his duty to supervise and control the trial so as to insure a fair trial to all parties had the right and duty to interrogate prospective jurors in order to clarify their answers"), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). In *Rogers*, we stated, "[w]e fail to see how the trial judge's inquiry or his ruling excusing the juror for cause could be construed as an improper expression of an opinion which might have unfairly influenced the views of the other jurors." 316 N.C. at 217, 341 S.E.2d at 722. We reach the same conclusion here.

Defendant further argues that his constitutional right to an impartial jury was violated because the trial judge's demeanor toward prospective juror Wheeler discouraged other prospective jurors from disclosing any possible influence from factors outside the evidence.

In the present case, it is mere speculation that the other prospective jurors were discouraged from disclosing any possible influence outside the evidence admitted at trial due to the trial judge's remarks. The trial judge was simply clarifying prospective juror Wheeler's ambiguous admission that he "possibly" might be influenced by information about the case he learned from three potential witnesses. This assignment of error is without merit.

IV.

[5] In his next assignment of error, defendant contends that the trial judge committed reversible error by commenting on the relevance of mitigating evidence in open court in the jurors' presence and, as a result, violated defendant's constitutional right to a fair and impartial jury trial and to jury consideration of mitigating evidence. We disagree.

Defendant posits that the trial judge improperly expressed an opinion when he responded to defense counsel's request to have defendant's mother, Ms. Simpson, show the jury scars on her wrists which resulted from her numerous suicide attempts. After Ms. Simpson testified that she had attempted suicide by slitting her wrists thirty times, defense counsel requested permission for Ms. Simpson to show the jury her wrists. The trial judge responded by saying, "I guess so. *I don't see how that's relevant*, but step down and show them your wrists." (Emphasis added.)

On appeal to this Court, defendant contends that the trial judge's comment regarding the relevancy of Ms. Simpson's showing her scars

was an improper expression of opinion of the relevancy of her suicide attempts as mitigating evidence, in violation of N.C.G.S. § 15A-1222. He argues that "[i]t is extremely unlikely that jurors understood the italicized portion of the court's remark as anything other than an opinion that the evidence . . . was irrelevant to the capital sentencing decision. Jurors would not have made the fine if not impossible distinction between the relevance of the demonstration, which was tangible evidence of the suicide attempts, and the relevance of the attempts themselves."

It is well established that it is "the duty of the [trial] judge to expedite the trial and to question the irrelevancy or redundancy of evidence." *State v. Currie*, 293 N.C. 523, 531, 238 S.E.2d 477, 482 (1977) (no error where the trial judge commented, "I fail to see any relevance to this," when the defendant was eliciting testimony concerning a trophy the defendant's softball team won). As stated above, N.C.G.S. § 15A-1222 provides in pertinent part that "[t]he judge may not express during any stage of the trial[] any opinion in the presence of the jury on any question of fact to be decided by the jury."

We note at the outset that whether Ms. Simpson had scars on her wrists was not a question of fact for the jury to decide. Contrary to defendant's contention, we believe that the trial court's comment was not directed at the relevance of her alleged suicide attempts as mitigating evidence. It is more likely that the trial court was merely commenting on the relevance of Ms. Simpson having to show the jury the scars on her wrists as evidence of her suicide attempts. As we stated in *State v. Perry*, 231 N.C. 467, 57 S.E.2d 774 (1950):

> The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.

Id. at 471, 57 S.E.2d at 777.

In *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969), this Court held that a trial judge's expression of opinion on evidence did not constitute prejudicial error where, on cross-examination, a State's witness stated that after she "split up" with the defendant, she "took a bunch of pills and cut [her] arm," and then, over the prosecutor's objection, the trial court stated, "I don't see the relevancy, but I don't see the harm. Objection overruled." *Id.* at 349, 168 S.E.2d at 44. This

Court stated, "The chance remark that the judge failed to see relevancy does not amount to prejudicial error." *Id.*

Finally, as the eleventh mitigating circumstance, the trial court submitted and the jury found that "[t]he defendant witnessed physical and verbal abuse of his mother, her abuse of drugs and alcohol and an attempted suicide." Thus, it is obvious that the trial court did not persuade the jury that the suicide attempts were irrelevant at the sentencing phase. This assignment of error is overruled.

V.

[6] In his fifth assignment of error, defendant contends that the trial court committed reversible constitutional error by refusing to submit specific nonstatutory mitigating circumstances requested by defendant in writing. He argues that the instructions given by the trial court kept the jury from considering relevant mitigating evidence.

Defendant requested in writing four statutory mitigating circumstances. The fourth statutory mitigating circumstance was the catchall mitigating circumstance that the jury may consider "any other circumstance or circumstances arising from the evidence which [they] deem[ed] to have mitigating value." N.C.G.S. § 15A-2000(f)(9) (Supp. 1995). Under the (f)(9) mitigating circumstance, defendant listed thirty-three nonstatutory mitigating circumstances. The trial court refused to submit the circumstances in the manner defendant requested and instead combined several of defendant's proposed nonstatutory mitigating circumstances into single statements of mitigation, resulting in the submission of four statutory mitigating circumstances and eight nonstatutory mitigating circumstances to the jury. In addition, the trial court submitted as a separate mitigating circumstance the (f)(9) catchall mitigating circumstance, to permit the jurors to give effect to any additional mitigating circumstances that they found to have mitigating value. In simplifying the presentation of nonstatutory mitigating circumstances, the trial court omitted two of defendant's proposed nonstatutory mitigating circumstances, believing that they were subsumed into the other mitigating circumstances it submitted to the jury.

Defendant first argues that by using the conjunction "and" to combine two or more proposed nonstatutory mitigating circumstances into one statement of mitigation, the trial court prevented the jury from considering all of his mitigating evidence. Therefore, according to defendant, unless a juror found all the elements making

up a submitted nonstatutory mitigating circumstance and found each element to have mitigating value, the juror could not give effect to any one of the elements in the combined statement. In response to defendant's contentions, the State argues that when the instructions are read in context with the format used on the Issues and Recommendation as to Punishment form, it is obvious that the trial court's merging of the mitigating circumstances did not prevent the sentencing jury from considering and giving effect to any mitigating evidence offered by defendant. We agree.

At the outset, we note that it is well settled that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence, 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Boyde v. California*, 494 U.S. 370, 377, 108 L. Ed. 2d 316, 327 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181, 101 L. Ed. 2d 155, 170 (1988)).

In *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), this Court held that

> where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the [Issues and Recommendation as to Punishment] form.

Id. at 324, 389 S.E.2d at 80.

When reviewing the instruction for error, the Court must construe it contextually. "[I]n determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981); *see also State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987) ("In reviewing jury instructions for error, this Court has held that they must be considered in their entirety."). " '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' *Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 373 (1973)." *State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991).

Essentially, defendant challenges the trial court's failure to submit the nonstatutory mitigating circumstances as he had requested

them in four categories: (1) defendant's sexual molestation and physical assault; (2) defendant's unstable and dysfunctional upbringing and home; (3) defendant's mother's abusive relationships, her substance abuse, and her attempted suicides; and (4) defendant's confession and cooperation with law enforcement officers upon his arrest and interrogation. With respect to the first category, defendant proposed four separate nonstatutory mitigating circumstances which described defendant's (1) sexual molestation by older adult males, (2) sexual molestation by the son of one of his grandmother's eight former husbands, (3) defendant's physical assaults, and (4) defendant's history of closed head injury. The trial court condensed the four nonstatutory mitigating circumstances into the following: "Consider whether the defendant was sexually molested and physically assaulted during his formative years." The jury did not find this mitigating circumstance to exist or to have mitigating value.

Based upon our review of the record, the evidence does not support each of the requested nonstatutory mitigating circumstances as written. There was no evidence in the record that defendant was molested by "older adult males." Assuming *arguendo* that the evidence fully supported each of the proposed circumstances, defendant's proposed mitigating circumstances were subsumed in the trial court's version of the nonstatutory mitigating circumstance as it was submitted. *See Benson*, 323 N.C. at 327, 372 S.E.2d at 522 (no error when trial court fails to submit a mitigating circumstance that was subsumed into other nonstatutory mitigating circumstances).

In the next category, defendant requested four separate nonstatutory mitigating circumstances describing (1) his lack of control over the chaotic and violent home in which he was raised, (2) his lack of a meaningful relationship with his father since birth, (3) his transient upbringing because of his mother's six marriages, and (4) his dysfunctional home. Because all of these circumstances as requested are duplicative, the trial court properly consolidated these proposed circumstances into a single mitigating circumstance, submitting the following to the jury: "Consider whether the defendant came from a broken and dysfunctional home, moved often, and had no male guidance or father figure in his formative years." "The refusal [of a trial judge] to submit proposed circumstances separately and independently . . . [is] not error." *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 443 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

Next, defendant challenges the trial court's failure to submit four proposed nonstatutory mitigating circumstances regarding (1) the physical and verbal abuse inflicted on defendant's mother by "several" of defendant's stepfathers in his presence; (2) the suicide attempts by defendant's mother that defendant witnessed in his "formative years"; (3) the psychological counseling defendant received because of his mother's suicide attempts; and (4) defendant's introduction to alcohol by various family members, including his mother, which resulted in his becoming an alcoholic early in his life. The trial court submitted, "Consider whether the defendant witnessed physical and verbal abuse of his mother, her abuse of drugs and alcohol and an attempted suicide." Again, the evidence did not support each of defendant's proposed nonstatutory mitigating circumstances. There was no evidence that defendant witnessed his mother being abused by "several" of his mother's husbands, just one of them. Nor was there any evidence that defendant's mother attempted suicide in defendant's formative years. There was no evidence that defendant was introduced to alcohol by anyone other than his mother. Finally, the evidence supported a finding that defendant received counseling because of his sexual abuse, but not because of his mother's suicide attempts. Thus, it was not error for the trial court to refuse to submit the proposed mitigating circumstances as defendant had written them.

In the fourth category, defendant requested four nonstatutory mitigating circumstances regarding (1) his cordial and polite demeanor during police interrogation, (2) his voluntary confession, (3) his assistance in locating and delivering evidence to police officers, and (4) his cooperation with law enforcement officers upon his arrest and interrogation. The trial court submitted, "Consider whether the defendant confessed upon his arrest and was polite to and cooperative with law enforcement officers and assisted in location of evidence." Each nonstatutory mitigating circumstance as written by defendant was covered under the circumstance submitted by the trial court. The use of the conjunctive form did not prevent the jury from considering all of defendant's evidence in mitigation related to his confession. *Frye*, 341 N.C. at 507-09, 461 S.E.2d at 684; *State v. Payne*, 337 N.C. 505, 526-29, 448 S.E.2d 93, 105-07 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995).

With respect to defendant's contention that the trial court erred in failing to submit in any form two of his proposed nonstatutory mitigating circumstances, we disagree. Defendant requested as a non-

statutory mitigating circumstance that "[s]everal members of the Defendant's immediate family were alcoholics to include his father, his mother, his sister, and his grandmother." The trial court submitted, "Consider whether the defendant is an alcoholic." Defendant argues that the manner in which the trial court submitted this nonstatutory mitigating circumstance precluded the jury's consideration of "defendant's genetic predisposition to alcohol abuse." He states, "Without this focus, the fact of [defendant's] alcoholism was more likely to be viewed simply as weakness or unmitigated choice."

Defendant also requested as a nonstatutory mitigating circumstance that "[d]uring his formative years[,] the Defendant was removed from several schools because of his mother's several marriages and moves." The trial court submitted, "the defendant discontinued school at the age of 16." Defendant argues that the reason for defendant's "generally dismal experience in school—family transience and instability—" should have been submitted as a mitigating circumstance.

As we have previously stated, it is not error for a trial court to refuse to submit a requested nonstatutory mitigating circumstance that has been incorporated into another mitigating circumstance that has been submitted. *Benson*, 323 N.C. at 327, 372 S.E.2d at 521-22. In *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, —-U.S. —-, 130 L. Ed. 2d 547 (1994), we found that certain submitted mitigating circumstances as well as the (f)(9) 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.* at 183, 443 S.E.2d at 38; *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 jury was not precluded from considering any mitigating evidence. The jury was always free to consider any evidence under the (f)(9) catchall mitigating circumstance. *State v. McLaughlin*, 341 N.C. 426, 448, 462 S.E.2d 1, 12 (1995) ("the jury could have given this evidence mitigating value under the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9)"), *cert. denied*, —- U.S. —-, 133 L. Ed. 2d 879 (1996). Therefore, assuming

arguendo that the trial court erred in not submitting the omitted proposed mitigating circumstances, the error was harmless beyond a reasonable doubt.

In summary, after a careful and thorough review of the record, we conclude that defendant was not denied the benefit of any of his proposed nonstatutory mitigating circumstances. Those that were supported by the evidence were submitted to the jury in substance, and those that were not supported by the evidence were not submitted to the jury. Viewed contextually, the substance of the mitigating circumstances that defendant requested was subsumed into other submitted mitigating circumstances, including the (f)(9) catchall mitigating circumstance. The jury was not precluded from considering any of defendant's mitigating evidence. Thus, the trial court did not err in refusing to submit defendant's mitigating circumstances as requested. Any error is deemed harmless.

This assignment of error is overruled.

VI.

[7] By this assignment of error, defendant contends that he is entitled to a new sentencing hearing because the prosecutor sought to inflame the jurors by bringing before them defendant's purported homosexuality in an effort to undercut the evidence of defendant's sexual abuse.

During jury selection, the prosecutor asked the first twelve veniremembers whether "the sexual persuasion of someone[] would . . . have any bearing upon [their] decision in this case." Defendant immediately objected, and the trial court sustained defendant's objection. Subsequently, during cross-examination of defendant's aunt, the prosecutor had her clarify an earlier response on direct examination concerning her knowledge that defendant had been sexually abused as a child. She testified that she had heard about the abuse but that she herself had no direct knowledge of it. The prosecutor then asked, "Well, you knew that Mr. Hartman is a homosexual. You've heard that." Defendant objected, and after sustaining defendant's objection, the trial court instructed the jury to disregard the improper statement of the prosecutor. Then the prosecutor asked, "Did you know what sexual persuasion the defendant was?" Again, defense counsel objected, and the trial court sustained the objection.

In response to defendant's contention, the State contends that defendant's engagement in homosexual activity with State's witness

Richard Prince shortly after he murdered Smith was not consistent with defendant's evidence of remorsefulness. Thus, according to the State, the real purpose for asking about defendant's sexual persuasion was to rebut defendant's evidence of remorsefulness.

The assignment of error here parallels an issue raised in *State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970), for which this Court held no error because curative instructions were given. In *Moore*, one of the State's witnesses stated four times and his wife one time that the defendant had admitted to them that he had previously killed one person. On each of these five occasions, the trial court struck the witnesses' unresponsive answer from the record. This Court stated, "We do not, therefore, deem this evidence so inherently prejudicial that its initial impact—whatever it was—could not have been erased by the judge's prompt and emphatic instructions that the jury should not consider the testimony for any purpose whatsoever." *Id.* at 149, 171 S.E.2d at 458.

Here, the prosecutor's questions regarding defendant's sexual persuasion were never answered. Moreover, this Court has stated that where the trial court properly instructed the jury not to consider certain evidence, our system of justice is based upon the assumption that trial jurors are women and men " 'of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.' " *Id.* (quoting *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938)). Thus, any error was corrected by the trial court's prompt curative instructions.

This assignment of error is overruled.

VII.

[8] In his seventh assignment of error, defendant contends that the trial court erred by failing to submit the lesser included offense of larceny when it charged the jury on robbery with a firearm during the guilt-innocence phase of the trial. Defendant does not contest the sufficiency of the evidence to support submission of the offense of robbery-felony murder and robbery with a firearm. Rather, defendant argues that a reasonable jury could have concluded that defendant lacked the necessary intent for robbery at the time of the killing, thus demonstrating that the killing and the taking of property were not one continuous transaction. Therefore, because no continuous transaction occurred, according to defendant, he was entitled to an instruction on larceny, and the trial court's failure to so instruct the jury was

error and requires the case to be remanded either for a new trial on the offense of robbery and, potentially, a new sentencing hearing, or for a new trial on robbery and the imposition of a life sentence for the first-degree murder conviction.

During the charge conference, defendant requested that larceny be submitted to the jury because it "could find him guilty of larceny." The trial court denied his request. Subsequently, the jury found defendant guilty of first-degree murder based upon premeditation and deliberation and under the felony murder rule with robbery as the underlying felony. The phrases "armed robbery," "robbery with a firearm," and "robbery with a dangerous weapon" are used interchangeably. *See State v. Bishop*, 343 N.C. 518, 563, 472 S.E.2d 842, 866 (1996); *State v. Handy*, 331 N.C. 515, 527, 419 S.E.2d 545, 551 (1992).

> Under N.C.G.S. § 14-87(a), robbery with a dangerous weapon is: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened."

State v. Olson, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (quoting *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)); *see* N.C.G.S. § 14-87 (1993). " 'Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.' " *Beaty*, 306 N.C. at 496, 293 S.E.2d at 764 (quoting *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944)).

> Before the trial court [is] allowed to submit robbery with a dangerous weapon . . . , it [is] required to find that substantial evidence would support a finding that [defendant's] use of a dangerous weapon preceded or was concomitant with the taking, "or [was] so joined by time and circumstances with the taking as to be part of one continuous transaction."

State v. Brewton, 342 N.C. 875, 877-78, 467 S.E.2d 395, 397 (1996) (quoting *Olson*, 330 N.C. at 566, 411 S.E.2d at 597).

Larceny is a lesser included offense of robbery with a dangerous weapon. *White*, 322 N.C. at 514, 369 S.E.2d at 817. "There is a special relationship between armed robbery and larceny. Both crimes involve an unlawful and willful taking of another's personal property. We have

said that armed robbery is an aggravated form of larceny." *Id.* at 516, 369 S.E.2d at 818. "To convict of larceny, there must be proof that defendant (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently." *Id.* at 518, 369 S.E.2d at 819. However, as we have often stated, "[a] trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984), *quoted in White*, 322 N.C. at 512, 369 S.E.2d at 816. But where the State adequately establishes all the elements of a crime and defendant produces no evidence sufficient to negate these elements, "[t]he mere possibility that the jury could return with a negative finding does not, without more, require the submission of the lesser included offense." *Cummings*, 326 N.C. at 317, 389 S.E.2d at 77. "The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

Applying the foregoing principles to the case *sub judice*, we conclude that the State introduced substantial evidence of defendant's guilt of robbery with a firearm and that the trial court did not err by refusing to charge on the lesser included offense of larceny. Defendant's confession provides ample support for finding that "defendant's use of the gun was so joined by time and circumstances to the taking as to make the use of the gun and the taking parts of one continuous transaction." *Olson*, 330 N.C. at 567, 411 S.E.2d at 597.

In his second confession, defendant, who recanted his initial statement that the shooting was accidental, stated:

> Herman was sitting in a recliner in the den. I picked the gun up off the table, walked up behind Herman, pointed the gun at the back of Herman's head. The sight of blood makes me sick so I turned my head and at very close range, pulled the trigger and shot Herman Smith in the back of the head.
>
> I dropped the gun and went to the phone and started to dial my mom's phone number. Before I finished dialing the phone I hung the phone up and went over to Herman. I saw the blood and

saw Herman was not breathing. I got sick and went to the bathroom and threw up.

I went back out, sat at the kitchen table, and laid the gun up there. My mind was racing a hundred miles an hour. I thought about calling the police or paramedics and I thought what have I done. The only thought that came to my mind was to get the hell out of there.

I got a change of clothes, the pistol, my dog, and took Herman's car to Norfolk.

Additionally, the State's evidence tended to show that defendant had expressed to a friend months before the shooting his thoughts about killing Smith to get his money. Subsequently, shortly after the murder, defendant asked his mother whether she would receive anything upon Smith's death. Defendant took Smith's gun and his car immediately following the murder. Several witnesses testified that defendant attempted to sell Smith's gun and car after the murder. All the evidence tended to show that defendant intended to permanently deprive Smith of the property he took.

> The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events. Neither the commission of armed robbery, as defined by N.C.G.S. § 14-87(a), nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing. Under N.C.G.S. § 14-17, a killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction.

Handy, 331 N.C. at 529, 419 S.E.2d at 552 (citations omitted).

In this case, there is simply no evidence to support defendant's contention that he formed the intent to take Smith's property at a time which could not be part of a continuous transaction. The State's evidence is uncontroverted as to each element of armed robbery and "[t]aking the evidence in the light most favorable to defendant, we conclude that the elements of violence and taking nevertheless were so joined in time and circumstances that the trial court did not err by

refusing to instruct the jury on the lesser included offenses." *Brewton*, 342 N.C. at 878, 467 S.E.2d at 397.

This assignment of error is overruled.

VIII.

[9] In his next assignment of error, defendant disputes the manner in which the trial court instructed the jury on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murder was "committed while the defendant was under the influence of mental or emotional disturbance." None of the jurors found this mitigating circumstance to exist. Defendant contends that the trial court's use of the conjunction "and" in listing the potentially supporting evidence conditioned a finding of the circumstance on a finding of all the listed factors. Because defendant did not object at trial, this Court's review is limited to plain error.

The trial court instructed the jury on the (f)(2) mitigating circumstance as follows:

> You would find this mitigating circumstance if you find that the defendant suffered from post[-]traumatic headache disorder, alcohol abuse and dependency, personality and anxiety disorder, *and* chronic depression, and that as a result, the defendant was under the influence of mental and emotional disturbance when he killed the victim.

(Emphasis added.)

Defendant claims that the trial court's instruction may have precluded consideration of mitigating evidence. We disagree.

"[T]he court is not required to summarize all of the evidence in its charge to the jury." *Payne*, 337 N.C. at 527, 448 S.E.2d at 106. The trial court's instruction clearly comported with defendant's mitigating evidence. Dr. Royal testified that defendant suffered from posttraumatic headache disorder; alcohol abuse and dependency; personality disorder with immaturity, impulsivity, and identity problems; chronic depression; and anxiety disorder. "[T]herefore, the instruction in the conjunctive basically accorded with defendant's evidence and was not plain error." *Id.*

Moreover, the trial court also instructed the jury that "[f]or 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." (Emphasis added.) The trial court's instruction as given did not preclude the jury from considering mitigating evidence but, instead, allowed the jury to consider one or all of defendant's psychological problems as presented at trial. *See Frye*, 341 N.C. at 508, 461 S.E.2d at 684 (no error where the trial court instructed the jury with a conjunctive on the factual bases potentially supporting the (f)(2) circumstance and stated that "it is enough that the defendant's mind or emotions were disturbed from any cause"); *see also Hill*, 331 N.C. at 419, 417 S.E.2d at 781 (holding that the trial court's instruction did not improperly limit consideration of mental or emotional disturbance mitigating circumstance to brain damage in light of language included in the instruction that "it is enough that the defendant's mind or emotions were disturbed, from any cause").

This assignment of error is overruled.

IX.

[10] Defendant next contends that the trial court erred by sentencing defendant to a forty-year term on the robbery conviction by finding as an aggravating factor that "[t]he victim was very . . . old." N.C.G.S § 15A-1340.4(a)(1)(j) (1988) (repealed effective 1 October 1994; reenacted as N.C.G.S. § 15A-1340.16(d)(11) effective 1 October 1994). Defendant claims that the aggravating factor did not apply to this case because "there was no evidence that the victim was more vulnerable to the commission of the offense by reason of his age." We disagree.

> A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized.

State v. Hines, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985). "As this Court observed in *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983) (emphasis in original), '*vulnerability* is clearly the concern addressed by this factor [of the victim's age].' " *Hines*, 314 N.C. at 526, 335 S.E.2d at 8 (alterations in original).

Although the record is not clear as to Smith's exact age, he was somewhere between seventy-two and seventy-seven years old at the

time of the murder. In addition, the evidence tended to show that Smith suffered from emphysema and relied on inhalers at all times. Smith had limited use of one arm and weighed only ninety-three pounds at the time of the autopsy. Further, Smith had provided defendant with shelter, food, cigarettes, beer, and transportation when defendant had nowhere else to go. Despite all that Smith had done for defendant, defendant took advantage of Smith's trust. Smith's age, physical disabilities, and stature made him vulnerable and an inviting target for the physically superior twenty-eight-year-old defendant.

Thus, the trial court properly found from this evidence that Smith's age was an aggravating factor. Defendant's assignment of error is, therefore, overruled.

X.

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

XI.

[11] Having concluded that defendant's capital sentencing proceeding was free from prejudicial error, we turn to the duties reserved exclusively for this Court in capital cases by N.C.G.S. § 15A-2000(d)(2). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings 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 considerations; 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).

In the case *sub judice*, the jury found defendant guilty of first-degree murder based upon premeditation and deliberation and under the felony murder rule. The jury found as an aggravating circumstance that the murder was committed by defendant while defendant was engaged in the commission of robbery with a firearm. N.C.G.S.

§ 15A-2000(e)(5). The jury found as a statutory mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1). The jury also found as nonstatutory mitigating circumstances (1) that defendant is an alcoholic; (2) that defendant confessed upon his arrest and was polite to and cooperative with law enforcement officers and assisted in locating evidence; (3) that defendant came from a broken and dysfunctional home, moved often, and had no male guidance or father figure in his formative years; and (4) that defendant witnessed physical and verbal abuse of his mother, her abuse of drugs and alcohol, and an attempted suicide.

We have thoroughly examined the record, transcripts, and briefs in the present case and conclude that the evidence fully supports the aggravating circumstance found by the jury that the murder was committed by defendant while defendant was engaged in the commission of robbery with a firearm. N.C.G.S. § 15A-2000(e)(5). Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

Although defendant made no argument that his death sentence is disproportionate, we are nevertheless mandated by N.C.G.S. § 15A-2000(d)(2) to conduct proportionality review. We 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. Burke*, 343 N.C. 129, 162, 469 S.E.2d 901, 918 (1996). We have found the death penalty disproportionate in seven cases. *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *Rogers*, 316 N.C. 203, 341 S.E.2d 713; *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 *Benson*, *Jackson*, and *Stokes*, the defendants either pled guilty or were convicted by the jury solely under the theory of felony murder. Here, defendant was convicted based upon the theory of felony murder and of premeditation and deliberation. This Court has stated that "[t]he 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).

In *Rogers*, defendant mistakenly shot the victim during an argument with the victim's friend. Here, defendant intentionally shot the victim.

This case is also distinguishable from *Young*, where the jury found aggravating circumstances that the defendant committed the murder for pecuniary gain and during the commission of a robbery. In *Young*, defendant stabbed a man twice in the chest in order to get money to buy liquor. The Court noted, however, that the defendant's accomplice actually "finished" the victim by stabbing him several more times. *Young*, 312 N.C. at 688, 325 S.E.2d at 193. Here, defendant clearly shot the gun and murdered Smith.

In *Hill*, the aggravating circumstance found was that the offense was committed against a law enforcement officer engaged in the performance of his official duties. This Court vacated the sentence of death due in part to the speculative nature of the evidence and the defendant's lack of motive. In the case at bar, the evidence was not speculative and tended to show that defendant's motive for killing Smith was for monetary gain.

Significantly, in *Bondurant*, the defendant shot the victim but then immediately sought medical attention to help the victim. Here, defendant made no attempts to seek medical assistance for Smith; he instead left Smith for several days following the murder in the recliner in which he was sitting when defendant shot him.

> It is also proper to compare this case to those where the death sentence was found proportionate. *[State v.] McCollum*, 334 N.C. [208,] 244, 433 S.E.2d [144,] 164 [(1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994)]. 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.*

Burke, 343 N.C. at 162, 469 S.E.2d at 918.

This Court's opinion in *State v. Carter*, 342 N.C. 312, 464 S.E.2d 272 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 957 (1996), provides a set of facts and circumstances similar in many respects to the case at bar. This Court in *Carter* upheld a death sentence where defendant was found guilty of first-degree murder based upon

theories of premeditation and deliberation and felony murder with the underlying felony of robbery with a dangerous weapon. In *Carter*, "[d]efendant killed [the victim] for fifteen dollars to enable him to buy crack cocaine which he smoked while [the victim] lay dead on her living room floor." *Id.* at 329, 464 S.E.2d at 283. The victim was seventy-one years old and suffered from cancer and emphysema. This Court stated, "Defendant chose to kill a person who had treated him with kindness and compassion, for whom he had done yard work in the past, and who had been his neighbor for quite some time . . . . At 5'2 1/2" tall and 119 pounds, she was no match for defendant, a healthy twenty-four-year-old man." *Id.*

In the present case, the evidence tended to show that Smith, an elderly man with poor health, had befriended twenty-eight-year-old defendant, taken him into his home, and offered him respect and goodwill, just as the victim did to defendant in *Carter*. Furthermore, defendant took Smith's belongings and attained money by using the victim's personal checks throughout several days following the murder while leaving Smith's body in the recliner in which he was murdered.

Finally, we note that the victims in both *Carter* and the case *sub judice* were killed in the solace of their own homes. 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).

After reviewing the cases, we conclude that based on the nature of this crime, particularly the circumstances noted above, we cannot conclude as a matter of law that the sentence of death was disproportionate. We also 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.

Having considered and rejected all of defendant's assignments of error, we hold that defendant received a fair capital sentencing proceeding, free from prejudicial error. After comparing this case to other 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 sentence 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. RUSSELL D. WORKMAN, II

STATE OF NORTH CAROLINA v. EDDIE W. SHOFFNER

No. 485A94

(Filed 11 October 1996)

1. Evidence and Witnesses § 2172 (NCI4th)— opinion by expert—testimony not admissible to show basis

In a prosecution for the first-degree murders of two grocery store workers wherein defendant presented expert opinion testimony that defendant panicked and did not act voluntarily when he heard two screams inside the grocery store, and that those screams triggered a "robbery/murder script" that did not originate in defendant's mind, testimony that defendant identified the codefendant as the person who implanted the "robbery/murder script" in his mind was not admissible under Rule 705 to show the basis for the expert's opinion and was properly excluded where (1) neither the State nor counsel for the codefendant requested that the witness disclose the basis of his opinion; (2) defendant's self-serving hearsay statements that the "robbery/murder script" was originated by the codefendant were not inherently reliable, particularly since defendant was unavailable for cross-examination by either the State or the codefendant; (3) the substance of defendant's defense that the "robbery/murder script" originated somewhere other than in defendant's own mind was related to the jury; and (4) defendant acknowledged during the trial that the identity of the person who implanted the "script" into defendant's mind was not necessary to explain the expert witness's testimony. Therefore, the joinder of the trials of defendant and the codefendant did not deprive defendant of a fair trial by causing the exclusion of evidence critical to his theory of defense. N.C.G.S. § 8C-1, Rule 705.

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

2. Evidence and Witnesses § 1217 (NCI4th); Appeal and Error § 155 (NCI4th)— statement by testifying codefendant—no *Bruton* violation—absence of objection

An officer's rebuttal testimony that the codefendant told the police that defendant had proposed that the two commit a robbery and the codefendant said "Okay" did not violate the rule of *Bruton v. United States*, 391 U.S. 123, where the codefendant had already testified and was available for cross-examination by the defendant. Further, defendant waived appellate review of this testimony by failing to object at trial and to argue specifically that the admission of this testimony constituted plain error. Rule of Appellate Procedure 10(c)(4).

Am Jur 2d, Evidence §§ 721, 751.

Supreme Court's application of rule of *Bruton v. United States* (1968) 391 US 123, 20 L. Ed. 2d 476, 88 S Ct 1620, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

3. Constitutional Law § 343 (NCI4th)— preliminary qualification of jurors—no right of defendant to be present

Defendant was not deprived of his constitutional right to be present at every stage of his capital trial when prospective jurors were preliminarily sworn, oriented and qualified generally for jury service by a deputy clerk of court outside defendant's presence without regard to any particular case or trial.

Am Jur 2d, Criminal Law §§ 695, 696, 910 et seq.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 ALR4th 429.

4. Jury § 30 (NCI4th)— prospective jurors—basic qualifications—examination by deputy clerk—absence of challenge to panel

There was no merit to defendant's assignment of error that N.C.G.S. § 15A-1211(b) was violated because a deputy clerk of court, rather than the trial court, examined the basic qualifications of the prospective jurors in a capital trial where defendant

failed to follow the procedures set out in that statute for challenges to the jury panel and further failed to alert the trial court to the alleged improprieties.

Am Jur 2d, Jury §§ 100 et seq.

5. Arrest and Bail § 93 (NCI4th)— belief defendant in trailer—lawfulness of officers' entry

Officers had reasonable cause to believe that defendant was inside his trailer at the time they arrived to execute arrest warrants, even though defendant's car was not at the trailer, so that the officers did not make an unlawful entry into the trailer which would require the suppression of a T-shirt and boots observed in plain view and later seized pursuant to a search warrant where a codefendant had previously identified a car parked at the trailer as belonging to defendant; three officers were dispatched to watch the trailer to see if defendant left the trailer while the arrest warrants were obtained; those officers reported that they did not see anyone leave the trailer; and the officers noticed that lights were on in the trailer and heard noises inside the trailer before they entered it. N.C.G.S. § 15A-401(e)(1)(b).

Am Jur 2d, Arrest §§ 117-120.

6. Criminal Law § 339 (NCI4th)— denial of severance—defendants' defenses not antagonistic

The defenses of defendant Shoffner and his codefendant Workman were not antagonistic in this prosecution for two first-degree murders, and the trial court did not abuse its discretion by denying defendant Shoffner's motion for severance, where both defendants agreed that Workman's hand held the knife used to kill the victims; Workman contended that his ADD, aggravated by alcohol use, rendered his actions involuntary and also rendered him incapable of premeditation and deliberation; and Shoffner contended that Workman took him completely by surprise when he killed the two victims.

Am Jur 2d, Trial § 170.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 ALR3d 245.

7. Evidence and Witnesses § 1134 (NCI4th)—hearsay statement by defendant or codefendant—admission of party opponent—implied admission—*Bruton* rule not violated

The admission of hearsay testimony by a witness in a prosecution for attempted robbery and two murders that she overheard either defendant or his codefendant state, "I guess we'll just have to rob somebody," did not violate defendant's right of confrontation under the *Bruton* rule because this testimony was admissible under recognized exceptions to the hearsay rule. If the statement was made by defendant, it was competent under N.C.G.S. § 8C-1, Rule 801(d) as an admission of a party opponent; if the statement was made by the codefendant, defendant's acquiescence in the statement rendered it competent as an implied admission under N.C.G.S. § 8C-1, Rule 801(d)(B).

Am Jur 2d, Evidence §§ 721, 751.

Supreme Court's application of rule of *Bruton v. United States* (1968) 391 US 123, 20 L. Ed. 2d 476, 88 S Ct 1620, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

8. Evidence and Witnesses § 1134 (NCI4th)— testimony elicited by codefendant implicating defendant—prior inconsistent statement—*Bruton* rule not violated

In a prosecution for attempted robbery and first-degree murder wherein a witness testified that she had overheard a conversation between defendants in which one defendant stated that he guessed they would have to rob somebody but that she could not remember which defendant made the statement, a detective's testimony elicited on cross-examination by defendant Workman that the witness had identified defendant Shoffner as the one who made the statement was admissible to show a prior inconsistent statement by the witness relating to a material fact and did not violate the *Bruton* rule.

Am Jur 2d, Evidence §§ 721, 751.

Supreme Court's application of rule of *Bruton v. United States* (1968) 391 US 123, 20 L. Ed. 2d 476, 88 S Ct 1620,

holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

9. Evidence and Witnesses § 1134 (NCI4th)— expert witness—statements by codefendant—*Bruton* rule not violated

In a prosecution for the murders of two grocery store workers, testimony by the codefendant Workman's mental health expert that Workman told him that, after hearing two screams, he panicked and committed the murders was not sufficiently specific to implicate the defendant Shoffner and thus did not violate the *Bruton* rule by allowing a codefendant's out-of-court statements incriminating defendant to be presented through the testimony of the codefendant's expert witness.

Am Jur 2d, Evidence §§ 721, 751.

Supreme Court's application of rule of *Bruton v. United States* (1968) 391 US 123, 20 L. Ed. 2d 476, 88 S Ct 1620, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

10. Evidence and Witnesses § 771 (NCI4th)— testimony admissible against codefendant—admission against defendant—new trial not required

In a prosecution for the murders of two grocery store workers, assuming testimony by the assistant manager of another grocery store that the two defendants were in her store on the afternoon of the murders and she saw defendant Workman put his hand inside her pocketbook when she went outside the store was admissible only as to defendant Workman and was improperly admitted as to defendant Shoffner, a different result would not have been reached at trial if this testimony had been excluded as to defendant Shoffner where he elicited testimony on cross-examination of the witness that he was not near defendant Workman when Workman put his hand in the witness's pocketbook.

Am Jur 2d, Appellate Review §§ 713, 752-754, 759.

11. Criminal Law § 1318 (NCI4th)— capital trial—no *Enmund* violation

Placing defendant on trial for his life for two first-degree murders when his codefendant actually committed the murders during an attempted robbery did not violate *Enmund v. Florida*, 458 U.S. 782, where defendant was found guilty of two counts of felony murder; the trial court instructed the jury that before it could recommend that defendant be sentenced to death, the State must prove beyond a reasonable doubt that defendant "killed or attempted to kill the victim or intended to kill the victim or intended that deadly force would be used in the course of the felony or was a major participant in the underlying felony and exhibited reckless indifference to human life"; and the jury answered the *Enmund* issue "no" and recommended that defendant be sentenced to life imprisonment for both counts of felony murder.

Am Jur 2d, Trial §§ 888 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.

12. Jury § 232 (NCI4th)— death qualification of jury—constitutionality

Death qualification of a jury does not result in a guilt-prone jury and does not deny a defendant the right of a fair trial and fair sentencing proceeding.

Am Jur 2d, Jury §§ 199, 279.

13. Criminal Law § 101 (NCI4th)— discovery—defendant's oral statements—sufficient compliance with statute

Where a witness told police that she overheard a conversation between defendants in which defendant Shoffner said he and defendant Workman were "going up the road to get some money," Workman asked who Shoffner knew up the road that had some money, and Shoffner replied that "I guess we'll just have to rob somebody," the State complied with its discovery obligation under N.C.G.S. § 15A-903(a)(2) to divulge the "substance" of defendant's oral statements when it presented a document to defendant Shoffner which included a statement by him that "We

will have to rob someone." Furthermore, due process did not require the State to disclose any more information about defendant's statements.

Am Jur 2d, Deposition and Discovery §§ 431 et seq.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

14. Homicide § 266 (NCI4th)— felony murders—attempted robbery—sufficiency of evidence

The State's evidence was sufficient to support defendant Shoffner's conviction on two counts of felony murder predicated upon the felony of attempted armed robbery where it tended to show that defendants Shoffner and Workman were together the afternoon of the murders; defendant Workman bought a fish fillet knife sometime that afternoon; defendants tried to sell various items for money; one defendant was overheard to say that he guessed they would "just have to rob somebody"; shortly thereafter, both defendants arrived at a grocery store; a witness saw defendants exit the store quickly and, upon entering the store, discovered the bodies of the two persons who had been working in the store; the throats of both victims had been cut with a thin, very sharp knife; the female victim was found in the front of the store clutching her pocketbook to her chest; and the buzzer on the store cash register was sounding and the register was lying on its side.

Am Jur 2d, Homicide §§ 425-428, 442.

15. Evidence and Witnesses § 2051 (NCI4th)— defendant desperate for money—shorthand statement of fact

Testimony that a defendant on trial for felony murder had tried to sell a vest to the witness and told the witness to borrow the money from his mother "like he might have been desperate for money" was admissible as a shorthand statement of fact.

Am Jur 2d, Expert and Opinion Evidence §§ 10, 11.

Appeal as of right by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Cornelius, J., at the 24 January 1994 Criminal Session of Superior

Court, Forsyth County, upon jury verdicts finding defendants guilty of first-degree murder. Heard in the Supreme Court 14 September 1995.

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

Danny T. Ferguson for defendant-appellant Workman.

J. Clark Fischer for defendant-appellant Shoffner.

LAKE, Justice.

Defendants were tried jointly and capitally for the first-degree murders of Arthur Lee Drake and Janet Louise Drake. As to defendant Workman, the jury returned verdicts of guilty of first-degree murder of Arthur Drake under the felony murder rule and guilty of first-degree murder of Janet Drake on the basis of premeditation and deliberation. As to defendant Shoffner, the jury returned verdicts of guilty of first-degree murder of Arthur Drake under the felony murder rule and guilty of first-degree murder of Janet Drake under the felony murder rule. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended both defendants be sentenced to life imprisonment for each murder conviction. The trial court accordingly sentenced each defendant to two consecutive terms of life imprisonment. We find no prejudicial error, and therefore, we uphold defendants' convictions and sentences.

The State's evidence tended to show that at approximately 8:00 p.m. on 12 June 1993, Stephan Poplin went to Carlton's Grocery on West Clemmonsville Road in Forsyth County to buy some snacks. As Poplin drove into the parking lot, he noticed two men walk quickly from the store, get into an older model Monte Carlo and drive away. The driver stared at Poplin, and Poplin later identified him as defendant Workman. Inside the store, Poplin found seventy-one-year-old Arthur Drake lying on his side with blood all around him, his throat cut. Poplin ran to the store counter to call for help and discovered sixty-three-year-old Janet Drake lying on the floor behind the store counter. Her throat had also been cut, and her pocketbook was pulled close to her body.

Dr. Patrick Lantz, a forensic pathologist, performed autopsies on the Drakes. Mrs. Drake suffered a large incised wound from the left side of her neck to just below her right ear. She also had stab wounds below her left collarbone, on her upper back, on her lower neck and

on her back below her rib cage. Mrs. Drake further suffered two defensive wounds on her hands. Mr. Drake "had a very large gaping wound going [a]cross the front of his neck, going back all the way through his windpipe and his voice box and severing the blood vessels on the right side." He also suffered a stab wound on his left upper back. From the nature of the incised wounds across the necks of Mr. and Mrs. Drake and the minimal amount of bruising present, Dr. Lantz determined that the object used to kill the Drakes "was very sharp" and "fairly thin," consistent with injuries caused by a fish fillet knife.

Crime Scene Specialist W.F. Lemons performed luminol and phenolphthalein testing inside Carlton's Grocery. The testing revealed two separate sets of bloody shoe prints. One set had a clearly defined heel and toe and, in Lemons' opinion, was made by cowboy boots; this set of prints led from Mr. Drake's body to Mrs. Drake's body. Luminol and phenolphthalein testing also revealed the presence of human blood on the driver's side of defendant Workman's blue Monte Carlo and on the inside panel of the passenger side of the car an inch above the back seat. Testing further revealed the presence of human blood on a green and white T-shirt with marijuana leaves depicted on it and bearing the aphorism, "This Bud's For You," and on a pair of cowboy boots; both were seized from defendant Workman's trailer. The blood on defendant Workman's T-shirt was confirmed by DNA analysis to be from Mr. Drake. No blood was detected on the black Harley Davidson T-shirt, black vest and tennis shoes given to police by defendant Shoffner.

Defendant Workman and defendant Shoffner spent the day of the murders riding around in defendant Workman's blue Monte Carlo and making several stops during the course of the afternoon and early evening. At some point in the afternoon, defendants went to Ford's Fishing Center, where defendant Workman bought a fish fillet knife. At approximately 5:50 p.m., defendants arrived at Village Cue & Pub. Julie Stanley, the bartender, testified that when she asked defendant Workman if he wanted another drink, he replied that they were "running short on money." Stanley further testified that the defendants left Village Cue & Pub shortly before 7:00 p.m. and that they were not drunk. After leaving Village Cue & Pub, the defendants stopped at a yard sale. Janet Terry testified that as defendants were leaving the yard sale, she overheard defendant Shoffner say that they were "going up the road to get some money." Both defendants got inside the Monte Carlo, and Terry, who could not identify at trial which defendant was speaking, heard one defendant say, "Who do you know up the

road that has some money?" The other defendant replied, "I don't know anybody. I guess we'll just have to rob somebody."

Between 7:00 and 7:30 p.m., defendants stopped at Hampton's Grocery, where they played pinball. The assistant manager of the store, Diana Stewart, went outside to sweep. Upon reentering the store, she saw defendant Workman with his hand inside her pocketbook; defendant Workman jerked his hand back when he heard Stewart's approach. Defendants then left and drove away in the direction of Carlton's Grocery. Shortly before 8:00 p.m., several people noticed a dark-colored Monte Carlo in the vicinity of Carlton's Grocery.

The day after the murders, defendant Shoffner voluntarily gave a statement to the police and turned over the black vest, black T-shirt and tennis shoes he had worn the day before. Defendant Shoffner told police that he and defendant Workman had been out riding around in defendant Workman's blue Monte Carlo. During the course of the day, they made several stops. The last stop they made was at Carlton's Grocery. Defendant Shoffner told police, and later testified at trial, that he went inside to buy some cigarettes and was standing at the front of the store by the counter with Mrs. Drake when he heard what sounded like water hitting the floor. Defendant Shoffner turned around and saw Mr. Drake fall to the floor and "blood going everywhere." Both defendant Shoffner and Mrs. Drake screamed, and defendant Workman came from the back of the store and began to stab Mrs. Drake. Defendants left the store and drove away quickly. While they were in the car, defendant Workman told defendant Shoffner to throw the fish fillet knife out the window; defendant Shoffner picked up the knife by the tip and threw it out. Defendant Shoffner showed police where he had thrown the knife, and a search team later recovered it. Further, defendant Shoffner took police to defendant Workman's trailer, identified the blue Monte Carlo parked in front of the trailer as belonging to Workman and stated it was the car the two were driving the day before.

Defendant Workman did not testify on his own behalf. Other facts necessary to the development of the issues in this appeal will be presented where relevant.

ISSUES RAISED BY DEFENDANT WORKMAN

In his first assignment of error, defendant Workman argues that the trial court erred by granting the State's motion for joinder and by

denying his motions for severance made prior to trial and during trial. Specifically, defendant Workman argues (1) that joinder of defendants' trials resulted in the exclusion of evidence critical to his theory of defense, and (2) that joinder of defendants' trials resulted in the admission of prejudicial evidence that could not have been offered had he been tried separately. We disagree.

Charges brought separately against two or more defendants may be joined when the offenses charged:

1. Were part of a common scheme or plan; or
2. Were part of the same act or transaction; or
3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C.G.S. § 15A-926(b)(2)(b)(1) to (3) (1988). While public policy is strongly in favor of consolidation, *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980), a motion for joinder must nevertheless be denied whenever it is "necessary to . . . a fair determination of the guilt or innocence of . . . [a defendant]." N.C.G.S. § 15A-927(c)(2)(a) (1988). The decision to join cases for trial rests within the sound discretion of the trial court, and "[a]bsent a showing that a defendant has been deprived of a fair trial by joinder, the trial [court's] discretionary ruling on the question will not be disturbed." *Nelson*, 298 N.C. at 586, 260 S.E.2d at 640. Defendant concedes that joinder in this case was permissible under the statute. We must therefore determine whether the decision by the trial court to join defendants' trials deprived defendant Workman of a fair trial.

[1] First, defendant Workman argues that joinder of defendants' trials deprived him of a fair trial by excluding evidence critical to his theory of defense. Specifically, he argues that the trial court erred by refusing to allow his expert witness, Dr. Frank Wood, to testify that Workman had related, in an interview session, that on the day of the murder, it was defendant Shoffner who implanted a "robbery/murder script" in defendant Workman's mind.

On direct examination, Dr. Wood testified that, in his opinion, Workman suffered from attention deficit disorder ("ADD"). Defendant Workman then attempted to elicit testimony from Dr. Wood regarding an "event that occurred within the store that [Dr.

Wood] found significant to [his] diagnosis." The State and defendant Shoffner objected, and the jury was sent out of the courtroom.

Dr. Wood testified on *voir dire* that defendant Workman told him that defendant Shoffner suggested that they rob an establishment using the fish fillet knife and that "if you rob a place, you can't have any witnesses." Dr. Wood further testified that defendant Workman rejected this idea. However, according to Dr. Wood, the screams of Shoffner and Mrs. Drake, and particularly defendant Shoffner's scream, acted as a "triggering mechanism," causing defendant Workman to believe the robbery was taking place. In Dr. Wood's opinion, the combination of defendant Workman's ADD, aggravated by alcohol use, defendant Shoffner's scream and the "robbery/murder script" implanted in defendant Workman's mind by defendant Shoffner, rendered Workman unable to exercise any self-control and unable to plan or reflect upon his actions when he killed Mr. and Mrs. Drake.

Following much discussion between the parties and the trial court, the court ruled:

> THE COURT: . . . [Dr. Wood] may testify as to the screams without attributing them to anybody and he may testify as to robbery being in his mind, Mr. Workman's mind . . . .
>
> . . . .
>
> THE COURT: And then to his opinion and his opinion may deal with . . . Workman's mental state, his mental processes and also his impulses and whether or not he would have self-control under those findings.

Before the jury, Dr. Wood testified, in part, as follows:

> Q. Did you learn of something that occurred in the store when [defendant Workman] walked into the store that had an effect on him?
>
> A. Yes. Not when he walked in, after he had walked in and gone to the back.
>
> Q. Okay. And what was that?
>
> A. That he heard two screams.
>
> Q. And what effect, in your opinion, did that have on [defendant Workman's] mind when he heard those screams.

A. I believe they made him panic and I believe that the reason they made him panic is that . . . they made him think that the robbery had started.

[DEFENSE COUNSEL FOR SHOFFNER]: Objection. Move to strike, Your Honor.

THE COURT: Sustained. Members of the jury, disregard the last statement by the witness.

Q. In your opinion, after [defendant Workman] heard the scream, what occurred in [his] mind?

A. He panicked, in my opinion, and at that point was under such heavy arousal from that panic that he was unable to control himself and act voluntarily.

Q. And how did the scream play into that—into this arousal and his ability to control himself?

A. It triggered an idea, an image, I would even say a script which had been deposited —

[DEFENSE COUNSEL FOR SHOFFNER]: Objection.

A. —in his mind —

THE COURT: Overruled.

A. —and the idea was to the effect that if stores get robbed, witnesses have to be —

[DEFENSE COUNSEL FOR SHOFFNER]: Objection. Motion to strike, Your Honor.

THE COURT: Overruled.

A. I'm not sure I got to finish.

Q. Okay. Please finish your answer.

A. The idea being that if stores do get rob[bed], witnesses have to be killed.

Q. And in your opinion, do you have an opinion as to whether or not this idea originated in [defendant Workman's] mind?

A. Yes.

Q. And what is your opinion?

A. My opinion is that that idea did not originate in [defendant Workman's] mind.

From this evidentiary record, it is clear defendant Workman was able to present testimony from Dr. Wood to the jury to the effect that defendant Workman panicked and did not act voluntarily when he heard two screams inside Carlton's Grocery. Further, Dr. Wood was able to testify that these screams triggered a "robbery/murder script" that did not originate in defendant Workman's mind. The only evidence the jury was not permitted to hear was that defendant Workman identified defendant Shoffner as being the person who implanted the "robbery/murder script" in his mind. Defendant Workman, however, contends that the identity of the person responsible for implanting the "robbery/murder script" in his mind is admissible under Rule 705 of the North Carolina Rules of Evidence.

Rule of Evidence 705 provides that an expert may testify regarding his or her opinion without first disclosing "the underlying facts or data, unless an adverse party requests otherwise . . . . 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). This Court has previously recognized that "Rule 705 does not . . . make the bases for an expert's opinion automatically admissible." *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992). "Only if an adverse party requests disclosure must the trial court require the expert to disclose the underlying facts of his opinion." *Id.*

It is clear that the trial court's decision excluding the basis of Dr. Wood's opinion was correct. First, neither the State nor counsel for defendant Shoffner requested that Dr. Wood disclose the basis of his opinion. Second, defendant Workman's self-serving hearsay statements that the "robbery/murder script" was originated by defendant Shoffner were not inherently reliable, particularly since defendant Workman had informed the trial court that he would not testify on his own behalf and, therefore, was unavailable for cross-examination by either the State or defendant Shoffner. *See Baldwin*, 330 N.C. at 457, 412 S.E.2d at 37-38 (psychological expert not allowed to testify regarding the substance of any self-serving, exculpatory statements made by the defendant during interviews unless or until the defendant testifies regarding matters relating to those statements). Third, the exclusion of Dr. Wood's basis for his opinion did not deprive defendant of the full force of his defense. As the portions of Dr. Wood's testimony reproduced above amply demonstrate, the jury

heard the complete substance of Workman's defense. The crux of Workman's defense, that the "robbery/murder script" originated somewhere other than defendant Workman's own mind, was relayed to the jury. Finally, defendant Workman himself acknowledged during the trial that the identity of the person who actually implanted the "script" into defendant's mind was not necessary to explain Dr. Wood's testimony when he stated, "[T]he doctor doesn't have to say where [the script] came from, but it's crucial, Judge, that he says it didn't originate with [defendant Workman.]" We therefore hold that the trial court did not abuse its discretion by excluding evidence regarding the identity of the person responsible for implanting the "robbery/murder script" in defendant Workman's mind.

[2] Finally, defendant Workman contends that joinder of defendants' trials resulted in the admission of prejudicial rebuttal evidence that could not have been offered had he been tried separately.

Defendant Shoffner testified on his own behalf that he had no intent to rob anyone on the day of the murders. The State responded with the rebuttal testimony of Detective Randall Pitts, who indicated that the day after the murders, when defendant Shoffner made his statement to police, he stated that Workman had proposed that the two commit a robbery, and Shoffner said, "Okay." Defendant Workman contends this rebuttal testimony was received in violation of *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), which prohibits the admission of incriminating statements made by nontestifying codefendants.

We note first that this testimony was offered by the State in rebuttal. At that point in the trial, codefendant Shoffner had already testified and was available for cross-examination by codefendant Workman. *Bruton* therefore does not apply in this instance.

Further, Rule 10 of the Rules of Appellate Procedure provides that in order to preserve a question for appellate review, a party must make a timely objection. *See* N.C. R. App. P. 10(b)(1). Defendant Workman did not voice an objection, on any grounds, to the elicited testimony he now contends was improper and prejudicial; thus, he has failed to preserve this issue for appellate review. "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1080 (1996). Defendant Workman has waived appellate review of this issue by failing specifically and distinctly to argue

plain error as required by Rule 10(c)(4) of the Rules of Appellate Procedure.

Accordingly, we overrule defendant Workman's first assignment of error.

[3] In his second assignment of error, defendant Workman contends he was deprived of his constitutional right to be present during a stage of his capital trial. This constitutional deprivation, according to defendant Workman, arises from the fact that various venires of jurors were preliminarily sworn, oriented and qualified generally for jury service by a deputy clerk of court in a jury assembly room outside defendant Workman's presence. Defendant Workman notes further that no court reporter was present during these "proceedings" to record the events as they transpired.

The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution "guarantees an accused the right to be present in person at every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). "This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995), *cert. denied*, —— U.S. ——, 135 L. Ed. 2d 1077 (1996). A defendant's right to be present during all stages of his capital trial is a nonwaivable right, *Payne*, 320 N.C. at 139, 357 S.E.2d at 612, and we have imposed a duty upon the trial court to insure a defendant's presence throughout the trial, *id.* The violation of this right is subject to a harmless error beyond a reasonable doubt standard of review. *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).

The record reveals, and defendant Workman himself acknowledges in his brief on this point, that defendant Workman's case was called for trial 24 January 1994. It is quite clear that defendant Workman was present when jury selection began for his trial:

> [DEFENDANT WORKMAN'S COUNSEL]: Oh, one other matter, Your Honor. During jury selection when the time comes for the lawyers to introduce themselves, we would . . . like to let our client stand up and introduce himself to the jury. Does the [c]ourt have any problem with that?
>
> THE COURT: Yes, I do. The [c]ourt will be introducing all parties.

Any other matters? Well, due to the time, only about 15 minutes before the lunch break, I think we'll wait and start at two o'clock and have the jurors brought up at that time and begin the jury selection process at that point rather than bring them up here and send them to lunch.

Does everyone agree with that?

[DEFENDANT SHOFFNER'S COUNSEL]: Yes, Your Honor.

THE COURT: Any other matters before we take the lunch recess? Okay. The court will be in recess until two o'clock.

(A noon recess was taken.)

(The defendants are present in the courtroom.)

(The prospective jurors were brought into the courtroom.)

THE COURT: I'd like to extend a welcome to those of you who are here for jury service. We're very pleased to have you here this afternoon. Very shortly we're going to begin the jury trial of a couple of criminal cases and these cases are being consolidated for one trial . . . and I'm going to be talking to you a little bit about the cases and you need to listen very carefully.

Defendant's right to be present at all stages of his trial does not include the right to be present during preliminary handling of the jury venires before defendant's own case has been called. *See State v. Rannels*, 333 N.C. 644, 430 S.E.2d 254 (1993); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992). Defendant Workman had no right to be present when prospective jurors were preliminarily sworn, oriented and qualified for jury service in general, without regard to any particular case or trial. Further, because defendant Workman's trial had not yet commenced, these "proceedings" could not have been conducted during a stage of defendant Workman's capital trial.

[4] Defendant Workman further argues under this assignment of error that N.C.G.S. § 15A-1211(b) was violated because a deputy clerk of court, rather than the trial court, allegedly examined the basic qualifications of the prospective jurors. It is true that the trial court "must decide all challenges to the panel and all questions concerning the competency of jurors." N.C.G.S. § 15A-1211(b) (1988). However, this statute further provides that while a defendant may make a challenge to the jury panel, the challenge:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c). In the case *sub judice*, defendant Workman never followed this specific procedure. Indeed, the record reflects that defendant never challenged the jury panel selection process and never once voiced to the trial court any objection to the allegedly improper handling of the jury venires prior to the call of his case for trial before a jury. In light of the fact that defendant failed to follow the procedures clearly set out for jury panel challenges and further failed, in any manner, to alert the trial court to the alleged improprieties, we hold this portion of this assignment of error is without merit. This assignment of error is overruled.

[5] Lastly, defendant Workman argues the trial court erred in denying his motion to suppress the admission of cowboy boots, a T-shirt and blue jeans seized from defendant Workman's trailer.

Defendant Workman filed a pretrial motion to suppress this evidence, arguing that police entry into his trailer to effectuate his arrest was unlawful as it was allegedly made without reasonable cause to believe he was present inside the trailer as required by N.C.G.S. § 15A-401(e)(1)(b). The trial court concluded as a matter of law that officers had probable cause to believe that defendant was inside the trailer and that the entry into the trailer was not in violation of defendant Workman's constitutional rights. The trial court further concluded as a matter of law that the discovery of the cowboy boots and the T-shirt was the result of Detective Pitts seeing them in plain view, that Detective Pitts had a right to be in the trailer after making a lawful entry and that their discovery was inadvertent. Therefore, the trial court denied defendant's motion to suppress those items. The trial court did, however, grant defendant's motion to suppress as to the blue jeans. We find no error in the trial court's denial of defendant's motion to suppress with regard to the cowboy boots and T-shirt.

Entry into a private premises by police in order to make an arrest is governed by N.C.G.S. § 15A-401(e)(1) and (2). This statute provides in part:

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

a. The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued,

b. The officer has *reasonable cause to believe the person to be arrested is present*, and

c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

(2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized . . . to enter without giving notice of his authority and purpose.

N.C.G.S. § 15A-401(e)(1), (2) (1988) (emphasis added). In the present case, defendant Workman only argues that the trial court's conclusion that officers had reasonable cause to believe defendant Workman was inside the trailer was erroneous. Defendant Workman argues that because his car was not at the trailer when officers arrived to execute the arrest warrant, the officers did not have reasonable cause to believe defendant Workman was inside the trailer. We disagree.

The trial court's findings of fact provide ample evidence from which to conclude that the officers had reasonable cause to believe defendant Workman was inside his trailer when they entered. The trial court found as fact that defendant Shoffner met with Detective Pitts and made statements implicating himself and defendant Workman in the attempted robbery of Carlton's Grocery. Defendant Shoffner stated that defendant Workman cut the throats of both victims. Defendant Shoffner led Detective Pitts to the approximate area where the knife used in the murders was thrown, and it was recovered. Defendant Shoffner took Detective Pitts down a dead-end road and pointed out defendant Workman's trailer; defendant Shoffner identified a blue Monte Carlo parked in front of the trailer as belonging to defendant Workman. Detective Pitts dispatched three officers to defendant Workman's trailer with instructions to stay out of sight and to watch the road to see if defendant Workman left in his car. Detective Pitts and Detective Millard Shepherd then obtained an

arrest warrant for defendant Workman on two counts of first-degree murder. At approximately 11:30 p.m., after obtaining the arrest warrant, officers noticed that lights were on inside the trailer; although Detective Pitts did not notice defendant Workman's car, the officers sent by Detective Pitts to watch the trailer indicated that they did not observe anyone leave the trailer. As Detective Pitts approached the trailer, he heard noises inside. After waiting approximately three minutes after the officers' presence and purpose were announced, officers entered the trailer. While looking for Workman, Detective Pitts observed, in plain view, a pair of cowboy boots and a T-shirt with blood on them. Detective Pitts then secured a search warrant for the trailer.

Under these facts and circumstances, the officers had reasonable cause to believe that defendant Workman was inside his trailer at 11:30 p.m. on a Sunday night, when lights were on inside the trailer and noises were heard inside. Further, no officer stationed outside the trailer, for the express purpose of watching the trailer to see if Workman left, saw anyone leave. Based upon the trial court's findings of fact, it properly concluded that the officers did not make an unlawful entry into the trailer requiring suppression of the T-shirt and cowboy boots seen in plain view and later seized pursuant to a search warrant. Accordingly, this assignment of error is overruled.

ISSUES RAISED BY DEFENDANT SHOFFNER

[6] In his first assignment of error, defendant Shoffner also argues that the trial court erred by granting the State's motion for joinder and by denying his motions for severance made prior to trial and during trial. Specifically, defendant Shoffner argues that the trial court abused its discretion by denying his motions to sever because his defense and the defense of defendant Workman were in direct conflict and, therefore, antagonistic.

In *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994), we stated:

> The existence of antagonistic defenses will not, standing alone, warrant a severance. *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986). On the other hand, the fact that the evidence may be substantial against a defendant will not preclude severance where joinder denies a defendant a fair trial. "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *Lowery*, 318 N.C. at

59, 347 S.E.2d at 734, quoting *Nelson*, 298 N.C. at 587, 260 S.E.2d at 640.

Pickens, 335 N.C. at 725, 440 S.E.2d at 556 (citations omitted). Based upon our review of the transcript, we cannot agree with defendants' characterization of their defenses as antagonistic.

Defendant Workman's defense at trial was twofold. First, he argued he was not criminally responsible for premeditated and deliberated murder because he suffered from ADD, aggravated by alcohol use, which rendered his actions involuntary. Workman contended that a "robbery/murder script," that "when places get robbed, witnesses have to be killed," had been implanted in his mind and that when he heard two screams inside Carlton's Grocery, the combination of his ADD and the "robbery/murder script" caused him to panic; his actions became automatic and he killed Mr. Drake. Defendant Workman did not deny that he also killed Mrs. Drake, although he presented evidence that he had no memory of the events regarding her murder. Alternatively, defendant Workman contended that even if he was in control of his actions on the night of the murder, his ADD rendered him completely incapable of premeditation and deliberation. Defendant Shoffner's defense, on the other hand, was simply that defendant Workman took him completely by surprise when Workman killed Mr. and Mrs. Drake.

Neither defendant pointed a finger toward the other and claimed the other was the actual killer. Rather, both defendants quite harmoniously agreed that defendant Workman's hand held the knife used to kill the victims. Under these circumstances, we conclude that these defenses are wholly different, not irreconcilable and not antagonistic. *Cf. Pickens*, 335 N.C. at 728, 440 S.E.2d at 558-59 (error to deny defendant's motion to sever where each defendant presented antagonistic evidence that the other defendant, or some other third party, was the actual shooter).

[7] Defendant Shoffner further argues he suffered prejudicial error from the consolidation of his trial with defendant Workman's trial. First, defendant Shoffner contends that the testimony of Janet Terry was inadmissible under *Bruton*, which prohibits the admission of incriminating statements made by nontestifying codefendants.

"The holding of *Bruton* is based on the right of a litigant to confront the witnesses against him. Consequently, if testimony is admitted under the hearsay rule, or as an exception to it, there is no right

of confrontation[,] and *Bruton* does not prohibit the use of such testimony." *State v. Willis*, 332 N.C. 151, 167, 420 S.E.2d 158, 165 (1992). While *Bruton* involved the in-custody confession of a nontestifying codefendant, we have applied its holding to the extrajudicial admissions, or statements, of a nontestifying codefendant. *See, e.g., State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *State v. Jones*, 280 N.C. 322, 185 S.E.2d 858 (1972).

Janet Terry testified at trial that she overheard defendant Shoffner say that he and defendant Workman were "going up the road to get some money." Terry, who could not identify at trial which defendant was speaking, next heard one defendant say, "Who do you know up the road that has some money?" The other defendant replied, "I don't know anybody. I guess we'll just have to rob somebody."

We conclude this testimony was properly admitted under recognized exceptions to the general prohibition against the admission of hearsay testimony, and thus, no violation of *Bruton* occurred in this instance. If defendant Shoffner was the defendant who said, "I guess we'll just have to rob somebody," this statement was properly admitted, as it is a statement of a party opponent and admissible under Rule 801(d) of the North Carolina Rules of Evidence, which provides for the admission of a statement "if it is offered against a party and it is . . . his own statement." N.C.G.S. § 8C-1, Rule 801(d) (1992). Further, if defendant Shoffner was the one who asked, "Who do you know up the road that has some money?" then his acquiescence in defendant Workman's response that he guessed they would have to rob someone was an implied admission and properly admitted under Rule of Evidence 801(d)(B). *See id.*; *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977) (a statement made in a person's presence under such circumstances that the person would naturally be expected to deny the statement if it is untrue is admissible as an implied admission and is not barred by *Bruton*). Terry's testimony concerning the conversation she overheard between defendants was properly admitted at trial, as the statements, though hearsay, fell under well-recognized exceptions to the rule barring hearsay. Because no right to confrontation exists when testimony is admitted as an exception to the hearsay rule, the holding of *Bruton* was not violated.

[8] Defendant Shoffner further contends under this assignment of error that defendant Workman's cross-examination of Detective Pitts

concerning Janet Terry's trial testimony was improperly admitted. During the police investigation of the Drakes' murders, Detective Pitts interviewed Terry about the conversation she overheard between defendants. In this interview, Terry identified defendant Shoffner as the defendant who said, "I guess we'll just have to rob somebody." At trial, however, Terry testified she could not remember which defendant made this statement.

"Inconsistent prior statements are admissible for the purpose of shedding light on a witness's credibility," *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984), and when the "prior statement relates to material facts in the witness's testimony, extrinsic evidence may be used to prove the prior inconsistent statement," *id.* We have defined material facts as those facts relating to matters "pertinent and material to the pending inquiry." *Id.* In the present case, the cross-examination of Detective Pitts demonstrating Terry's prior inconsistent statement was proper extrinsic evidence of a material fact. This information was a vital portion of the State's case against both defendants, as it demonstrated that defendants had discussed a robbery shortly before the murders at Carlton's Grocery. As such, it constitutes a material fact within the context of this particular trial. We conclude that the cross-examination on this point was properly admitted, without violating *Bruton*, as it showed a prior inconsistent statement made by Terry.

[9] Defendant Shoffner next argues that certain out-of-court statements made by defendant Workman were improperly admitted through the testimony of defendant Workman's expert witness, Dr. Wood, and that these statements incriminated defendant Shoffner in violation of *Bruton*. Specifically, defendant Shoffner contends that Dr. Wood should not have been allowed to testify that after hearing two screams, defendant Workman allegedly panicked and committed the murders. By this testimony, defendant Shoffner asserts defendant Workman "was allowed to state through his surrogate, Dr. Wood, that [defendant] Shoffner planned the Carlton's robbery and physically assaulted Mrs. Drake."

We disagree that the testimony given by Dr. Wood was sufficiently specific to actually implicate defendant Shoffner. Dr. Wood's testimony did not identify defendant Shoffner, or any other person, as having screamed. Further, we disagree that the plain inference from the screams was that defendant Shoffner had attacked Mrs. Drake at the front of the store. Defendant Shoffner himself testified that he

and Mrs. Drake screamed, but that they screamed after, and because, defendant Workman had attacked Mr. Drake with the fish fillet knife. By this testimony, it is apparent that defendant Shoffner had no objection at trial to the jury hearing evidence that defendant Shoffner was in fact one of the people who screamed inside Carlton's Grocery. We further note that defendant Shoffner declined, once after Dr. Wood's direct examination and again after his redirect examination, to question Dr. Wood concerning any aspect of the testimony he gave in front of the jury. Based upon the circumstances as developed at trial, we conclude *Bruton* was not violated by the admission of Dr. Wood's testimony in this regard.

[10] Defendant Shoffner further proposes that he was improperly "tainted" by evidence received under Rule of Evidence 404(b), which evidence defendant Shoffner contends was admissible only as to defendant Workman. At trial, the State called Diana Stewart, assistant manager of Hampton's Grocery. Stewart testified that defendants were inside the store playing pinball the afternoon of the murder. Stewart went outside to sweep and saw defendant Workman walk "straight to my pocketbook and he was sticking his hand inside my pocketbook." Stewart opened the door to come back inside, and when the bell on the door sounded, defendant Workman pulled his hand out of Stewart's pocketbook.

During cross-examination of Stewart, defendant Shoffner elicited testimony from her that he was not near defendant Workman when Workman put his hand in Stewart's pocketbook. In light of this cross-examination, even assuming the admission of this testimony as to defendant Shoffner was prejudicial, we nevertheless conclude 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).

[11] Finally, defendant Shoffner argues he should not have been placed on trial for his life pursuant to *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), in that "forcing him to trial before a death-qualified jury, when the evidence against him was both quantitatively and qualitatively different from his codefendant who was the undisputed murderer, unfairly increased his chances of conviction."

In *Enmund*, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a mur-

der is committed by others . . . [when the defendant] does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797, 73 L. Ed. 2d at 1151. In *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127 (1987), the Court refined the holding in *Enmund* and stated that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158, 95 L. Ed. 2d at 145.

Defendant Shoffner was found guilty of two counts of felony murder. At his capital sentencing proceeding, conducted in accord with N.C.G.S. § 15A-2000, the trial court instructed that before the jury could recommend that defendant Shoffner be sentenced to death, the State must prove beyond a reasonable doubt that "the defendant Eddie Wayne Shoffner killed or attempted to kill the victim or intended to kill the victim or intended that deadly force would be used in the course of the felony or was a major participant in the underlying felony and exhibited reckless indifference to human life." This instruction is in full accord with *Enmund* and *Tison*, as well as with the pattern jury instructions. *See* N.C.P.I.—Crim. 150.10 (1995). The record further reflects that the jury answered the *Enmund* issue, submitted on the Issues and Recommendation as to Punishment form as to both counts of felony murder as Issue One-A, "no." The jury, following its instructions, accordingly recommended that defendant Shoffner be sentenced to life imprisonment for both counts of felony murder. We detect no hint of error in the trial court's instructions or the jury's procedure in this regard.

[12] As to defendant Shoffner's argument that his risk of conviction was unfairly increased because he was tried before a death-qualified jury, we rejected this argument in *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), when we held that death-qualifying a jury does not result in a guilt-prone jury and does not deny a defendant the right to a fair trial and fair sentencing proceeding. Defendant Shoffner advances no reason why we should depart from our prior precedent regarding this issue; accordingly, this assignment of error, in its entirety, is overruled.

[13] In his second assignment of error, defendant Shoffner contends it was error for the trial court to allow Janet Terry to testify when the State allegedly failed to provide defendant Shoffner with Terry's statements as required by N.C.G.S. § 15A-903(a)(2). Defendant Shoffner

also proposes that his right to due process was infringed by the alleged discovery violation.

The criminal discovery statute in question, N.C.G.S. § 15A-903(a)(2), requires the State, upon motion by a defendant, "[t]o divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant." N.C.G.S. § 15A-903(a)(2) (1988). The State is required to "divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial." *Id.* "Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court." *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995). A "trial court is not required to impose any sanctions for abuse of discovery orders." *State v. Weeks*, 322 N.C 152, 171, 367 S.E.2d 895, 906 (1988).

Janet Terry told police that she overheard a conversation between defendants in which defendant Shoffner said he and defendant Workman were "going up the road to get some money." Defendant Workman said, "Who do you know up the road that has some money," and defendant Shoffner replied, "I don't know anybody. I guess we'll just have to rob somebody." On 10 September 1993, the State presented defendant Shoffner with a document setting out the substance of oral statements made by defendant Shoffner; statement number nine contained the following statement: "We will have to rob someone." Although defendant Shoffner concedes there is no general obligation on the part of the State to provide the names of witnesses prior to trial, *see State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988), he appears to contend that the State's discovery response "was both inherently misleading and inadequate to satisfy" the State's discovery obligation because nothing more concerning the conversation Terry overheard was divulged. We cannot agree. N.C.G.S. § 15A-903(a)(2) only requires the State to divulge the "*substance*" of a defendant's oral statement. This the State did. "Defendant was not entitled to a description of the facts and circumstances surrounding these statements." *Harris*, 323 N.C. at 122, 371 S.E.2d at 695. We conclude the trial court did not err in determining that the State had fully complied with its discovery obligations in this instance. We further conclude that due process did not, in this case, require the State to disclose any more information than it did, and this assignment of error is overruled.

[14] In another assignment of error, defendant Shoffner argues it was error for the trial court to deny defendant Shoffner's motion to dismiss the two first-degree murder charges against him on the grounds of insufficiency of the evidence. Because the jury found defendant Shoffner guilty of two counts of first-degree murder solely on the theory of felony-murder, premised upon the felony of attempted robbery with a dangerous weapon, we do not address defendant Shoffner's contention that there was insufficient evidence upon which the jury could have found him guilty of premeditated and deliberated murder.

"Felony murder is a murder committed in the perpetration or attempted perpetration of certain felonies including those committed or attempted with the use of a deadly weapon." *State v. Cook*, 334 N.C. 564, 570, 433 S.E.2d 730, 733 (1993); *see* N.C.G.S. § 14-17 (1993). Attempted robbery with a dangerous weapon is the unlawful attempt to take personal property from another or in another's presence by the use or threatened use of a firearm or other dangerous weapon which threatens or endangers the life of another. *See* N.C.G.S. § 14-87(a) (1993); *State v. Allison*, 319 N.C. 92, 352 S.E.2d 420 (1987). In order to gain convictions against both defendants, particularly with respect to defendant Shoffner, the State proceeded under the theory of concerted action. "A defendant may properly be found guilty of first-degree felony murder where he knowingly engages in the commission of a dangerous felony and where a killing takes place." *State v. Reese*, 319 N.C. 110, 145, 353 S.E.2d 352, 372 (1987).

We have set forth the law governing motions to dismiss countless times:

> "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. 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. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. King, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted).

The evidence at trial tended to show that defendant Workman and defendant Shoffner were together the afternoon of the Drakes' murders. Numerous witnesses testified regarding defendants' attempts to sell various items for money. Another witness testified that one of the defendants stated that they were "running short on money." Yet another witness testified that she overheard defendant Shoffner say that he and defendant Workman were "going up the road to get some money." This witness then heard one of the defendants say, "Who do you know up the road that has some money?" To which the other defendant replied, "I don't know anybody. I guess we'll just have to rob somebody." Shortly thereafter, both defendants arrived at Carlton's Grocery. Stephan Poplin witnessed the defendants' quick exit from the store. Upon entering the store, Poplin heard the buzzer on the cash register sounding and noticed that the register was lying on its side. Mrs. Drake was found in the front of the store clutching her pocketbook to her chest. Both victims' throats had been cut with a thin, very sharp knife. Defendant Workman had purchased a fish fillet knife that very afternoon.

Viewing this evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, we conclude the evidence against defendant Shoffner was sufficient for the jury's consideration and determination. From the evidence, the jury could reasonably infer and find as fact that defendants Workman and Shoffner needed money; "went up the road" to rob the grocery store; and during the course of the robbery, murdered the Drakes. The trial court, therefore, did not err by denying defendant Shoffner's motion to dismiss. This assignment of error is overruled.

[15] In his last assignment of error, defendant Shoffner argues that he was prejudiced by Chad Viars' allegedly improper cross-examination testimony. The cross-examination at issue transpired, in part, as follows:

> Q. How hard was Shoffner trying to sell this vest to you?
>
> A. He just—he made—Shoffner made the request "Borrow the damn money from your mom" *like he might have been desperate for money.*

(Emphasis added.) Defendant Shoffner objected and moved to have the testimony stricken. The trial court overruled the objection and denied the motion to strike. Defendant contends Viars' testimony that

he "might have been desperate for money" was irrelevant under Rule of Evidence 401 and was highly prejudicial under Rule of Evidence 403.

We conclude, however, that Viars' testimony was admissible as a short-hand statement of fact. *See, e.g., State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989) (witness testimony that defendant responded to a coconspirator's remarks with "a long glance like he had better shut up" admissible as a shorthand statement of fact); *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971) (witness testimony that defendant "seemed to be joking about it" was admissible as a shorthand statement of fact). "Opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 178 (4th ed. 1993). The weight to give Viars' testimony that defendant Shoffner "might have been desperate for money" was for the jury to decide. Even assuming error as to this particular statement, we conclude defendant Shoffner still would not be entitled to relief. Other evidence tended to show defendant Shoffner needed money the day of the murder, *e.g.*, he pawned a microwave. Further, he was overheard participating in a conversation with defendant Workman in which one or the other stated they would have to go up the road and rob somebody. There is no reasonable possibility that absent this one remark by Viars, the result of the trial would have been different. N.C.G.S. § 15A-1443(a). This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. LORENZA DONNELL NORWOOD

No. 318A94

(Filed 11 October 1996)

1. Jury § 222 (NCI4th)— capital murder—jury selection—death qualification—other jurors confused by questions—no rehabilitation

The trial court did not err in jury selection for a capital first-degree murder prosecution by excusing for cause twelve prospective jurors based on their answers to the trial court's death qualification questions. Although defendant contends that these jurors were likely confused since other prospective jurors expressed confusion when questioned about their responses, the record discloses that these twelve jurors unequivocally stated that they would be unable to vote for the death penalty even though they were satisfied beyond a reasonable doubt that the requirements for its imposition were present. Additional questions by defendant would not likely have produced different answers from those given to the court.

Am Jur 2d, Criminal Law § 685; Jury § 279.

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

2. Jury § 172 (NCI4th)— capital murder—jury selection—death qualification—jury as cross-section of community—no violation

A defendant in a capital first-degree murder prosecution was not deprived of his Sixth Amendment rights to a trial by a jury representing a fair cross-section of the community where the trial court during jury selection excused seven of nine African-American women and two of four African-American men after they said they would be unable to vote for the death penalty. Neither the Sixth Amendment nor *Batson v. Kentucky*, 476 U.S. 79, guarantees defendant the right to a jury composed of members of a certain race or gender, and *Batson* applies only to peremptory challenges, not challenges for cause. The excusal for cause of these jurors did not deprive defendant or the jurors of their constitutional rights.

Am Jur 2d, Criminal Law § 685; Jury § 279.

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

3. Jury § 258 (NCI4th)— capital murder—jury selection—State's use of peremptory challenges—no prima facie case of discrimination

The trial court did not err during jury selection for a capital first-degree murder prosecution by finding that defendant had not made out a *prima facie* case of discrimination in the State's use of a peremptory challenge where the trial judge found that the State had not previously used a peremptory challenge to strike an African-American juror, that an African-American man was seated on the panel, that there was no discernible pattern of removing African-American jurors, and that under the totality of the circumstances defendant had failed to make a *prima facie* showing of discrimination.

Am Jur 2d, Criminal Law §§ 681, 682; Jury § 244.

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

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

Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L. Ed. 2d 1078.

4. Jury §§ 82, 88 (NCI4th)— capital murder—jury selection—hardship discharge—last remaining black female

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing the only remaining black female because of personal commitments. The juror was a single woman with five children who had just enrolled in community college and defendant concedes that this was a valid hardship excusal. Although defendant argues that the juror should not have been considered in isolation because she was defendant's last hope of having a black female on the jury, defendant is not entitled to a petit jury composed in whole or in part of persons of a certain race.

Am Jur 2d, Jury §§ 133-139, 179, 182.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination justifying relief in federal court. 4 ALR Fed. 449.

Construction and application of provisions of Jury Selection and Service Act of 1968 (28 USCS secs. 1861-1867) governing plans for, and manner of, selecting federal grand and petit jurors. 17 ALR Fed. 590.

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution—Supreme Court cases. 33 L. Ed. 2d 783.

5. Jury § 204 (NCI4th)— capital murder—jury selection—State's burden—excusal for cause

The trial court did not abuse its discretion during jury selection in a capital first-degree murder prosecution by excusing two prospective jurors for cause where one stated that she would require the State to prove each element beyond all doubt, the other that he would hold the State to a higher burden at the sentencing phase than at the guilt-innocence phase and the court did not permit the defendant to attempt to rehabilitate them. The inability of these two prospective jurors to follow the legal standard required the trial court to excuse them for cause pursuant to N.C.G.S. § 15A-1212(8).

Am Jur 2d, Jury §§ 205, 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.

6. Jury § 139 (NCI4th)— capital murder—jury selection—reasonable doubt

There was no prejudicial error during jury selection for a capital first-degree murder prosecution by sustaining the State's objection when defendant asked a prospective juror whether he understood that "satisfies beyond a reasonable doubt" means "fully satisfies or entirely convinces you of the defendant's guilt" where the court read to the jury the pattern jury instruction, which included this phrase, and correctly instructed the entire jury in the charge at the end of each phase of the trial.

Am Jur 2d, Jury §§ 205, 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.

7. Jury § 150 (NCI4th)— capital murder—jury selection—death qualification—disparate treatment of defendant and State

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution where defendant contended that there was disparate treatment of defendant and the State in that there were sixteen instances in which the court denied rehabilitation of prospective jurors who said they were unable to vote for the death penalty whatever the evidence showed, in contrast to the court's allowing extensive rehabilitation of prospective jurors who believed the death penalty should be imposed in every case of first-degree murder. The jurors were excused for cause in two of the cases cited by defendant in which further questioning was allowed after the prospective juror indicated that the death penalty was appropriate for all cases of first-degree murder and in the other instances the court properly denied the challenges after rehabilitation.

Am Jur 2d, Jury §§ 230-233, 279.

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

Effect of accused's federal constitutional rights on scope of voir dire examination of prospective jurors—Supreme Court cases. 114 L. Ed. 2d 763.

8. Jury § 203 (NCI4th)— capital murder—jury selection—opinion that this crime terrible—ability to follow the law

The trial court did not err during jury selection in a prosecution for first-degree murder by denying challenges for cause to two jurors who stated that this particular homicide was "terrible" and "painful." Although defendant contended that the prospective jurors had already formed an opinion on whether this homicide was especially heinous, atrocious, or cruel, both jurors stated unequivocally that they could follow the law and there is no indication that their regard for the way the victim died as "terrible" or "painful" would have influenced their ability to do so.

Am Jur 2d, Jury §§ 230-233, 278, 284.

9. Jury § 203 (NCI4th)— capital murder—jury selection—jury with some knowledge of case—ability to be fair—disparate treatment of another juror

The trial court did not err during jury selection for a capital first-degree murder prosecution by not excusing for cause a prospective juror who worked as a telecommunicator for emergency services and had dispatched rescue vehicles to this crime scene; his wife worked for the owner of the convenience store where the crime occurred; and he knew "a little" about the case. This juror stated unequivocally that he could be a fair and impartial juror and that he could follow the law in this case. Although defendant contends that disparate treatment given to another juror challenged for cause indicates that unequivocal answers to similar questions ended in for-cause excusals for the State, disparate treatment of another prospective juror is not evidence that the trial court abused its discretion.

Am Jur 2d, Jury §§ 230-233, 289.

10. Constitutional Law § 371 (NCI4th)— death penalty—not unconstitutional

Although defendant argued that the constitutionality of North Carolina's death penalty should be reconsidered in light of Justice Blackmun's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, the North Carolina Supreme Court declined to change its position.

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.

11. Constitutional Law § 371 (NCI4th)— death penalty—IQ of 69—not unconstitutional

A sentence of death for a defendant with an IQ of 69 was not unconstitutional. The United States Supreme Court has ruled that the Eighth Amendment does not categorically prohibit the execution of mentally retarded defendants who commit capital crimes, the North Carolina Supreme Court has refused to extend special

protection to mentally retarded defendants under the North Carolina Constitution, and several death sentences involving defendants with IQs lower than this defendant's have been upheld. The defendant in this case passed the North Carolina competency test, obtained his driver's license, and held several jobs. A psychologist testified that he thought defendant knew that burning someone was wrong.

Am Jur 2d, Criminal Law § 628.

Propriety of imposing capital punishment on mentally retarded individuals. 20 ALR5th 177.

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.

12. Evidence and Witnesses §§ 1700, 1688 (NCI4th)— capital murder—autopsy photographs—photos of victim while alive

The trial court did not err in a capital first-degree murder prosecution by showing to the jury autopsy photographs of the victim and a photograph taken before his death. Defendant concedes that the autopsy photographs of the victim were used to illustrate the testimony of the medical examiner, it has repeatedly been held that showing photographs of victims made during their lives is not prejudicial error, and defendant has failed to show that the photographs were unduly prejudicial or that their admission was not proper.

Am Jur 2d, Evidence §§ 963, 964.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. 76 ALR Fed. 700.

13. Evidence and Witnesses § 2809 (NCI4th)— capital murder—leading question—incorrect repetition of answer—no prejudice

There was no prejudicial error in a capital first-degree murder prosecution where defendant contended that the prosecutor improperly led a twelve-year-old witness and that the prosecutor's incorrect repetition of the answer was the only evidence that the defendant had any intention to kill the victim. The witness's correction of the incorrect statement of the prosecuting attorney made any error harmless and, even without the prosecutor's misstatement, there was sufficient evidence from which a jury could find that defendant intended to kill the victim when he doused him with gasoline.

Am Jur 2d, Trial § 499; Witnesses § 853.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner. 38 ALR2d 952.

14. Evidence and Witnesses § 82 (NCI4th); Criminal Law § 1346 (NCI4th)— capital murder—burning of store and victim—officer's conversation with customer

There was no prejudice in a capital first-degree murder prosecution resulting from a burning in the admission of an officer's testimony about a witness's burns, observed when the officer spoke with the witness at a hospital, where defendant contended that the State produced no competent evidence to support its allegation that this man was burned as a result of defendant's acts. The officer's testimony was certainly relevant and admissible to support the charge that defendant committed an assault with a deadly weapon with intent to kill inflicting serious injury upon the witness and the court's dismissal of the assault indictment at the close of the State's evidence does not affect the admissibility of this evidence. Although defendant contended that there was a prejudicial effect on sentencing since no other evidence before the jury showed that someone other than the murder victim had been injured in the fire, there was testimony that others were in the store when the fire was set. N.C.G.S. § 15A-2000(e)(10) is concerned with the creation of a great risk of death to more than one person; it is not necessary that more than one person was actually injured.

Am Jur 2d, Evidence § 305; Homicide § 5.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 31 ALR4th 913.

Admissibility of statement made to government agent by unavailable witness, under Rule 804(b)(5) of Federal Rules of Evidence, providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 61 ALR Fed. 915.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

15. Criminal Law § 687 (NCI4th)— capital murder—requested instruction—given in substance

There was no error in a capital first-degree murder prosecution in the court's instructions on expert witnesses where the court did not give the charge requested by defendant, but the charge given instructed the jury in substance as requested by defendant.

Am Jur 2d, Homicide § 488; Trial § 1226.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

16. Evidence and Witnesses § 222 (NCI4th)— capital murder—flight—instruction

The trial court did not err in a capital first-degree murder prosecution by instructing the jury on flight where the evidence showed that defendant ran from the burning building and went to the house of a girl he knew; approximately six or seven hours passed by the time he called the police; and defendant testified that he knew by that time that police had seized his car and were looking for him. Regardless of the reason for the flight, the relevant inquiry is whether there is evidence that defendant left the scene and took steps to avoid apprehension.

Am Jur 2d, Evidence §§ 532-534; Homicide § 319; Trial §§ 1333-1335.

17. Homicide § 244 (NCI4th)— capital murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where the evidence showed that defendant and the victim had an altercation a few hours before the arson; defendant said he was going to "get" the victim and then threw a burning paper bag and gasoline at the victim behind the counter; and there was eyewitness testimony that defendant did not trip, but "gush[ed]" the gasoline behind the counter and then threw the container at the victim. Although defendant argues that the witnesses told divergent stories, that he had been drinking and smoking crack on the day of the fire, and that a psychologist had testified that he did not have the capacity to form the specific intent to kill, the jury is not required to accept the opinions or conclusions of a witness, expert or otherwise; furthermore, defendant was convicted under the felony murder rule as well as under the theory of premeditation and deliberation and his conviction for first-degree murder would not be affected even if the evidence of premeditation and deliberation was insufficient.

Am Jur 2d, Homicide §§ 52, 263-266, 439, 472.

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

18. Criminal Law § 463 (NCI4th)— capital murder—prosecutor's argument—close to evidence admitted

There was no error during a capital first-degree murder prosecution where the prosecutor was allowed to argue during the guilt phase testimony which defendant contends was not in evidence. The statement attributed to the witness by the prosecutor was close enough that there was no error.

Am Jur 2d, Criminal Law § 917; Trial §§ 572, 573.

19. Criminal Law § 441 (NCI4th)— capital murder—prosecutor's argument—defense psychologist

There was no error in sentencing phase closing arguments in a first-degree capital murder trial where the prosecutor stated that defendant's psychologist was not a forensic psychiatrist, but a psychologist who "helps children get over divorce." Even though the trial court accepted the witness as an expert, the pros-

ecutor's statements were supported by the record; additionally, it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument.

Am Jur 2d, Criminal Law § 917.

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.

20. Criminal Law § 452 (NCI4th)— capital murder—prosecutor's argument—catchall mitigating circumstance

There was no error in a capital first-degree murder prosecution where the prosecutor stated that the catchall mitigating circumstance indicated that defendant was "grasping at straws." This argument was not a depreciation of mitigating evidence so improper that it required *ex mero motu* intervention. Additionally, the trial court correctly instructed the jury on mitigating circumstances, including N.C.G.S. § 15A-2000(f)(9), and the jurors are presumed to follow the trial court's instructions.

Am Jur 2d, Criminal Law §§ 628, 917; Trial §§ 572, 573.

21. Criminal Law § 543 (NCI4th)— capital murder—prosecutor's questions—mistrial denied

The trial court did not abuse its discretion during a first-degree murder sentencing hearing by denying defendant's motion for a mistrial where the prosecutor asked defendant's high school teacher, who had testified about her opinion of defendant's ability and character, whether she thought the family and friends of the victim thought defendant deserved to die for the crime and whether she thought defendant was respectful of the victim when defendant poured gasoline on him and set him on fire. The trial court sustained defendant's objections and allowed motions to strike but defendant did not request a curative instruction. Defendant failed to show that the mere asking of questions to which objections were sustained prejudiced him.

Am Jur 2d, Criminal Law § 917; Trial §§ 572, 573.

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

22. Criminal Law § 1346 (NCI4th)— capital murder—aggravating circumstances—risk of death to more than one person

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The State's evidence showed that defendant threw a burning paper bag and gasoline into a convenience store during business hours; the store exploded into flames after the defendant had escaped; and at least two other people were in the store at the time. Defendant should have known that his action was hazardous to them and a can of gasoline, when used in conjunction with a burning paper bag, constitutes a device that has the potential to kill more than one person. N.C.G.S. § 15A-2000(e)(10).

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

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

23. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

A death sentence for a first-degree murder was not disproportionate where the evidence supports the aggravating circumstances and there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Defendant was found guilty of first-degree murder based on both the felony murder rule and on premeditation and deliberation, the jury found the murder to be especially heinous, atrocious, or cruel, and the victim suffered great physical pain in that he was burned alive and survived for twelve hours, knowing that death was imminent. Defendant, having set the victim on fire, did nothing to procure medical assistance, to inquire into the victim's condition, or to express remorse to the victim; in his own words, he stood and watched the victim burn

and then left the scene; and he went to a friend's house and did not call the police until several hours later. Although defendant contends that he is not "normal," the defendant's mental status does not render the death sentence disproportionate.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sumner, J., at the 16 May 1994 Criminal Session of Superior Court, Nash County, upon a verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals on his appeal from a conviction for willfully burning a building was allowed by this Court on 27 April 1995. Heard in the Supreme Court 13 December 1995.

The defendant was tried for first-degree murder, conspiracy to commit murder, willfully burning a building, and assault with a deadly weapon with intent to kill inflicting serious injury. The evidence at trial tended to show that on 13 April 1993, the defendant attempted to purchase a pint of wine from the Honolulu Mart convenience store. When the defendant was twenty cents short, the store clerk, Walid Al-Hourani, refused to sell him the wine. John Winstead, a customer in the store, agreed to pay the twenty cents upon the defendant's request, but the clerk still refused to sell wine to the defendant. After asking the defendant to leave, the clerk hit him on the arm with a baseball bat.

The defendant then walked down the path behind the Honolulu Mart and found his cousin, Herbert Joyner, who was with Mike Richardson. When the defendant told them what had happened, Joyner said, "You ought to burn the store down." Later, Joyner added, "If you set the store on fire, then I'm going to rob the store." Richardson procured a container half-filled with gasoline and gave it to the defendant. Joyner and the defendant then returned to the Honolulu Mart. The State's evidence tended to show that the defendant told Joyner he was going to "get" the clerk. Joyner waited outside while the defendant threw a burning paper bag into the store and then doused the clerk and his surroundings with gasoline. The store caught fire. One customer, Lynard Lancaster, escaped unharmed. He testified that another customer ran out of the store with his leg on fire and then left the scene. Al-Hourani, engulfed in flames, ran from the store shouting, "I'm gone, I'm gone." He had burns on ninety-five percent of his body and died within twelve hours of the incident. Before

he died, the victim identified the men responsible for his burns as "Herb" and "Bedrock," the nicknames of Joyner and the defendant.

The defendant testified that he intended only to scare the victim because the victim had hit him several times with a baseball bat earlier that day. According to the defendant, he returned to the store carrying gasoline in a jug because he "just wanted to scare the Jew to show him that he couldn't beat me with that bat like that." The defendant testified that Joyner threw a burning bag into the store. The defendant stated that he (the defendant) tripped on the threshold at the door, and the gas flew out of his hand onto the counter and the floor. When he saw that the victim was on fire, the defendant "panicked," so he watched the victim burn for a few moments and then walked away. He went to his mother's house, but when she was not there, he went to the home of a girl he knew. Approximately six hours later, when he discovered that police had located his car and were looking for him, the defendant called the police station and turned himself in.

Dr. John Gorman, a psychologist, testified that the defendant's IQ is 69 and that the defendant has "mild mental retardation with depression and certainly very severe problems with substance abuse." Although he stated that in his opinion the defendant did not have the capacity to form the specific intent to kill, Dr. Gorman stated that the defendant knew that burning a person "was something that was wrong."

The jury returned a verdict of guilty of first-degree murder based on premeditation and deliberation and felony murder and guilty of willfully burning a building. The jury found the defendant not guilty of conspiracy to commit murder. The court dismissed the assault charge. The defendant presented evidence at the sentencing phase that after the death of the defendant's best friend, the defendant changed and his drug use worsened. The defendant's mother testified that after the fire, the defendant was "sorry." There was also testimony that the defendant was mentally retarded, chronically depressed, and addicted to drugs and alcohol.

The jury found two aggravating circumstances, that the murder was especially heinous, atrocious, or cruel, and that the defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person. One or more jurors found twenty-eight mitigating circumstances, only three of which were statutory.

Nevertheless, the jury found that the mitigating circumstances did not outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty. Thus, the jury returned a recommendation of death, and the trial court sentenced the defendant to death in accordance with that recommendation. The defendant was sentenced, in addition, to thirty years' imprisonment for willfully burning a building. The defendant appealed.

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

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

WEBB, Justice.

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

JURY SELECTION ISSUES

[1] The defendant first assigns error to the excusal for cause of twelve prospective jurors based on their answers to the trial court's death qualification questions. First, the defendant says that the trial court's questions were confusing and that they failed to establish either an understanding on the part of the jurors of what they were being asked or an actual bias justifying their removal from the venire. *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). The defendant also says the trial court abused its discretion by failing to allow him the opportunity to rehabilitate these jurors. Finally, the defendant argues that the trial court's "formula" for excusing jurors for cause had a devastating impact on the racial composition of the jury, in violation of the Sixth Amendment to the United States Constitution, and infringed on the rights of the excluded jurors under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). These contentions are without merit.

The trial court explained to each prospective juror the procedure followed in a capital sentencing hearing in pertinent part as follows:

> The law . . . provides . . . that it is the duty of the jury to recommend that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things: Number one, that one or more of the aggravating circumstances prescribed by statute exists; number two, that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty; and number three, that any mitigating circumstances found to exist are insufficient to outweigh the aggravating circumstances found. Do you understand that . . . ?
>
> . . . .
>
> If the State fails to satisfy the jury of all these three things . . . it is the duty of the jury to recommend life imprisonment. Do you understand that . . . ?

The court then asked each juror the following questions:

> If you are selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether the defendant is guilty or not guilty of first degree murder or of any other lesser offense?
>
> . . . .
>
> If you are satisfied beyond a reasonable doubt of those things necessary to constitute first degree murder, can and will you vote to return a verdict of guilty of first degree murder, even though you know that death is one of the possible penalties?
>
> . . . .
>
> Considering your personal beliefs about the death penalty . . . please state for me . . . whether you would be able or unable to vote for a recommendation of the death penalty, even though you are satisfied beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances previously mentioned[.]

The trial court excused for cause those jurors who answered that they would be "unable" to vote for a recommendation of death, even if they answered that they could follow the law as to the sentencing requirements.

We upheld the same process and reason for excusing jurors for cause in *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995). In that case we held

that the trial court did not improperly excuse for cause those jurors who stated that they would be unable to impose the death penalty. *Id.* at 87-88, 449 S.E.2d at 721-22. We further held that the trial court's use of standardized questions and answers and its failure to allow rehabilitation by the defendant was not an abuse of discretion. *Id.*

We have held that a venireman may be excused for cause if he is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. *State v. Brogden*, 334 N.C. 39, 41, 430 S.E.2d 905, 907 (1993). A juror cannot properly be excused for cause for his views on capital punishment unless 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. 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)). It is not an abuse of discretion to refuse to allow the rehabilitation of a juror who has expressed unequivocal opposition to the death penalty. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990).

The defendant concedes that there is no evidence on the record that any of the prospective jurors were confused or misunderstood the questions. He contends, however, that their confusion was likely since other prospective jurors expressed confusion when questioned about their responses. As in *Ward*, the record discloses that twelve prospective jurors in this case unequivocally stated that they would be unable to vote for the death penalty even though they were satisfied beyond a reasonable doubt that the requirements for its imposition were present. Additional questions by the defendant would not likely have produced different answers from those given to the court. *Id.* It was not error for the court to deny the defendant the right to question these prospective jurors further.

[2] Finally, the defendant contends that the trial court's allowance of these challenges for cause deprived him of his constitutional rights to a trial by a jury representing a fair cross-section of the community as guaranteed by the Sixth Amendment. He says this is so because seven of the nine African-American women and two of the four African-American men were excluded after they said they would be "unable" to vote for the death penalty. The defendant also says, citing *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed 2d 69, that the challenges infringed on the rights of these excluded jurors. There is no merit to either argument.

These prospective jurors were properly excused for cause because of their opposition to the death penalty. Neither the Sixth Amendment nor *Batson* guarantees the defendant the right to a jury composed of members of a certain race or gender. *See Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975). Furthermore, *Batson* applies only to peremptory challenges, not challenges for cause. The excusal of these jurors for cause did not deprive the defendant or the jurors of their constitutional rights. *State v. Avery*, 315 N.C. 1, 19, 337 S.E.2d 786, 796 (1985).

This assignment of error is overruled.

[3] In his next assignment of error, the defendant contends that the trial court erred by failing to find that the defendant had established *prima facie* grounds to challenge the prosecutor's racially discriminatory use of a peremptory challenge and by improperly excusing a juror for cause. *Batson*, 476 U.S. 79, 90 L. Ed. 2d 69.

After the trial court had excused several of the minority jurors, the State used a peremptory challenge to excuse prospective juror Towanda Cooper. The defendant contends that nothing in the *voir dire* suggests a nondiscriminatory reason for excusing Ms. Cooper. He says he made a credible *prima facie* showing of discrimination because of the races of the defendant and victim, the racial overtones of the case, and the ultimate racial make-up of the jury. *See State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991). The trial judge found that the State had not previously used a peremptory challenge to strike an African-American juror, that an African-American man was seated on the panel, and that there was no discernible pattern of removing African-American jurors. He concluded that under the totality of the circumstances, the defendant failed to make a *prima facie* showing of discrimination. We accord great deference to the findings of the trial court. *State v. Larrimore*, 340 N.C. 119, 134, 456 S.E.2d 789, 796 (1995). We cannot say the trial court erred in finding that the defendant had not made out a *prima facie* case of discrimination.

[4] The defendant also argues that the court improperly excused Doris Williams, the only remaining black female, because of personal commitments. The juror was a single woman with five children and had just enrolled in community college. The defendant concedes that the trial court validly exercised discretion and that this was a valid hardship excusal. The defendant argues, however, that the juror should not have been considered in isolation, as she was the defend-

ant's last hope of having a black female serve on the jury. He contends that he was denied a jury comprised of a fair cross-section of the community. As we discussed above, the defendant is not entitled to a petit jury composed in whole or in part of persons of a certain race. *Lockhart v. McCree,* 476 U.S. 162, 90 L. Ed. 2d 137. The court properly exercised its discretion in this instance and did not err in excusing Ms. Williams *ex mero motu.*

This assignment of error is overruled.

In his next assignment of error, the defendant again contests the excusal for cause of two prospective jurors. Both prospective jurors stated that they were unable to impose the death penalty. For the reasons stated above, this assignment of error is overruled.

[5] In his next assignment of error, the defendant contends that the trial court erred by excusing prospective jurors for cause without allowing the defendant to inquire from them if they understood the concept of reasonable doubt and without further instruction on reasonable doubt. The defendant argues that the State lowered its burden of proof and set up a "false dichotomy" by limiting the jurors' choices to "reasonable doubt" and "all doubt." This argument has no merit.

Juror Ruth Strickland Thomas stated that she understood the State's burden, but that she would require the State to prove each element "beyond all doubt." Juror John Robert Fulk stated that he would hold the State to a higher burden at the sentencing phase than at the guilt-innocence phase. The State challenged each juror for cause, which the court allowed. The court did not permit the defendant to attempt to rehabilitate them.

The inability of these two prospective jurors to follow the legal standard required the trial court to excuse them for cause pursuant to N.C.G.S. § 15A-1212(8). The defendant cannot show that the trial court abused its discretion by denying his request to attempt to rehabilitate them. *See State v. McCollum,* 334 N.C. 208, 234, 433 S.E.2d 144, 158 (1993), *cert. denied,* —— U.S. ——, 129 L. Ed. 2d 895 (1994).

[6] The defendant also argues that the trial court erred in sustaining the State's objection to the defendant's questioning of prospective juror John Baines. The defendant asked him whether he understood that satisfies "beyond a reasonable doubt" means "fully satisfies or entirely convinces you of the defendant's guilt." The trial court sustained an objection by the State to this question and then gave the

pattern instruction on the meaning of reasonable doubt, which included this phrase. Any error by the trial court in sustaining the objection was cured by the trial court's reading the pattern instruction to the juror and by correctly instructing the entire jury on reasonable doubt in his charge at the end of each phase of the trial. *See State v. White*, 340 N.C. 264, 278, 457 S.E.2d 841, 849, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995).

This assignment of error is overruled.

[7] In his next assignment of error, the defendant contends there was disparate treatment of the State and the defendant during the jury *voir dire*. He bases this argument on what he says were sixteen instances in which the court denied rehabilitation of prospective jurors who said they were unable to impose the death penalty whatever the evidence showed, in contrast to the court's allowing extensive rehabilitation of prospective jurors who believed the death penalty should be imposed in every case of first-degree murder.

We have held that it was not error to deny rehabilitation in those instances in which a prospective juror said he or she was unable to impose the death penalty whatever the evidence showed. We have examined the instances cited by the defendant in which further questioning was allowed after the prospective juror had indicated he or she felt the death penalty is the appropriate sentence for all cases of first-degree murder. Two of the jurors so questioned were excused for cause. The defendant suffered no prejudice from the questioning of these prospective jurors. In the other instances, the court properly denied the challenges for cause after rehabilitation. The defendant cannot complain of these rulings. It is within the discretion of the court whether to allow the rehabilitation of jurors, and the court did not abuse its discretion in this case. *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994).

This assignment of error is overruled.

[8] By his next assignment of error, the defendant contends that the trial court erred in denying certain of the defendant's challenges for cause. The defendant argues that jurors Benjamin Melton and Michael Farrell should have been excused because they stated that this particular homicide was "terrible" and "painful." The defendant says that the prospective jurors had thus already formed an opinion on the issue of whether this homicide was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (Supp. 1995).

A review of the record reveals that both jurors stated unequivocally that they could follow the law. There is no indication that their regard for the way the victim died as "terrible" or "painful" would have influenced their ability to do so. As such, we cannot say the trial court erred in denying the challenges for cause.

[9] The defendant also argues that the court should have allowed his excusal for cause of prospective juror Alwyn Ray Dixon, who had personal involvement in the case. Mr. Dixon testified on *voir dire* that as telecommunicator for Nash County Emergency Services, he had dispatched the rescue vehicles to the crime scene; that his wife worked for the owner of the Honolulu Mart; and that he knew "a little" about the case. The defendant contends that disparate treatment given to another juror challenged for cause indicates that unequivocal answers to similar questions ended in for-cause excusals for the State.

A review of the record reveals that Mr. Dixon stated unequivocally that he could be a fair and impartial juror and that he could follow the law in this case. *Cf. State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992). Disparate treatment of another prospective juror is not evidence that the trial court abused its discretion. The defendant established no grounds to excuse Mr. Dixon for cause, and the trial court did not err in denying the defendant's motion.

This assignment of error is overruled.

GUILT-INNOCENCE PHASE ISSUES

[10] The defendant next argues that the death penalty is unconstitutional. The defendant acknowledges that this Court has consistently upheld the constitutionality of the death penalty statute in this State. *See, e.g., 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. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). However, he asks this Court to reconsider its position in light of Justice Blackmun's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, 127 L. Ed. 2d 435 (1994). We specifically rejected this argument in *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 688 (1996), and decline to change our position.

This assignment of error is overruled.

[11] The defendant also contends that the death penalty is unconstitutional as applied to him in this case because he is mentally retarded. He argues that sentencing him to death violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution.

Dr. John Gorman testified that the defendant has an IQ of 69. In *Penry v. Lynaugh*, 492 U.S. 302, 335, 106 L. Ed. 2d 256, 289 (1989), the United States Supreme Court ruled that the Eighth Amendment does not categorically prohibit the execution of mentally retarded defendants who commit capital crimes. Similarly, we refused to extend special protection to mentally retarded defendants under the North Carolina Constitution in *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), *cert. denied*, --- U.S. ---, 130 L. Ed. 2d 895 (1995). Furthermore, we have upheld several death sentences involving defendants with IQs lower than the defendant's. *See, e.g., State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144; *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The defendant in this case passed the North Carolina competency test, obtained his driver's license, and held several jobs. Dr. Gorman testified that he thought the defendant knew that burning someone was wrong. The imposition of the death penalty on the defendant in this case is not unconstitutional.

This assignment of error is overruled.

[12] The defendant next assigns error to the showing of certain photographs of the victim to the jury. Three of the photographs, including one that was oversized, were autopsy photographs used by the medical examiner to illustrate his testimony concerning the nature and extent of the victim's injuries, as well as the cause and mechanism of his death. The trial court also allowed the State to introduce and publish to the jury a photograph of the victim that was taken before his death. The defendant contends that these photographs violated the trial court's victim-impact order and served no purpose other than to inflame the jury. N.C.G.S. § 8C-1, Rule 403 (1988).

"Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words." *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or

repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Further, we have repeatedly held that showing photographs of victims made during their lives is not prejudicial error. *See, e.g., State v. Goode*, 341 N.C. 513, 539-40, 461 S.E.2d 631, 647 (1995). In this case, the defendant concedes that the autopsy photographs of the victim were used to illustrate the testimony of the medical examiner. The defendant has failed to show that the photographs were unduly prejudicial or that their admission was not proper.

This assignment of error is overruled.

[13] The defendant next contends that the trial court erred in overruling two of his objections to the prosecutor's questioning of April Fields. Fields was twelve years old at the time of trial and had been present at the scene of the crime. She testified that she overheard a conversation between the defendant and Joyner on their way to the Honolulu Mart. The following colloquy occurred between Miss Fields and the prosecutor:

> A: [The defendant] said, "Man, we going to get him. We're going to get him." And Herb said, "We sure is." No, he said, "We are. We're together, we're going to do it." And then he said, "If you're going to do it, do it," or something like that.
>
> Q: Let me see if I understand exactly what you said. [The defendant] said to Mr. Joyner, "We're going to get him. I'm going to kill him." Is that what he said?
>
> MR. FALK: Objection, your Honor.
>
> THE COURT: Overruled.
>
> Q: Keep your voice up now.
>
> A: He said that, "I am going to get him," and Herb said, "If you're going to do it, do it, because we're together and we're going to go down together."

The defendant contends that the prosecutor's leading of the witness was improper and that his incorrect repetition of the answer was prejudicial. The defendant says that this statement by the prosecutor is the only evidence that the defendant had any intention to kill the victim. We note that the witness' correction of the incorrect statement of the prosecuting attorney made any error harmless. Even without the prosecutor's misstatement, there was sufficient evidence

from which a jury could find that the defendant intended to kill the victim when he doused him with gasoline.

This assignment of error is overruled.

[14] The defendant next assigns error to the admission of Officer James Breedlove's testimony concerning a Mr. Orlando Dew on the grounds that the evidence was inadmissible, inflammatory, improper, and prejudicial. N.C.G.S. § 8C-1, Rule 403. The State elicited testimony from Officer Breedlove that he spoke with Mr. Dew at a local hospital the night of the fire. Mr. Dew was apparently at the Honolulu Mart the day of the fire. Officer Breedlove testified that Mr. Dew was burned on the knee and thigh and that "[i]t had already started to blister and bubble and the meat of the skin was starting to break on his left knee and above on his thigh." The defendant contends that the State produced no competent evidence to support its allegation that a man named Dew was burned as a result of the defendant's acts. The defendant argues that Officer Breedlove's testimony therefore created prejudice to the defendant. Although the officer testified that he took a statement from Mr. Dew on that day, the statement was not read into evidence because the prosecution had failed to give timely written notice pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5). The defendant contends that a curative instruction should have been given following the testimony of Officer Breedlove, although he made no such request at trial.

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 or less probable than it would be without the evidence. N.C.G.S. § 8C-1, Rule 401 (1992). Officer Breedlove's testimony concerning Mr. Dew was certainly relevant and admissible to support the charge that the defendant committed an assault with a deadly weapon with intent to kill inflicting serious injury upon Mr. Dew. Furthermore, the trial court's dismissal of the assault indictment at the close of the State's evidence does not affect the admissibility of the evidence.

The defendant says that this testimony also had a prejudicial effect on sentencing since no other evidence before the jury showed that someone other than the victim had been injured in the fire. He says that the testimony provided tainted support for the aggravating circumstance contained in N.C.G.S. § 15A-2000(e)(10), that he "knowingly created a great risk of death to more than one person." This contention has no merit.

First, the defendant testified that there were others in the store the morning of the fire. Lynard Lancaster testified that he and an old man were present in the store when the fire was set and that the man's leg was on fire. Second, the N.C.G.S. § 15A-2000(e)(10) circumstance is concerned with the creation of "a great risk of death to more than one person." The possibility that others would be present in the store when the defendant started the fire satisfies this requirement. It is not necessary to show that more than one person was actually injured. *See State v. Moose*, 310 N.C. 482, 497, 313 S.E.2d 507, 517 (1984). The defendant has not shown prejudice from this testimony.

This assignment of error is overruled.

[15] The defendant next assigns error to the court's refusal to give a requested instruction. The defendant requested that the court charge the jury: "You may consider the opinions rendered by expert witnesses regarding those elements." The "elements" to which the defendant was referring were his ability to form specific intent and to premeditate and deliberate. The court did not charge as requested by the defendant, but it did correctly charge at some length as to how expert testimony could be considered. The charge instructed the jury in substance as requested by the defendant. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

This assignment of error is overruled.

[16] The defendant next contends that the trial court erred in instructing the jury on flight over his objection. He says that there was insufficient evidence to support the instruction and that the erroneous instruction was prejudicial. *State v. Lee*, 287 N.C. 536, 215 S.E.2d 146 (1975).

A flight instruction is proper "[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 fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). Regardless of the reason for the flight, "the relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990). Based on the foregoing principles, the defendant's contention that his response to the fire was the natural response of a retarded person from an unexpected result does not negate the evidence of flight.

The evidence in this case shows that the defendant ran from the burning building and went to the house of a girl he knew. By the time he called the police, approximately six or seven hours had passed. The defendant testified that by that time, he knew police had seized his car and were looking for him. Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled. *State v. Tucker*, 329 N.C. 709, 723, 407 S.E.2d 805, 813 (1991). The trial court did not err in giving this instruction.

This assignment of error is overruled.

[17] The defendant next assigns error to the denial of his motion to dismiss the first-degree murder charge. He argues there was insufficient evidence of his specific intent to kill formed after premeditation and deliberation. First, we note that the defendant was convicted of first-degree murder under the felony murder rule, as well as under the theory of premeditation and deliberation. Even if we were to conclude that the evidence of premeditation and deliberation was insufficient, the defendant's conviction for first-degree murder would not be affected. *See State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989). In this case, the evidence of premeditation and deliberation was sufficient.

Considered in the light most favorable to the State, the evidence showed that the defendant and the victim had an altercation a few hours before the arson. The defendant said he was going to "get" the victim and then threw a burning paper bag and gasoline at the victim behind the counter. There was eyewitness testimony that the defendant did not trip, but rather "gush[ed]" the gasoline behind the counter and then threw the container at the victim.

The defendant argues that the witnesses told divergent stories, that he had been drinking and smoking crack on the day of the fire, and that Dr. John Gorman testified that the defendant did not have the capacity to form the specific intent to kill the victim. We note that the jury is not required to accept the opinions or conclusions of a witness, expert or otherwise, regardless of whether he has been impeached. *Maggio v. Fulford*, 462 U.S. 111, 117-18, 76 L. Ed. 2d 794, 800 (1983). We conclude that there was sufficient evidence for a rational juror to find that the defendant acted with the premeditation and deliberation required for a first-degree murder conviction.

This assignment of error is overruled.

[18] The defendant next assigns error to the trial court's failure to sustain his objection on one occasion and intervene *ex mero motu* on two occasions when the prosecutor made "improper and prejudicial" arguments in both the guilt and sentencing phases. *See State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975).

First, the defendant says that the prosecutor argued facts not in evidence during the guilt phase closing arguments. When describing the evidence showing conspiracy, the prosecutor stated, "Right in here somewhere April Fields said, I heard them talking, he said, 'We're in this together, man. You throw the gas on him, I'm going to rob the place.' " The defendant contends this characterization of Fields' testimony was incorrect and damaging to him. To the contrary, although Ms. Fields actually testified that the defendant said, "I am going to get him," the statement attributed to her by the prosecutor was close enough to what the witness said so that there was no error in his statement.

[19] Second, the defendant argues that the prosecutor improperly denigrated the credentials of the defendant's expert witness and violated the trial court's ruling during the sentencing phase closing arguments. The prosecutor stated that Dr. Gorman was not a forensic psychiatrist, but a psychologist who "helps children get over divorce." We note that even though the trial court accepted the witness as an expert, the prosecutor's statements were supported by the record. In addition, it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument. *State v. Bacon*, 337 N.C. 66, 90, 446 S.E.2d 542, 554 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995).

[20] Finally, the defendant argues that the prosecutor misstated the law regarding mitigating circumstances by drawing the jury's attention to the mitigating circumstance: "Any other circumstance or circumstances arising from the evidence which one or more of you deems to having [sic] mitigating value." The prosecutor stated that this circumstance indicated that the defendant was "grasping at straws." We conclude that this argument was not a "depreciation of mitigating evidence so improper that it required *ex mero motu* intervention by the trial court." *State v. Robinson*, 336 N.C. 78, 129, 443 S.E.2d 306, 332 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 650 (1995). In addition, the trial court correctly instructed the jury on the mitigating circumstances, including N.C.G.S. § 15A-2000(f)(9), which instructed the jury to consider any other mitigating circumstances

deemed to have mitigating value. This Court presumes that jurors follow the trial court's instructions. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993).

This assignment of error is overruled.

SENTENCING PHASE ISSUES

[21] The defendant next assigns error to the denial of his motion for a mistrial and for a new sentencing hearing based on improper questions posed by the prosecutor during the sentencing phase of the trial. The defendant contends that the prosecutor's questions violated the trial court's order limiting any victim-impact material and prejudiced the defendant.

The defendant objected during the sentencing proceeding to the following questions posed to Dee Dee Hicks, the defendant's high school teacher who testified about her opinion of the defendant's ability and character:

> Q: Do you think the family and friends of [the victim] thinks [sic] [the defendant] deserves to die for it?
>
> . . . .
>
> Q: Do you think [the defendant] was respectful to [the victim] when he set him on fire and poured a gallon of gasoline on him?

The trial court sustained both objections and allowed both motions to strike. The defendant says that the trial court should have given a curative instruction. We note at the outset that the defendant did not request one and that the "trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense." *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992).

A review of the context of the prosecutor's statements reveals that the witness had just stated that the defendant respected her authority and that she did not think he deserved to die for what he had done. The decision of whether to grant a mistrial is within the sound discretion of the trial judge. *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990). "[A] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C.

747, 754, 291 S.E.2d 622, 627 (1982). The defendant has failed to show that the mere asking of the questions to which objections were sustained prejudiced him. *See State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995). It was not error to deny the motion for a mistrial. N.C.G.S. § 15A-1443(a) (1988).

This assignment of error is overruled.

[22] By another assignment of error, the defendant contends that the trial court erred by submitting the aggravating circumstance that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.G.G.S. § 15A-2000(e)(10). The defendant argues that a can of gasoline is not a weapon that would normally be hazardous to more than one person. He also says that no competent evidence establishes that he was aware or should have been aware of others in the store.

First, the State's evidence showed that the defendant threw a burning paper bag and gasoline into a convenience store during business hours. The store exploded into flames after the defendant had escaped. At least two other persons were in the store at the time. The defendant should have known that his action was hazardous to them.

Regarding the second part of the statute,

> the crucial consideration in determining what type of weapon or device is envisioned by G.S. § 15A-2000(e)(10) is its potential to kill more than one person if the weapon is used in the normal fashion, that is, in the manner for which it was designed. The focus must be upon the destructive capabilities of the weapon or device.

State v. Moose, 310 N.C. at 497, 313 S.E.2d at 517. A can of gasoline, when used in conjunction with a burning paper bag, constitutes a device that has the potential to kill more than one person.

This assignment of error is overruled.

PRESERVATION ISSUES

The defendant brings forth additional assignments of error for preservation purposes. As we have previously decided the issues adversely to the defendant's position, we will not revisit those questions.

PROPORTIONALITY REVIEW

[23] Having determined that there was no error in the defendant's trial and capital sentencing proceeding, we are required to determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentence of death was imposed; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

The jury in this case found the defendant guilty of first-degree murder under the theory of premeditation and deliberation, as well as under the felony murder rule. It also found him guilty of willfully burning a building. 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 defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, N.C.G.S. § 15A-2000(e)(10).

We conclude that the evidence supports both circumstances. The victim in this case was burned alive and suffered for twelve hours before he died. This evidence was sufficient to support the jury's finding of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(9). As we discussed above, the evidence was also sufficient to support the aggravating circumstance in N.C.G.S. § 15A-2000(e)(10).

Having thoroughly examined the record, transcripts, and briefs in this case, we further conclude that there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We now turn to our final statutory duty of conducting a proportionality review. One purpose of proportionality review "is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Another is to guard "against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We compare this case to others in the pool (which we defined

in *State v. Williams*, 308 N.C. 47, 79-80, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), and *State v. Bacon*, 337 N.C. at 106-07, 446 S.E.2d at 563-64) that "are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (1994).

This case has several distinguishing characteristics. First, the defendant was found guilty of first-degree murder based on both the felony murder rule and on premeditation and deliberation. "The 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. Further, the jury found the murder to be especially heinous, atrocious, or cruel. Also, the victim suffered great physical pain in that he was burned alive and survived for twelve hours, knowing that death was imminent.

This Court gives great deference to a jury's recommendation of a death sentence. *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 694 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). In only seven cases have we found a death sentence disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We find the instant case distinguishable from each of these. None involved a defendant who deliberately burned the victim to death. None included the aggravating circumstance that the defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Furthermore, only two of these cases involved the "especially heinous, atrocious, or cruel" aggravating circumstance, but neither is similar to this case.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653, the victim was part of a gang of four men who robbed and beat the victim, but the evi-

dence failed to establish exactly which members engaged in the beating. Also, there was virtually no evidence of premeditation and deliberation. Stokes was convicted of first-degree murder under the felony murder rule, and the jury found only one aggravating circumstance. This Court also considered that one of Stokes's accomplices, who had committed the same crime, was sentenced to life imprisonment. The defendant contends that his sentence is disproportionate because Herb Joyner was allowed to plead to accessory before the fact to second-degree murder, even though he was no less culpable than the defendant. The defendant says that, if anything, he was less deserving of death than Joyner. The evidence in this case does not support the defendant's contention. Here, there was eyewitness testimony from a customer in the store that the defendant carried the jug of gasoline into the store and doused the victim with it. Two witnesses testified that the defendant was also the one who threw the lit paper bag into the store. Furthermore, this case is distinguishable from *Stokes* because the jury in this case found two aggravating circumstances, and the defendant was convicted of first-degree murder under the theories of premeditation and deliberation and felony murder.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170, we attached significance to the fact that after the defendant shot the victim from his car, the defendant exhibited concern for the victim's life and remorse for his action by directing the driver of the car to the hospital immediately after the shooting. The defendant accompanied the victim into the hospital to secure medical treatment for him and confessed to police. The defendant in this case did not show such remorse. We have found lack of remorse or pity and the defendant's cool actions after the murder to be indications that the death sentence was not disproportionate. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). In this case, the defendant, having set the victim on fire, did nothing to procure medical assistance, to inquire into the victim's condition, or to express remorse to the victim. In his own words, he stood and watched the victim burn and then left the scene. The defendant went to a friend's house and did not call the police until several hours later.

The defendant concedes that the victim in this case died in a gruesome manner, lingering for long hours knowing that death was imminent. He says that no "normal, reasonably intelligent[] adult could fail to appreciate the horror that would inevitably ensue from combining gasoline and fire." He says, however, that he is not "normal." As we

have discussed above, the defendant's mental status does not render the death sentence disproportionate.

We hold that the defendant received a trial and capital sentencing proceeding free from prejudicial error, that the jury did not sentence the defendant out of prejudice or passion, and that the sentence is proportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. ALDEN JEROME HARDEN

No. 427A94

(Filed 11 October 1996)

1. Constitutional Law § 344.1 (NCI4th)— capital murder—bench conferences—no error

The trial court did not err in a capital first-degree murder prosecution by conducting unrecorded bench conferences out of defendant's presence or in the absence of defense counsel where the record does not affirmatively show that defense counsel did not attend the bench conferences in question and reflects that defense counsel actually requested many of the conferences in question. Even assuming that one or more of these conferences occurred outside the presence of defendant or his counsel, any error was harmless because the court documented the subject matter of these conferences and the record demonstrates that none of these conferences implicated defendant's right to confrontation.

Am Jur 2d, Criminal Law §§ 695, 696, 910 et seq.

2. Criminal Law § 78 (NCI4th)— capital murder—pretrial publicity—change of venue denied—no error

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion for a change of venue for pretrial publicity where the trial court found that the media coverage of the circumstances of the crime was factual and that the media response to the incident was predominantly noninflammatory; defendant did not allege or attempt to prove that he was required to accept any juror who did not unequivocally state

that he or she could put aside any pretrial information and decide the case solely on the evidence presented at trial; defendant concedes that the jurors who were selected advised the trial court that they could set aside pretrial publicity; and the trial court conducted an individual examination of each juror and excused those who gave an equivocal answer regarding putting pretrial information aside.

Am Jur 2d, Criminal Law §§ 378, 389.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

3. Homicide § 257 (NCI4th)— capital murder—killing of police officer with officer's weapon—evidence of premeditation and deliberation—evidence sufficient

The trial court did not err in a capital first-degree murder prosecution arising from the shooting of two police officers by denying defendant's motion to dismiss the charges. Although defendant specifically argues that there was insufficient evidence that the killing of Officer Burnette was premeditated and deliberate, the State's evidence tended to show that defendant's intent changed sometime during his struggle with the officers from a mere attempt to flee to the killing of the officers to further his escape; defendant made the concerted effort to seize Officer Burnette's weapon, yank it from its holster, look down upon Officer Nobles, who was lying at his feet, and shoot him in the back of the head; and, having killed Nobles, defendant simply turned to the fallen officer Burnette, placed the barrel of the gun against the left side of Officer Burnette's head, and shot him.

Am Jur 2d, Homicide §§ 437 et seq.

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

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

4. Homicide § 495 (NCI4th)— capital murder—deliberation—instructions

The trial court did not err in a capital murder prosecution by refusing to instruct the jury on the elements of premeditation and

deliberation pursuant to defendant's request where the only substantive difference between the instruction given and defendant's requested instruction is that defendant's requested instruction requires the "deliberation" to occur before the scuffle or quarrel began, which is an incorrect statement of the law. Deliberation may occur during a scuffle or a quarrel between the defendant and the victim if the emotions produced by the scuffle or quarrel have not overcome defendant's faculties and reason.

Am Jur 2d, Homicide § 501.

5. Evidence and Witnesses § 2148 (NCI4th)— capital murder—police procedure—expert testimony excluded—no abuse of discretion

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excluding expert defense testimony about whether the victims, police officers, were following proper police procedures at the time they were murdered. The evidence tended to show that defendant started backing up when first approached by officers, then ran because he thought he had crack cocaine in his possession; clearly, defendant was not responding reasonably to arrest procedures and the witness's opinion about what the proper arrest procedures might have been was irrelevant to the circumstances of the case. Furthermore, defendant's offer of proof did not reveal that the witness would testify that the officers used excessive force. The testimony could only have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force used in attempting to apprehend defendant.

Am Jur 2d, Expert and Opinion Evidence §§ 1-7, 32-38, 43.

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under Rule 702 of Federal Rules of Evidence. 75 ALR Fed. 461.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rules 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. 76 ALR Fed. 700.

6. Jury § 260 (NCI4th)— capital murder—jury selection—peremptory challenges—Batson challenge

There was no error in a capital murder prosecution in the prosecutor's use of peremptory challenges where the prosecutor used eight of his fourteen peremptory challenges to remove black venire members, leaving only one black juror sitting on the final jury, and defendant specifically argues that the court permitted the prosecutor to peremptorily challenge two black females for a pretextual reason. The prosecutor gave reasons for the dismissal of each juror, so that the question of whether defendant met his initial burden of showing discrimination need not be addressed, and, with respect to the two black females, the prosecutor offered as reasons for excusing the first her youth and immaturity, along with concern about her residence (the YWCA) and her change in response regarding knowledge about the case. As for the second, she had small children, she expressed reservations about job security and loss of income, the prosecutor could not get her to elaborate when she said she did not oppose the death penalty, and the prosecutor felt she would hold the State to a higher burden than the law requires. There was sufficient evidence to support the trial court's finding that the reasons proffered by the prosecutor were race-neutral.

Am Jur 2d, Jury §§ 235, 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 challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-*Batson* federal cases. 110 ALR Fed. 690.

7. Evidence and Witnesses §§ 1688, 1694, 1700 (NCI4th)— capital murder of police officers—photographs of victims—appearance in life, at scene, autopsy

The trial court did not abuse its discretion in the capital first-degree murder prosecution of defendant for the murder of two police officers by overruling defense objections to the introduction of photographs of the victims. Two of the ten photographs were introduced to illustrate the testimony of the victims' relatives regarding the victims' appearance in life, two more were used to illustrate the testimony of police officers who carried the

victims to the hospital, and the medical examiner used the remaining six photographs to illustrate his testimony. Whether the use of photographic evidence is excessive in light of its illustrative value and whether the evidence is more probative than prejudicial are matters generally left to the sound discretion of the trial court.

Am Jur 2d, Evidence §§ 971, 972; Homicide §§ 417 et seq.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene. 37 ALR5th 515.

8. Evidence and Witnesses § 1501 (NCI4th)— capital murder—killing of police officers—introduction of their clothes

The trial court did not err in a prosecution for capital first-degree murder arising from the killing of two police officers by allowing the introduction of the bloody clothes of both officers. The condition of the officers' clothing tended to show the circumstances surrounding the struggle with defendant, the location and number of wounds, and the officers' relative sizes. Bloody clothing of a victim that is corroborative of the prosecutor's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial.

Am Jur 2d, Homicide § 413.

9. Criminal Law § 1312 (NCI4th)— capital sentencing—prior record—anecdotal evidence

The trial court did not err in a capital sentencing proceeding by allowing presentation of anecdotal evidence regarding defendant's prior criminal record and bad acts. Although defendant argued that he was willing to stipulate to having a previous criminal record and that the prosecutor is limited to proving those convictions through official court records, the use of witnesses in a capital sentencing proceeding to prove the circumstances of prior convictions has been approved.

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

10. Criminal Law §§ 1357, 1360 (NCI4th)— capital sentencing—instructions—impaired capacity—mental or emotional disturbance—use of conjunctive in each

There was no plain error in a capital sentencing proceeding where defendant argued that the use of the conjunctive in instructions on impaired capacity and mental or emotional disturbance impaired the jury's consideration of relevant mitigating evidence. The court's instruction allowed the jury to consider either or both of defendant's psychological problems in the context of the mental or emotional circumstance. With respect to the impaired capacity circumstance, an expert in forensic psychiatry testifying for defendant did not testify that either one of defendant's disorders alone resulted in impaired capacity but that defendant's capacity to appreciate the criminality of his conduct was impaired because he was suffering from both schizotypical personality disorder and crack cocaine addiction. Both of the trial court's instructions therefore comported with defendant's evidence.

Am Jur 2d, Criminal Law §§ 598 et seq., 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

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 § 496 (NCI4th)— capital sentencing—jury's request to review transcript denied—no plain error

There was no plain error in a capital sentencing proceeding where the trial court denied the jury's request for a transcript of

defendant's testimony and the testimony of defense experts in forensic psychiatry and psychopharmacology. The trial court was aware that it had discretion to produce the transcript and the record shows that the trial court exercised its discretion when deciding not to honor the jury's request. Also, it is clear that the trial court had decided that justice would be better served if the jury deliberations were not delayed to produce the requested transcripts and the trial court's instruction that the jurors rely upon their individual and collective memory of the testimony is indicative of further exercise of its discretion.

Am Jur 2d, Trial §§ 1577, 1578, 1580, 1671.

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

12. Criminal Law § 486 (NCI4th)— capital sentencing—publicity concerning another crime during deliberations—no voir dire

The trial court did not abuse its discretion in a capital sentencing proceeding arising from the murder to two Charlotte police officers by failing to conduct a jury *voir dire* regarding extensive publicity in the local media concerning shootings of two South Carolina officers during the jury's deliberations. The trial court is in the best position to know whether or to what extent matters extraneous to the trial might affect the jury and to take proper precautions to protect the defendant's right to a fair trial. The trial court's decisions on these issues will not be disturbed on appeal absent an abuse of discretion.

Am Jur 2d, Trial §§ 1546, 1547.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR4th 11.

13. Criminal Law § 1348 (NCI4th)— capital sentencing—mitigation—definition

The trial court did not err in a capital sentencing proceeding in its definition of mitigating circumstances where defendant contended that the court defined mitigation too narrowly and limited mitigation to evidence which was extenuating or which

reduced defendant's moral culpability. Defendant's contention has been consistently rejected.

Am Jur 2d, Criminal Law §§ 598 et seq., 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

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.

14. Criminal Law § 1373 (NCI4th)— death sentence—not disproportionate

A sentence of death was not disproportionate where the record fully supported the aggravating circumstances found by the jury and there was no indication that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary consideration. The evidence in this case clearly shows that defendant deliberately murdered two police officers for the purpose of evading a lawful arrest. The North Carolina Supreme Court has consistently noted that it has never found disproportionality in a case in which the defendant was convicted of killing more than one victim; there is no doubt that defendant took the weapon from one officer's holster for the purpose of shooting both officers; there is no doubt that prior to his encounter with the officers defendant stole a van and robbed and threatened two victims; and the jury found that defendant murdered the officers to avoid arrest and that he had been engaged in a course of conduct which included crimes of violence against others. The jury's finding of the prior conviction of a violent

felony aggravating circumstance is significant; none of the cases in which the death sentence was found to be disproportionate included this aggravating circumstance. The present case is more similar to certain cases in which the sentence of death was found proportionate than to those in which the sentence was found disproportionate or to those in which juries have consistently returned recommendations of life imprisonment.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Saunders, J., on 12 August 1994 in Superior Court, Mecklenburg County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 9 September 1996.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

Richard B. Glazier for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was indicted on 18 October 1993 for the first-degree murders of Anthony A. Nobles and John T. Burnette. He was tried capitally at the 5 July 1994 Criminal Session of Superior Court, Mecklenburg County. The jury found defendant guilty of both counts of first-degree murder on the theory of premeditation and deliberation. After a separate capital sentencing proceeding, the jury recommended a sentence of death for each murder, and the trial court sentenced defendant accordingly.

The State's evidence tended to show *inter alia* that on 5 October 1993, defendant shot and killed two Charlotte police officers, Anthony A. Nobles and John T. Burnette, who were attempting to apprehend him. The State called thirty-four witnesses during the guilt/innocence phase of the trial. Detailed testimony was presented tending to show that defendant began the day by stealing a green Ford Aerostar van from a local hotel. Defendant then robbed Rolfe Sukkert of his wallet, threatening to injure him or Sukkert's six-month-old grandson. Defendant next proceeded to assault and rob Charles Cook at another hotel. Officers Nobles and Burnette spotted a vehicle fitting the description and license tag of the stolen Aerostar van and requested "back-up" by radio. Witnesses testified that they

saw the officers chase and tackle defendant and heard shots being fired. A five-year-old eyewitness testified that he saw defendant fighting with the officers on the ground, and then he saw defendant shoot the officers. Another witness testified that after hearing gunshots, she saw defendant walking out of the woods and heard him state, "Two down, two down."

Defendant testified on his own behalf and admitted that he shot the two police officers, but stated that he did so only because he believed that the officers intended to shoot him. Defendant testified he then left the scene and hid under a tree for approximately four hours. When he left his hiding place, he was spotted by other officers searching for him. Defendant was pursued, apprehended, and taken into custody. Defendant gave a statement to the police, detailing events leading up to and including the shootings.

[1] By his first assignment of error, defendant contends that the trial court conducted unrecorded bench conferences out of his presence or in the absence of defense counsel in violation of defendant's rights under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Defendant relies on both his confrontation rights and on this Court's decision in *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991). In *Buchanan*, this Court held that

> a defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties. If, however, the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend, the defendant would have a constitutional right to be present. The burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence. Once a violation of the right is apparent, the burden shifts to the State to show that it is harmless beyond a reasonable doubt.

Id. at 223-24, 410 S.E.2d at 845 (citations omitted).

Since deciding *Buchanan*, this Court has had occasion to address the issue of a criminal defendant's right to personal presence as guaranteed by both the United States Constitution and the North Carolina Constitution. In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994),

cert. denied, —— U.S. ——, 130 L. Ed. 2d 1083 (1995), this Court held that

> even unrecorded bench conferences with counsel for both parties, conducted with the defendant in the courtroom, do not violate the defendant's right to be present unless the conference implicates the defendant's confrontation rights or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend. Defendant bears the burden of demonstrating the usefulness of his presence.

Id. at 85, 446 S.E.2d at 551 (citation omitted).

The record does not affirmatively show that defense counsel did not attend the bench conferences in question. To the contrary, the record reflects that defense counsel actually requested many of the conferences in question. Absent evidence in the record that defendant was not present in the courtroom, defendant cannot claim that the lack of evidence of his presence constitutes error. *See State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 739 (1996). Even if we assume, *arguendo*, that one or more of these conferences occurred outside of the presence of defendant or his counsel, any error was harmless beyond a reasonable doubt. The court documented the subject matter of these conferences either at the time of the conferences or later in the transcript, and the record demonstrates that none of these conferences implicated defendant's right to confrontation. This assignment of error is overruled.

[2] By another assignment of error, defendant contends that the trial court denied his federal and state constitutional right to a fair trial by an impartial jury by denying his motion for a change of venue. Defendant argues that the extreme amount of newspaper and television coverage inflamed the entire community for many weeks following the murders. Defendant presented a substantial number of reports and witnesses to illustrate the level of pretrial publicity and its effects on any prospective jurors from within the Charlotte area.

The test for determining whether a change of venue should be granted is whether "there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983). The burden is on the defendant to show a reasonable likelihood that the prospective jurors will base their decision in the case upon pretrial information rather than the evidence pre-

sented at trial and will be unable to remove from their minds any preconceived impressions they might have formed. *Id.* at 255, 307 S.E.2d at 347. This determination rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Alston*, 341 N.C. 198, 225, 461 S.E.2d 687, 701 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996).

For a defendant to meet his burden of showing that pretrial publicity prevented him from receiving a fair trial, he must show *inter alia* that jurors had prior knowledge concerning the case, that he exhausted his peremptory challenges, and that a juror objectionable to him sat on the jury. *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 347-48. In determining whether a defendant has met his burden of showing prejudice, it is always relevant to consider whether the chosen jurors stated that they could ignore any prior knowledge or earlier-held opinions and decide the case solely on the evidence presented at trial. *Id.* at 255, 307 S.E.2d at 348. "The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 34 (1991).

After reviewing the record, we conclude that defendant has failed to show that the trial court abused its discretion in denying his motion for a change of venue. First, the trial court found that the media coverage of the circumstances of the crime was factual. The trial court also found that the media response to the incident was predominantly noninflammatory. Defendant does not allege and makes no attempt to prove that he was required to accept any juror who did not unequivocally state that he or she could put aside any pretrial information and decide the case solely on the evidence presented at trial. Defendant even concedes that the jurors who were selected advised the trial court that they could set aside pretrial publicity. Further, the trial court conducted an individual examination of each juror and excused those who gave an equivocal answer regarding putting pretrial information aside. Because defendant cannot show that the pretrial publicity was inflammatory and prejudicial and prevented him from receiving a fair trial, this assignment of error is overruled.

[3] By another assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charges of first-degree murder. Defendant specifically argues that there was insuffi-

cient evidence that the killing of Officer Burnette was premeditated and deliberate. We disagree.

When considering a motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). First-degree murder is the unlawful killing of another human being with malice, premeditation, and deliberation. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation means that the act was thought out beforehand for some length of time, however short; but no particular amount of time is necessary for the mental process of premeditation." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). Deliberation is an intent to kill carried out in a "cool state of blood" without the influence of a violent passion or a sufficient legal provocation. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

The evidence, when considered in the light most favorable to the State, is sufficient to permit a rational juror to find that defendant killed the officers with premeditation and deliberation. The State's evidence tended to show that sometime during defendant's struggle with the officers, his intent changed from a mere attempt to flee to the killing of the officers to further his escape. Defendant made the concerted effort to seize Officer Burnette's weapon; yank it from the officer's holster; look down upon Officer Nobles, who was lying at his feet; and shoot him in the back of the head. Having killed Nobles, defendant simply turned to the fallen Officer Burnette, placed the barrel of the gun against the left side of Officer Burnette's head, and shot him. Based on this evidence, a reasonable juror could find that defendant killed the officers after premeditation and deliberation. This assignment of error is overruled.

[4] By another assignment of error, defendant contends that the trial court erred in refusing to instruct the jury on the elements of premeditation and deliberation pursuant to the following written request:

> A killing committed during the course of a quarrel or scuffle may constitute first degree murder if the defendant formed the

> intent to kill in a cool state of blood *before* the quarrel or scuffle began and the killing during the quarrel or scuffle was the product of this earlier formed intent. If, however, the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree. Therefore, if the State has failed to prove to you beyond a reasonable doubt that [defendant] formed the intent to kill Officers Burnette and Nobles *before* the scuffle, it would be your duty to find [defendant] Not Guilty of First Degree Murder.

(Emphasis added.) Defendant cites *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981), as authority for the appropriateness of this requested instruction.

As long as the trial court gives a requested instruction in substance, it is not error for a trial court to refuse to give a requested instruction verbatim, even if the request is based on language from this Court. *State v. Thompson*, 328 N.C. 477, 490-91, 402 S.E.2d 386, 393 (1991). In this case, the trial court instructed the jury that before it could convict defendant of the first-degree murder of either Officer Burnette or Officer Nobles, it had to find beyond a reasonable doubt that

> [defendant] acted with premeditation; that is that he formed the intent to kill [the victim] over some period of time, however short, before he acted.
>
> Fifth, that [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 passion, it is immaterial that he was in a state of passion or excited when that intent was carried into effect.

The only substantive difference between the court's instruction, which is taken from N.C.P.I.—Crim. 206.10, and defendant's requested instruction is that defendant's requested instruction requires the "deliberation" to occur *before* the scuffle or quarrel began. This is an incorrect statement of the law. Deliberation may occur during a scuffle or a quarrel between the defendant and the victim if the emotions produced by the scuffle or quarrel have not overcome the defendant's faculties and reason. *State v. Hill*, 311 N.C. 465, 470, 319 S.E.2d 163,

167 (1984); *see also State v. Simpson*, 341 N.C. 316, 347, 462 S.E.2d 191, 209 (1995) (not error for the trial court to refuse to give requested instruction when it is an incorrect statement of law), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 194 (1996). Thus, the trial court did not err in refusing to give defendant's requested instruction, as it was not an accurate statement of the law. This assignment of error is overruled.

[5] By another assignment of error, defendant contends that the trial court erred by excluding defense witness Ronald Guerrette's testimony regarding whether the victims were following proper police procedures at the time they were murdered. Defendant argues that this testimony was relevant to his defense of self-defense.

The admission of expert testimony is governed by the North Carolina Rules of Evidence. In *State v. Anderson*, 322 N.C. 22, 366 S.E.2d 459, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988), this Court summarized those rules as follows:

> The admissibility of expert testimony in North Carolina is now governed by Rule 702 of our Rules of Evidence. N.C.G.S. § 8C-1, Rule 702 (1986). We have construed that rule to mean that: "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987). In applying the rule, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion. *See id.* at 164, 353 S.E.2d at 384; *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). Further, under Rule 403 even relevant evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 434-35 (1986). Whether to exclude expert testimony for this reason also rests within the sound discretion of the trial court, which will be reversed only for an abuse of discretion. *Id.*

Anderson, 322 N.C. at 28, 366 S.E.2d at 463.

Applying the foregoing principles in reviewing the trial court's exclusion of Ronald Guerrette's testimony, we conclude that the trial court did not abuse its discretion. Rather, the trial court acted well within its discretion in excluding the proffered expert testimony on

the ground that it would not assist the jury in understanding the evidence or determining a fact in issue. The evidence in this case tended to show that when the officers first approached defendant, he started backing up and then ran because he thought he had crack cocaine in his possession. Clearly, defendant was not responding reasonably to the arrest procedures. Therefore, Guerrette's opinion about what the proper arrest procedures might have been was irrelevant to the circumstances in this case.

Further, defendant's offer of proof regarding Guerrette's testimony did not reveal that Guerrette would testify that the officers used excessive force in attempting to make the arrest. Thus, his testimony could only have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force the officers used in attempting to apprehend defendant. Accordingly, we conclude that the trial court did not abuse its discretion in excluding the proffered testimony. This assignment of error is overruled.

[6] By another assignment of error, defendant contends that his right to be tried by a jury selected without regard to race was violated by the prosecutor's discriminatory use of peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

In *Batson*, the United States Supreme Court set out a three-pronged process to determine whether a prosecutor impermissibly excluded prospective jurors because of their race. First, a criminal defendant must make out a *prima facie* case of discrimination by demonstrating that the prosecutor exercised peremptory challenges on the basis of race and that this fact and other relevant circumstances raise an inference of discrimination. *Id.* at 96, 90 L. Ed. 2d at 87-88. Here, the prosecutor gave reasons for the dismissal of each juror in question. Accordingly, we need not address the question of whether defendant met his initial burden of showing discrimination and may proceed as if a *prima facie* case had been established. *State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991).

Second, once a defendant has made a *prima facie* case of discrimination, the State must come forward with race-neutral explanations for the peremptory challenges. *Purkett v. Elem*, — U.S. —, —, 131 L. Ed. 2d 834, 839 (1995). However, the law "does not demand [a race-neutral] explanation that is persuasive, or even plausible. 'At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the

prosecutor's explanation, the reason offered will be deemed race neutral.' " *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 114 L. Ed. 2d 395, 406 (1991)).

Finally, the trial court must "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). In evaluating the State's explanations, a reviewing court should remember that the trial court's findings "largely will turn on evaluation of credibility, [and so] should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. The findings of a trial court are not to be overturned unless the appellate court is "convinced that its determination was clearly erroneous." *Hernandez*, 500 U.S. at 365, 114 L. Ed. 2d at 412.

Defendant argues that the prosecutor in this case used eight of his fourteen peremptory challenges to remove black venire members, leaving only one black juror sitting on the final jury. Defendant contends that race was a motivating factor for the prosecutor's dismissal of prospective black jurors. Defendant specifically argues that, over his objection, the trial court permitted the prosecutor to peremptorily challenge Shannon Smith and Linda Stein, both black females, for a pretextual reason.

With respect to Smith, the prosecutor offered her youth and immaturity as reasons for excusing her. The prosecutor also indicated concern about her residence (she lived at the YWCA) and her change in response regarding having knowledge about the case (she denied it at first and then said she had seen something in the paper). Based on those statements, the trial court allowed the challenges. The trial court subsequently noted in the record that Smith had been twenty-four minutes late for court that morning and that she had altered her testimony regarding exposure to pretrial publicity.

With respect to Stein, the prosecutor indicated four concerns in response to defendant's *Batson* motion: (1) she had small children; (2) she expressed reservations about job security and loss of income; (3) although she said she did not oppose the death penalty, the prosecutor could not get her to elaborate; and (4) the prosecutor felt that she would hold the State to a higher burden of proof than the law requires.

After careful review of the record, we conclude that the prosecutor's *voir dire* questioning of Smith and Stein shows that there was

sufficient evidence to support the trial court's finding that the reasons proffered by the prosecutor were race-neutral. This assignment of error is therefore overruled.

[7] By another assignment of error, defendant contends that the trial court erred by overruling his objections to the admission of photographs of the victims and the victims' uniforms. Defendant argues that the crime scene and autopsy photographs were unnecessary. Defendant maintains that the graphic nature of the witnesses' testimony precluded the necessity for the admission of the photographs. Furthermore, there was no dispute as to the identity of the victims or the cause of their deaths. Therefore, defendant argues the photographs should have been excluded.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Whether the use of photographic evidence is excessive in light of its illustrative value and whether the evidence is more probative than prejudicial are matters generally left to the sound discretion of the trial court. *Id.* at 285, 372 S.E.2d at 527. Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.*

A review of the record in this case shows that the prosecutor used a total of ten photographs of both victims. The prosecutor used two of these photographs to help illustrate the testimony of the victims' relatives regarding the victims' appearance in life. We have held that it is not error to admit photographs depicting a victim as he looked when he was alive. *State v. Goode*, 341 N.C. 513, 539-40, 461 S.E.2d 631, 646-47 (1995). The prosecutor used two more photographs to illustrate the testimony of the police officers who carried the victims to the hospital. The medical examiner used the remaining six photographs to illustrate his testimony regarding abrasions of the victims' bodies, the entrance site of the bullets, the bullets' trajectory, and the burned area around Officer Burnette's wound which indicated that the muzzle of the gun was pressed against his head when the fatal shot was fired. The use of the photographs was not excessive or repetitious. Therefore, we conclude that the trial court did not abuse its discretion in admitting these photographs for illustrative purposes.

[8] Defendant also contends that the introduction of the bloody clothes of both officers was unrelated to any issue in the case and was cumulative. Specifically, defendant argues that the sole purpose for the introduction of the bloody clothes was to sway the jury through emotion, sympathy for the victims, and anger at defendant. We disagree.

The condition of the officers' clothing in this case tended to show the circumstances surrounding the officers' struggle with defendant, the location and number of wounds, and the officers' relative sizes. Bloody clothing of a victim that is corroborative of the prosecutor's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial. *See State v. Knight*, 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995). Therefore, this assignment of error is overruled.

[9] By another assignment of error, defendant contends that the trial court erred in the capital sentencing proceeding by allowing the presentation of anecdotal evidence regarding his prior criminal record and bad acts. Defendant argues that because he was willing to stipulate to having a previous criminal record, the prosecutor is limited to proving those prior convictions through official court records and cannot introduce testimony of the victims to prove the circumstances surrounding those convictions. Defendant relies on this Court's decision in *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

In *Silhan*, this Court stated that

> the most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person.

Id. at 272, 275 S.E.2d at 484. However, we have approved the use of witnesses in a capital sentencing proceeding to prove the circumstances of prior convictions. In *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991), we found no error in the admission of testimony by a former SBI agent who had investigated the prior felony to support the (e)(3) aggravating circumstance. The agent was allowed to read into the record hearsay statements of a person who heard the defendant say to the victim of the prior crime that "if he didn't die, he would shoot him

again." *Id.* at 364, 402 S.E.2d at 615. Likewise, in *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 1013 (1995), we held that the State is entitled to present witnesses in the capital sentencing proceeding of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record or conviction. *Id.* at 120, 449 S.E.2d at 740-41. This assignment of error is overruled.

[10] By another assignment of error, defendant contends that the trial court erred in giving deficient and misleading instructions on two statutory mitigating circumstances: mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988) (amended 1994), and impaired capacity, N.C.G.S. § 15A-2000(f)(6). Defendant argues that the trial court improperly instructed in the conjunctive for both circumstances, thereby constricting the scope of each. The jury found the (f)(2) circumstance, but did not find the (f)(6) circumstance. Because defendant did not object to the instructions at trial, we review this issue for plain error. *See State v. Payne*, 337 N.C. 505, 526-29, 448 S.E.2d 93, 106-07 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 292 (1995).

The trial court instructed that the jury would find the (f)(2) circumstance if it determined that defendant was under the influence of a mental or emotional disturbance at the time of the murder as a result of "schitzotypal [sic] personality disorder and from crack cocaine addiction." Similarly, the trial court instructed the jury to find the (f)(6) circumstance if it found that defendant "had consumed crack cocaine and suffered schitzotypal [sic] personality disorder and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Defendant argues that the use of the conjunctive "and" in these instructions impaired the jury's consideration of relevant mitigating evidence. We disagree.

The Court recently addressed an argument identical to defendant's in *State v. Frye*, 341 N.C. 470, 507-08, 461 S.E.2d 664, 683-84 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 526 (1996). In *Frye*, defendant complained that the trial court instructed the jury to find the defendant acted under a mental or emotional disturbance or an impaired capacity if it determined that the murder was the result of "paranoid disorder, mixed substance abuse disorder, mixed personality disorder, and child abuse syndrome." *Id.* at 507, 461 S.E.2d at 684. Finding that this instruction was not plain error, we said:

> The court's instructions here did not preclude the jury from considering mitigating evidence. The court stated, with respect to the (f)(2) circumstance, that "it is enough that the defendant's mind or emotions were disturbed from any cause." This permitted the jury to consider any or all of defendant's psychological problems in the context of that circumstance. As to the (f)(6) circumstance, Dr. Noble never testified that any one of defendant's disorders alone resulted in impaired capacity. He did testify that defendant's history of drug abuse exacerbated his paranoia and that "intoxicants *and* psychosis [were] driving his behavior" at the time of the crime. (Emphasis added.) Thus, both instructions basically comported with defendant's evidence and were not plain error.

Id. at 508, 461 S.E.2d at 684.

Likewise, the trial court's instructions in this case did not preclude the jury from considering mitigating evidence. The trial court stated with respect to the (f)(2) circumstance, that "[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." This allowed the jury to consider either or both of defendant's psychological problems in the context of the (f)(2) circumstance. Further, with respect to the (f)(6) circumstance, Dr. Donald Morgan, an expert in forensic psychiatry testifying for defendant, did not testify that either one of defendant's disorders alone resulted in impaired capacity. Rather, Dr. Morgan testified that defendant's capacity to appreciate the criminality of his conduct was impaired because he was suffering from both schizotypal personality disorder and crack cocaine addiction. Both of the trial court's instructions therefore comported with defendant's evidence and were not plain error. This assignment of error is overruled.

[11] By another assignment of error, defendant contends that the trial court committed plain error in denying the jury's request for a transcript of his testimony and of the testimony of defense witnesses Dr. Morgan and Dr. John Warren, an expert in forensic psychiatry and psychopharmacology. We disagree.

This Court considered virtually the same issue in *State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995). In *Buckner*, the Court held that "the trial judge acted within his discretion and with the understanding that the decision as to the jury's request was fully within his discretion when he denied the jury's request to review the

testimony." *Id.* at 233, 464 S.E.2d at 434. Here, as in *Buckner*, the trial court was aware that it had discretion to produce the transcript, and the record shows that the trial court exercised its discretion when deciding not to honor the jury's request. The trial court was also aware that both doctors and defendant had testified at great length; the doctors' testimony covered over 180 pages of transcript and defendant's another 155 pages. In light of this evidence, it is clear that the trial court had decided that justice would be better served if the jury deliberations were not delayed to produce the requested transcripts. Moreover, the trial court's instruction that the jurors rely upon their individual and collective memory of the testimony is indicative of further exercise of its discretion. *See State v. Corbett*, 339 N.C. 313, 338, 451 S.E.2d 252, 265 (1994) (trial court exercised its discretion and complied with requirements of N.C.G.S. § 15A-1233(a) when it instructed jurors to rely upon their individual recollections to arrive at a verdict). This assignment of error is overruled.

[12] By another assignment of error, defendant contends that the trial court erred in failing to conduct a jury *voir dire* regarding extensive publicity in the local media concerning shootings of two South Carolina police officers. On 12 August 1994, during the jury's deliberations, Mecklenburg County area newspapers, television, and radio carried news stories about the shooting of two police officers in York County, South Carolina, a county adjacent to Mecklenburg County, North Carolina. In the absence of the jury, defendant specifically requested that the trial court conduct an individual *voir dire* of each juror deliberating at the capital sentencing proceeding to determine whether any of the jurors had encountered publicity about the shootings of the South Carolina officers and whether the publicity had any effect on their ongoing deliberations. Defendant maintains that his request constituted a reasonable request, especially since the shootings were covered extensively in the media. We disagree.

Issues regarding the examination of jurors are always addressed to the sound discretion of the trial court, and its decisions on these issues will not be disturbed on appeal absent an abuse of discretion. *State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202. The trial court is in the best position to know whether or to what extent matters extraneous to the trial might affect the jury and to take proper precautions to protect the defendant's right to a fair trial. *State v. Wilson*, 322 N.C. 117, 127, 367 S.E.2d 589, 595 (1988). Because defendant has not shown that the trial court abused its discretion when it refused to conduct a *voir dire* of the jury regarding the unre-

lated shooting of the officers in South Carolina, we overrule this assignment of error.

[13] By another assignment of error, defendant contends that the trial court erred when defining the term "mitigating circumstance" in its instructions to the jury. When instructing the jury during the sentencing phase, the trial court defined mitigating circumstance as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing and making it less deserving of extreme punishment than other first degree murders.

Defendant argues that the trial court's instructions defined mitigation too narrowly and limited mitigation to evidence which was extenuating or which reduced defendant's moral culpability. We disagree.

Defendant's contention has been consistently rejected by this Court. *See State v. Conaway*, 339 N.C. 487, 534, 453 S.E.2d 824, 854, *cert. denied*, — U.S. —, 133 L. Ed. 2d 153 (1995); *State v. Robinson*, 336 N.C. 78, 121, 443 S.E.2d 306, 327 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995). The instruction used by the trial court in defining mitigation is identical to the one which was approved by this Court in *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). We see no reason to depart from our prior holding. Therefore, this assignment of error is overruled.

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

[14] 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). 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 sentences of death in this case were imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In the present case, defendant was convicted of two counts of premeditated and deliberate first-degree murder. The jury found the following aggravating circumstances as to both counts: that defendant had been previously convicted of a violent felony, 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 against a law enforcement officer while engaged in the performance of his official duty, N.C.G.S. § 15A-2000(e)(8); and that the murder was committed as part of a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(11). The jury found as the sole statutory mitigating circumstance as to both counts that defendant was under the influence of a mental or emotional disturbance at the time of the offense, N.C.G.S. § 15A-2000(f)(2). In addition, the jury found seventeen of the twenty-five nonstatutory mitigating circumstances that were submitted as to both counts of first-degree murder.

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; *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.

Of the cases in which this Court has found the death sentence to be disproportionate, the case most similar to the present case is *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163. In *Hill*, the defendant was convicted of killing a single police officer with the officer's weapon after the officer had struggled with him in an effort to arrest him. This Court vacated the sentence of death based upon the speculative nature of the evidence, specifically, the lack of evidence tending to show that defendant drew the gun from the officer's holster and the lack of evidence regarding defendant's actions prior to the encounter with the officer.

However, the present case is clearly distinguishable from *Hill* for several significant reasons. First, defendant here murdered two police officers, not just one. This Court has consistently noted that it has never found disproportionality in a case in which the defendant was convicted of killing more than one victim. *See 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. Rose*, 339 N.C. 172, 451 S.E.2d 211 (1994), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 818 (1995); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Second, there is no doubt as to how defendant gained possession of Officer Burnette's weapon—he took it from Officer Burnette's holster for the purpose of shooting both Officer Nobles and Officer Burnette. Third, there is no doubt about what defendant had been doing prior to his encounter with the officers—he stole a van, and robbed and threatened two victims. Finally, in contrast to the jury in *Hill*, the present jury found that defendant murdered the officers to avoid arrest and that defendant had been engaged in a course of conduct which included crimes of violence against others. With respect to the issue of defendant's motive, defendant himself confessed that he murdered the unarmed Officer Burnette because after he had killed Officer Nobles, "I had to shoot him. I couldn't let him go."

The evidence in this case clearly shows that defendant deliberately murdered two police officers for the purpose of evading a lawful arrest.

The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in

> degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Hill, 311 N.C. 465, 488, 319 S.E.2d 163, 177 (dissenting opinion of Mitchell, J. (now C.J.)), quoted with approval in *State v. McKoy*, 323 N.C. 1, 46-47, 372 S.E.2d 12, 37 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). Therefore, we conclude that the present case is distinguishable from those cases in which we have found the death penalty 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. Moreover, 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 note 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 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.

STATE OF NORTH CAROLINA v. ELI NAIN OCASIO

No. 316A95

(Filed 11 October 1996)

1. Homicide § 283 (NCI4th)— felony murder—kidnapping—acting in concert—intent—evidence sufficient

The trial court did not err in a noncapital prosecution for first-degree murder by denying defendant's motions to dismiss charges of first-degree murder, second-degree burglary, larceny, kidnapping, larceny of a motor vehicle, breaking and entering, and safecracking where defendant contended that the evidence was insufficient to show that he possessed the requisite intent. The evidence showed that defendant agreed to commit the crimes with three others and suggested to another that he could participate in the planned robbery, defendant told that person that the victims would be killed if either saw their faces, and defendant stood guard over the victims. Defendant was convicted of two counts of first-degree murder solely on the basis of felony murder with the underlying felonies being kidnapping; the evidence was clearly sufficient to show that defendant acted in concert in committing these offenses.

Am Jur 2d, Conspiracy §§ 13, 20; Evidence § 837; Homicide §§ 34-36, 445; Trial § 1286.

2. Criminal Law § 106 (NCI4th)— noncapital murder—defendant's prior bad acts—statement of State's witness—discovery

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's pretrial motion to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce where a witness for the State testified about his written statement on redirect examination, the statement was read into evidence, and the statement contained an assertion that defendant had burglarized other homes. The State complied with the requirements of N.C.G.S. § 15A-903 by providing defendant with the substance of the statement; nothing in the discovery statute or N.C.G.S. § 8C-1, Rule 404(b) obligated the State to provide defendant with the written statement prior to trial.

Am Jur 2d, Depositions and Discovery §§ 438, 443.

3. Evidence and Witnesses § 2902 (NCI4th)— noncapital murder—prior burglary by defendant—admitted on redirect—no plain error

There was no plain error in a noncapital first-degree murder prosecution where a State's witness was allowed to testify about a prior burglary by defendant. The prosecutor introduced the statement only on redirect examination in response to defense counsel's questioning of the witness; the State was entitled to clear up any confusion that may have been created by defense counsel's questioning. Even assuming that the trial court erred by not intervening *ex mero motu*, that error did not amount to manifest injustice and did not amount to plain error.

Am Jur 2d, Trial § 564.

4. Evidence and Witnesses § 1262 (NCI4th)— noncapital murder—inculpatory statement by defendant—admissible

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to exclude his inculpatory statement. The trial court found that defendant was advised of his rights during his interrogation in New York and stated that he was willing to waive those rights; that he waived his rights orally and in writing and gave investigating officers an oral statement regarding the charges pending against him in North Carolina; and that one of the officers wrote a brief summary of the statement. The findings support its conclusion that defendant freely, knowingly, understandingly, and voluntarily waived his right to remain silent and his right to counsel after being advised of his rights, and the conclusions support the judgment denying defendant's motion to suppress.

Am Jur 2d, Evidence §§ 716, 717; Trial § 1426.

State constitutional requirements as to exclusion of evidence unlawfully seized—post-Leon cases. 19 ALR5th 470.

What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence. 34 ALR Fed. 412.

5. Evidence and Witnesses § 1700 (NCI4th)— noncapital murder—autopsy photographs—admissible

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by permitting the introduction of

three photographs which were used to illustrate the testimony of the pathologist as to the victim's cause of death. Although some of the photographs were gruesome, they were relevant to show the circumstances of the killing and tended to establish the extent of one victim's head wound.

Am Jur 2d, Evidence §§ 963, 964; Homicide §§ 276, 434.5; Trial § 507.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. 76 ALR Fed. 700.

6. Criminal Law § 468 (NCI4th)— noncapital murder—prosecutor's argument—no error

The trial court did not err in a noncapital murder prosecution by not intervening *ex mero motu* in the prosecutor's closing argument where defendant contended that the prosecutor's argument contained misstatements of law, matters not in evidence, and personal opinions injected solely to arouse the passions of the jury, but 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.

Am Jur 2d, Trial §§ 555, 566, 609, 648.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused—modern state cases. 88 ALR3d 449.

7. Homicide § 727 (NCI4th)— felony murder—underlying conviction—failure to arrest—error

The trial court erred in a noncapital murder prosecution which resulted solely in felony murder convictions by failing to arrest judgments on the underlying convictions for kidnapping.

Am Jur 2d, Homicide § 72; Trial §§ 1427, 1428.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide. 40 ALR3d 1341.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR3d 397.

8. Criminal Law § 1237 (NCI4th)— sentencing—credit for assistance in obtaining guilty pleas—no abuse of discretion

The trial court did not abuse its discretion in sentencing defendant for noncapital first-degree murder, burglary, and larceny by failing to give sufficient credit for the assistance defendant gave the State that enabled the State to secure guilty pleas from defendant's codefendants where the trial court sentenced defendant to the mandatory minimum for his first-degree murder convictions, consolidated several convictions for judgment, and gave minimum or presumptive sentences for those convictions.

Am Jur 2d, Trial § 1760.

What constitutes playing "mitigating role" in offense allowing decrease in offense level under United States Sentencing Guideline sec. 3B1.2, 18 USCS Appendix. 100 ALR Fed. 156.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of life imprisonment entered by Strickland, J., at the 16 January 1995 Criminal Session of Superior Court, Onslow County, upon jury verdicts of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed 12 February 1996. Heard in the Supreme Court 10 September 1996.

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

Margaret Creasy Ciardella for defendant-appellant.

FRYE, Justice.

Defendant, Eli Nain Ocasio, was indicted for the murders of Phyllis Aragona and Scott Allen Gasperson. He was also indicted for one count of second-degree burglary, four counts of felonious larceny, four counts of felonious possession of stolen property, two counts of first-degree kidnapping, one count of felonious breaking and entering, and one count of safecracking. He was tried noncapitally to a jury, found guilty of two counts of murder in the first degree, and sentenced to two mandatory terms of life imprisonment.

Defendant was sentenced to additional consecutive prison terms of fourteen years for second-degree burglary and larceny; two terms of twelve years for kidnapping; five years for two counts of larceny of a motor vehicle; and nine years for breaking and entering, larceny, and safecracking. Defendant appealed his murder convictions to this Court. We allowed defendant's motion to bypass the Court of Appeals as to the additional judgments.

Defendant brings forward ten assignments of error. 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: On 12 July 1990, defendant lived in a mobile home in Jacksonville, North Carolina, with his mother, Maria Monserrata (Monserrata), and Gary Fernandez (Fernandez), Monserrata's boyfriend. Also living in the mobile home were Fernandez's son Orlando; Orlando's wife, Lissette; the baby of Orlando and Lissette; Fernandez's son Charlie; and Monserrata's other son, Bruce. Near the beginning of July, Fernandez and Orlando were planning to rob Woodson Music and Pawn Store, which was located in Piney Green Shopping Center in Jacksonville. Fernandez asked Monserrata to participate in the robbery. Fernandez and Monserrata solicited defendant's participation. Fernandez and Monserrata also solicited the participation of Monserrata's daughter, Jeanette, but she refused. Defendant told his friend Mark Watkins about the plans for the robbery, but Watkins declined to participate. The plan consisted of waiting at the home of Scott Gasperson, the store's manager, and Phyllis Aragona, Gasperson's girlfriend who was also a store employee, until they came home from work one evening, kidnapping them, and forcing Gasperson to assist them in taking money and property from the store. On the night of 12 July 1990, the plan was executed.

Monserrata, Fernandez, Orlando, and defendant went to the victims' residence, pried open the front door with a screwdriver, and went inside. Monserrata left, but the three men remained inside. When Aragona arrived at her home, the men bound her with duct tape. Defendant guarded Aragona while Fernandez and Orlando pillaged the house. When Gasperson arrived, they bound him with duct tape as well. At some point, Monserrata returned, and they all went back to the mobile home. Defendant drove Aragona's Chevrolet

Blazer and transported the victims, who were still bound with duct tape. Once back at the mobile home, defendant guarded the victims.

On the morning of 13 July 1990, Fernandez left with Gasperson and returned without him. Gasperson's lifeless body was found later that day beside his automobile in a wooded area. Gasperson had suffered a shotgun blast to the head. On 13 July 1990, Monserrata, Fernandez, Orlando, and defendant travelled in two automobiles to Miami, Florida. The State's evidence showed that the most direct route from Jacksonville to Miami would be south on Highway 53, crossing Highway 41 in Pender County, and then to Interstate 95. Upon their arrival in Miami, the group stayed a couple of weeks and then went to the Dominican Republic. Aragona's decayed body was found approximately nine months later near Highway 53 in Pender County, approximately thirty-five to forty-five miles from Jacksonville.

The evidence also tended to show that two different types of duct tape were used to bind the victims. Pieces of both types were found at the victims' residence and at defendant's residence as well as at the scenes where the victims' bodies were ultimately located. The screwdriver that was used to pry open the front door to the victims' residence was also found at defendant's residence, along with homemade hoods of the type attached to Gasperson's body and of the type found in the trunk of the automobile in which defendant rode to Florida. Property owned by Gasperson and duct tape consistent with the type used to bind the victims were found in a storage unit rented by Orlando. Monserrata, Fernandez, and Orlando were arrested when they fled to the Dominican Republic; however, defendant was not arrested until 1994, when he was taken into custody in New York by agents of the Federal Bureau of Investigation. While in custody in New York, defendant gave a statement to an Onslow County police officer and an agent of the North Carolina State Bureau of Investigation. Defendant was ultimately extradited to North Carolina.

Defendant did not testify at trial but presented the testimony of the bail bondsman who had posted bail for Monserrata and Fernandez to be released from jail on narcotics charges prior to the commission of the crimes charged in this case.

Defendant made motions to dismiss all charges against him at the close of the State's evidence and again at the close of all the evidence. Except for the charges of felonious possession of stolen goods on

which the State did not proceed, the trial court denied defendant's motions to dismiss.

[1] Defendant assigns as error the trial court's denial of his motions to dismiss all the charges against him. Defendant argues that the evidence was insufficient to show that he possessed the requisite intent to commit any of the charged crimes.

On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* To be "substantial," evidence must be existing and real, not just "seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988).

In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). The determination of the witnesses' credibility is for the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383.

"[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653. "The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61.

In the instant case, defendant does not contend that he is not the perpetrator of the crimes charged. Instead, defendant argues that there was insufficient evidence to show that he possessed the requisite *mens rea* for the crimes charged. We disagree.

The State's evidence showed that defendant agreed to commit the crimes charged with Monserrata, Fernandez, and Orlando. The evidence further shows that defendant suggested to Mark Watkins that he could participate in the planned robbery. The evidence also shows that defendant told Watkins that if either of the victims saw their faces, they would be killed. The evidence shows that defendant stood guard over the victims both at their apartment and at the mobile home. Additionally, we note that defendant was convicted of two counts of first-degree murder solely on the basis of the felony murder rule with the underlying felonies being two counts of kidnapping. Viewing the evidence in the light most favorable to the State, we conclude that the trial court did not err in denying defendant's motions to dismiss the charges of two counts of first-degree murder, one count of second-degree burglary, two counts of larceny, two counts of kidnapping, two counts of larceny of motor vehicle, one count of breaking and entering, and one count of safecracking. The evidence was clearly sufficient to show that defendant acted in concert with Fernandez, Monserrata, and Orlando in committing these offenses. Accordingly, we reject this assignment of error.

[2] Defendant also assigns as error the trial court's denial of his pretrial motion to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant argues that the trial court's denial of his motion deprived him of his constitutional rights to due process including his right to effective cross-examination of Mark Watkins regarding Watkins' written statement to the police containing an assertion that defendant had previously broken into other homes and burglarized them.

At trial, Watkins, a witness for the State, did not testify as to his written statement to the police on direct examination. However, after being cross-examined by defendant about his statement to police, Watkins testified on redirect examination about the written statement. After authenticating the statement, the State requested that the statement be read into evidence rather than passed to the jury. Without objection, the trial court allowed the State's request. In addition to describing the robbery plans of defendant and his family, Watkins' written statement read into evidence stated that defendant told Watkins that defendant had also broken into a house on Lakewood Drive. Watkins stated that defendant told Watkins that defendant had stolen "a camera, some liquor and some old, possibly valuable coins."

Rule 404(b) governs the admissibility of evidence of other crimes, wrongs, or acts and 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). In *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, ––– U.S. ––, 131 L. Ed. 2d. 292 (1995), we said that Rule 404(b) "addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder." *Id.* at 516, 448 S.E.2d at 99. The statute governing disclosure of evidence by the State, N.C.G.S. § 15A-903 (1988), requires the prosecutor

> [t]o divulge, in [writing], the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State . . . .

N.C.G.S. § 15A-903(a)(2).

In the instant case, defendant concedes that the "record reveals that the State provided the *substance* of the testimony of Mark Watkins." Nevertheless, defendant argues that "there is nothing in the record to show that the defendant was ever provided information regarding the statement of Mark Watkins that defendant supposedly committed break-ins." Defendant contends that it is this specific information that he requested in his motion. We conclude, however, that the State complied with the requirements of N.C.G.S. § 15A-903 by providing defendant with the substance of Watkins' statement. Nothing in the discovery statute or Rule 404(b) obligated the State to provide defendant with Watkins' written statement prior to trial. Accordingly, we reject this assignment of error.

[3] By another assignment of error, defendant contends that the trial court erred in allowing Mark Watkins to testify about the prior burglary because it constituted a prior bad act purportedly committed by defendant. Defendant did not object to Mark Watkins' reading of his 4 September 1990 statement to the police at trial and now asks this Court to order a new trial under the plain error rule. 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.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (footnote omitted in original), *quoted in State v. Weathers*, 339 N.C. 441, 450, 451 S.E.2d 266, 271 (1994). Although *Odom* dealt with jury instructions, we have applied the plain error rule to the admission of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806 (1983).

The prosecutor introduced the written statement only on redirect examination of Mark Watkins in response to defense counsel's questioning of Watkins about a statement that he had made to police. The State was entitled to clear up any confusion that may have been created by defense counsel's questioning regarding a statement that Watkins had made to the police. Even assuming *arguendo* that the trial court erred in not intervening *ex mero motu* to exclude that portion of Mark Watkins' statement which referred to the prior bad act, we conclude that the court's error did not result in manifest injustice and did not amount to plain error.

[4] By another assignment of error, defendant contends that the trial court committed prejudicial error in denying his motion to suppress and to exclude from evidence defendant's inculpatory statement. By pretrial motion filed 4 August 1994, defendant moved to suppress his statement to police on the ground that it was unconstitutionally obtained. The trial court conducted a hearing on defendant's motion at which defendant presented evidence.

In *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), *cert. denied*, 498 U.S. 1092, 112 L. E. 2d 1062 (1991), this Court said:

North Carolina law is well established regarding this Court's role in reviewing a trial court's determination of the voluntariness of a confession.

> Findings of fact made by a trial judge following a voir dire hearing on the voluntariness of a confession are conclusive upon this Court if the findings are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported. This is true even though the evidence is conflicting.

Id. at 208-09, 394 S.E.2d at 166 (quoting *State v. Jackson*, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983)) (citations omitted in original). In the instant case, the trial court made extensive findings of fact regarding defendant's interrogation in New York. The court found as fact that defendant was advised of his *Miranda* rights, that defendant stated that he understood his rights and was willing to waive those rights, that defendant waived those rights both orally and in writing, that defendant then gave the investigating officers an oral statement regarding the charges pending against him in North Carolina, and that one of the officers then wrote a brief summary of the statement made by defendant. Defendant does not challenge any of these findings.

The trial court's findings support its conclusion that defendant freely, knowingly, understandingly, and voluntarily waived his right to remain silent and his right to counsel after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The conclusions support the judgment denying defendant's motion to suppress. Accordingly, we reject this assignment of error.

[5] By another assignment, defendant contends that the trial court committed prejudicial error in overruling his objection to and in permitting the introduction of prejudicial and inflammatory photographs which he argues were presented solely to inflame the passions of the jury. We disagree.

In *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994), we said 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)). "Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Rose, 335 N.C. at 319, 439 S.E.2d at 528.

Admissible evidence may be excluded, however, under Rule 403 of the North Carolina Rules of Evidence if the probative value of such evidence is substantially outweighed by its prejudicial effect. "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each . . . lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

In this case, defendant moved to exclude three photographs from being introduced into evidence. Although some of the photographs were gruesome, they were relevant to show the circumstances of the killing and tended to establish the extent of Gasperson's head wound. Each photograph was used to illustrate the testimony of the pathologist as to the victim's cause of death. Thus, the trial court did not abuse its discretion in not excluding these three photographs from evidence under Rule 403.

[6] By four assignments of error, defendant contends that the trial court committed reversible error when it failed to intervene *ex mero motu* during the prosecutor's closing argument. Defendant contends that the prosecutor's argument contained misstatements of law, matters not in evidence, and personal opinions injected solely to arouse the passions of the jury.

The arguments of counsel are left largely to the control and discretion of the trial judge, and counsel will be granted wide latitude in the argument of hotly contested cases. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). "Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). "Because defendant did not object to the portions of the argument to which he now assigns error, 'review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*.' " *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d

909, 924 (1989) (quoting *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). 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. —, 134 L. Ed. 2d 100 (1996).

In the instant case, during his closing argument, the prosecutor, after directing the jury's attention to the abrasions on the nose of the victim, argued that Scott Gasperson was beaten at the mobile home. Defendant also argues that the prosecutor misstated the testimony of Mark Watkins in arguing that Watkins had testified that he was going to help defendant break into a house. Further, defendant argues that the prosecutor's arguments that defendant "went hunting with the pack," that Phyllis Aragona was not provided with a "Christian burial," and that the victims had a right to go to their homes without being killed were grossly improper. Also, defendant argues that in disputing defendant's testimony as to defendant's participation in the crimes charged, the prosecutor implicitly called defendant a "liar" and that the prosecutor bolstered the testimony of State's witness Jeannette Ocasio by stating that she was courageous because she told "the truth about [her] own mother and [her] own brother." Finally, defendant argues that during closing arguments, the prosecutor misstated the law as to "mere presence" at the scene of a crime and as to whether the jury could consider defendant's age as a factor in his culpability. After reviewing the transcript, record, and briefs in this case, 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.

[7] By another assignment of error, defendant contends, and the State agrees, that the trial court erred in failing to arrest judgments on the first-degree kidnapping convictions when these convictions were the underlying felonies for the felony murder convictions. Because defendant's convictions of first-degree murder rest solely on a felony-murder theory, with kidnapping as the underlying felony, the kidnapping convictions merge with the murder convictions, and defendant may not be separately sentenced for kidnapping. *State v. Blankenship*, 337 N.C. 543, 563, 447 S.E.2d 727, 739 (1994); *State v. Gardner*, 315 N.C. 444, 450-60, 340 S.E.2d 701, 706-712 (1986); *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981). Accordingly, we arrest judgment on defendant's two convictions for kidnapping.

[8] In his final assignment of error, defendant contends that the trial court abused its discretion when it failed to give sufficient credit to the substantial assistance defendant gave that enabled the State to secure guilty pleas of defendant's codefendants. At defendant's sentencing hearing, the State stipulated that defendant rendered substantial assistance to the State in the State's cases against Orlando Fernandez and Maria Monserrata, in voluntarily submitting "an extensive statement of facts and proper testimony in both those cases, which was instrumental in the immediate nonjury disposition of those impending trials." Additionally, Officer Lee Stevens testified that defendant's "statement and offer to testify [constituted] substantial assistance to the law enforcement officers in the case."

We note, however, that for the two first-degree murder convictions, defendant was sentenced to the mandatory minimum terms of life imprisonment. The second-degree burglary conviction and one of the felonious larceny convictions were consolidated for judgment and defendant was sentenced to the mandatory minimum term of fourteen years' imprisonment for the burglary conviction. The trial court consolidated for judgment the two counts of larceny of a motor vehicle, each of which carried a three-year presumptive sentence, and sentenced defendant to five years' imprisonment, the judge finding as a mitigating factor that defendant had rendered substantial assistance. The trial court also consolidated for judgment the breaking and entering conviction, the safecracking conviction, and the remaining larceny conviction, each of which carried a three-year presumptive sentence, and sentenced defendant to a term of nine years' imprisonment, the judge again finding as a mitigating factor that defendant had rendered substantial assistance.

"While [a trial judge] is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the [Fair Sentencing] Act, a trial judge need not justify the weight he attaches to any factor." *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E.2d 689, 697 (1983). In the instant case, the trial court sentenced defendant to the mandatory minimum sentences of life imprisonment for his first-degree murder convictions. Additionally, the court consolidated several convictions for judgment and gave minimum or presumptive sentences for those convictions. Accordingly, we reject defendant's final argument.

In conclusion, our holdings on appeal in the present case are as follows:

No. 92CRS13020—First-Degree Murder—NO ERROR.

No. 92CRS13021—First-Degree Murder—NO ERROR.

No. 92CRS13022—Second-Degree Burglary and Larceny—NO ERROR.

No. 92CRS13023—Kidnapping—JUDGMENT ARRESTED.

No. 92CRS13024—Kidnapping—JUDGMENT ARRESTED.

No. 92CRS11964—Larceny of Motor Vehicle—NO ERROR.

No. 92CRS11965—Larceny of Motor Vehicle—NO ERROR.

No. 92CRS11966—Breaking and Entering and Larceny—NO ERROR.

No. 92CRS11967—Safecracking—NO ERROR.

STATE OF NORTH CAROLINA v. WAYNE EUGENE PRICE

No. 362A95

(Filed 11 October 1996)

1. Homicide § 705 (NCI4th)— first-degree murder—instruction on premeditation and deliberation—error cured by felony murder verdict

Defendant was not prejudiced by the trial court's submission to the jury of the charge of first-degree murder based on premeditation and deliberation where the jury found defendant guilty only on the theory of felony murder.

Am Jur 2d, Homicide § 501.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

2. Homicide § 262 (NCI4th)— assault on one victim—shooting of second victim—continuous transaction—submission of felony murder

A felonious assault on one victim occurred during the same series of events as the shooting of a second victim and had a causal relationship with the shooting so that the trial court did not err in submitting to the jury the charge of first-degree murder of the second victim under the felony murder theory where the evidence tended to show that defendant discovered his girlfriend sitting in a car with the assault victim; defendant pulled the assault victim from the car and beat him in the head with a pistol until he was unconscious; the girlfriend was screaming for the shooting victim to come to their aid; defendant testified that when he saw the shooting victim running toward him, he held the gun in front of him and told the shooting victim to "back off"; when the shooting victim continued to approach defendant, defendant tried to jab him with the gun in the forehead to knock him down and the gun went off and killed the victim; and the girlfriend testified that the series of events occurred "pretty much boom, boom, boom."

Am Jur 2d, Homicide § 442.

3. Homicide § 706 (NCI4th)— first-degree murder—failure to submit voluntary manslaughter—error cured by felony murder verdict

The trial court's failure to submit to the jury in a first-degree murder prosecution the lesser included offense of voluntary manslaughter based on imperfect self-defense and heat of passion, if error, was harmless where the jury found defendant guilty of first-degree murder based on felony murder; the trial court submitted to the jury possible verdicts of guilty of first-degree murder based on felony murder, guilty of first-degree murder based on premeditation and deliberation, guilty of second-degree murder, or not guilty; it cannot be assumed that a jury unconvinced that defendant was guilty of second-degree murder or first-degree murder based on either felony murder or premeditation and deliberation, but loath to acquit him completely because it was convinced he was guilty of voluntary manslaughter, might choose first-degree murder rather than second-degree murder as the means of keeping him off the streets; and the jury's verdict of first-degree murder based on felony murder when it had a right to convict defendant of second-degree murder shows that the jurors were not coerced and that they were certain of defendant's guilt of the greater offense.

Am Jur 2d, Homicide §§ 525 et seq.

4. Criminal Law § 707 (NCI4th); Homicide § 501 (NCI4th)— felony murder—incorrect instruction—correction by court—absence of prejudice

In a first-degree murder prosecution wherein the trial court initially correctly instructed the jury that to convict under the felony murder rule, the State must prove that "during the commission of the felonious assault, defendant killed the victim," the trial court's omission of the phrase "during the commission of" when the court thereafter read the summary paragraph on felony murder was not prejudicial error where the court later specifically corrected the instruction when it repeated the summary paragraph in its entirety. Furthermore, the trial court did not improperly enunciate felony murder as the proper choice for the jury by giving the curative felony murder instruction. N.C.G.S. § 15A-1234(a)(2).

Am Jur 2d, Trial §§ 1128, 1138.

Homicide: presumption of deliberation and premeditation from the fact of killing. 86 ALR2d 656.

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

5. Criminal Law § 465 (NCI4th)— closing argument—misstatement of law—error cured by instructions

Any error in an alleged misstatement of law by the prosecutor in her closing argument to the jury was cured by the trial court's instructions on the relevant law.

Am Jur 2d, Trial §§ 640 et seq.

6. Criminal Law § 463 (NCI4th)— prosecutor's closing arguments—reasonable inferences from evidence—inconsequential deviation from evidence

In a prosecution for felony murder based on the underlying felony of assault on another victim, the prosecutor's closing arguments that scratches on defendant's gun could have occurred when defendant was striking the assault victim on the pavement and that defendant was still beating the assault victim when the murder victim came over and there was no evidence of defendant stopping the beating were reasonable inferences drawn from the evidence. Furthermore, the prosecutor's argument that, upon hitting the assault victim, defendant's gun flew twenty-five feet across the parking lot when the evidence showed that the gun traveled about ten feet was an inconsequential deviation in an immaterial aspect of the evidence which was cured by the court's instruction on the duty of the jury to rely on its own recollection of the evidence.

Am Jur 2d, Trial §§ 911, 912.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR4th 810.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Bullock, J., at the 17 April 1995 Criminal Session of Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 8 April 1996.

Michael F. Easley, Attorney General, by Daniel F. McLawhorn and Thomas F. Moffitt, Special Deputy Attorneys General, for the State.

DeMent, Askew, Gammon, Mueller & DeMent, by Russell W. DeMent, Jr., and Angela L. DeMent, for defendant-appellant.

ORR, Justice.

The evidence at trial tended to show that on 25 March 1994, defendant drove to the parking lot of Chi-Chi's restaurant in Cary to have a drink with his girlfriend, Gayle Miller, when she finished working at Chi-Chi's. When he arrived at the restaurant's parking lot, defendant saw Ms. Miller in her car with another man, Christopher Hearn. Defendant drove to the home where he and Ms. Miller both resided and waited for Ms. Miller for about an hour. When she did not arrive, he went back to look for her and found her in the Chi-Chi's parking lot, still in her car with Mr. Hearn.

Defendant became angry and pulled Mr. Hearn out of the car while pointing a pistol at him. He proceeded to beat Mr. Hearn on the head with the pistol until he was unconscious. While defendant was beating Mr. Hearn, Ms. Miller was screaming for Hearn's friend, Phil Hafer, to come to their aid. Mr. Hafer had been waiting nearby in Mr. Hearn's car.

Defendant's gun slipped from his hand during his last blow to Mr. Hearn. As he stepped back from Mr. Hearn, defendant saw Mr. Hafer already running towards him across the parking lot. Defendant picked up his gun, took a "couple steps" back towards Ms. Miller's car, held the gun up in front of him, and told Mr. Hafer to "back off." Defendant testified that when Mr. Hafer continued to approach him, defendant tried to "jab him with the gun in the forehead" to knock him down. The gun went off, killing Mr. Hafer. Ms. Miller testified that the series of events occurred "pretty much boom, boom, boom." Defendant jumped into his car and drove away. He later turned himself in to Cary police.

After careful consideration of the assignments of error brought forward by defendant, we hold that defendant received a fair trial, free from prejudicial error.

I.

[1] Defendant contends that the trial court erred in submitting to the jury the charge of first-degree murder under the theory of premedita-

tion and deliberation because the evidence was insufficient to support such a charge. Assuming, without deciding, that the trial court erred in submitting the charge of first-degree murder based on premeditation and deliberation, defendant could not have suffered prejudice as a result. The jury declined to find defendant guilty of first-degree murder on the theory of premeditation and deliberation; the jury found defendant guilty of first-degree murder only on the theory of felony murder.

"Where the jury has rejected an erroneously submitted charge, the error is rendered harmless." *State v. Green*, 321 N.C. 594, 606, 365 S.E.2d 587, 594 (defendant could have suffered no prejudice if evidence of armed robbery had been insufficient to support the submission of the felony-murder theory to the jury because the jury declined to find the defendant guilty of any charges grounded on a felony-murder theory), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *see also State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 596 (1992) (even if evidence of armed robbery had been insufficient to support submission of felony-murder theory, prejudicial error would not have resulted because the jury found defendant guilty of first-degree murder only on the theory of premeditation and deliberation and did not find defendant guilty of any charges based on a felony-murder theory); *cf. State v. Bates*, 309 N.C. 528, 537, 308 S.E.2d 258, 264 (1983) (error in the admission of certain evidence was not prejudicial because the evidence clearly related only to the issue of premeditation and deliberation and the jury rejected this theory, convicting defendant of first-degree murder only on the theory of felony murder). Because defendant could not have been prejudiced by the court's submission of first-degree murder on the theory of premeditation and deliberation, this assignment of error is overruled.

II.

[2] Defendant next contends that the trial court erred in submitting to the jury the charge of first-degree murder under the felony-murder theory. Defendant argues that the evidence did not show a sufficient relationship between the assault on Mr. Hearn and the shooting of Mr. Hafer to support the submission of felony murder. We disagree.

"In passing upon a defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Aikens*, 342 N.C. 567, 573, 467 S.E.2d 99, 103 (1996). Viewed in the light most favorable to the State, the evidence showed a sufficient relationship

between the assault on Mr. Hearn and the shooting of Mr. Hafer to support the submission of first-degree murder under the felony-murder theory. N.C.G.S. § 14-17 provides: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." Death caused by the unintentional discharge of a gun in the hands of a person engaged in the perpetration of a felony within the meaning of N.C.G.S. § 14-17 is murder in the first degree. *State v. Woods*, 316 N.C. 344, 348-49, 341 S.E.2d 545, 548 (1986). Defendant pled guilty to assault with a deadly weapon inflicting serious injury—a felony within the meaning of N.C.G.S. § 14-17. In *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981), we stated the test for whether the felony and the murder are so sufficiently related as to invoke the felony-murder rule:

> A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

Defendant argues that there is no interrelation or connection between the assault on Mr. Hearn with a deadly weapon and the shooting of Mr. Hafer and that defendant's interaction with Mr. Hafer did not commence until the beating of Mr. Hearn was completely over. We conclude that the evidence viewed in the light most favorable to the State shows that the felony and the murder are interrelated parts of a series of events that formed one continuous transaction.

The evidence shows that while defendant was beating Mr. Hearn, Ms. Miller was screaming for Hearn's friend, Mr. Hafer, to come to their aid. Defendant himself testified that the gun slipped from his hand while he was attempting to hit Mr. Hearn with the gun. As he stepped back from Mr. Hearn, he saw Mr. Hafer already running towards him across the parking lot. Defendant picked up his gun, took a "couple steps" back towards Ms. Miller's car, held the gun up in front of him, and told Mr. Hafer to "back off." Defendant testified that when Mr. Hafer continued to approach him, defendant tried to "jab him with the gun in the forehead" to knock him down. The gun went off, killing Mr. Hafer. Ms. Miller testified that the series of events occurred "pretty much boom, boom, boom."

Under these facts, we find no merit in defendant's argument. This evidence clearly shows that the assault on Mr. Hearn not only occurred during the same series of events as the shooting of Mr. Hafer, but actually had a causal relationship with the shooting. Therefore, the trial court did not err in submitting to the jury the charge of first-degree murder under the felony-murder theory.

III.

[3] Defendant also contends that the trial court erred in failing to submit to the jury an instruction on voluntary manslaughter as a lesser included offense. A defendant is entitled to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence. *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559-60 (1989) (citing N.C.G.S. § 15-170 (1983)). Voluntary manslaughter is a lesser included offense supported by an indictment charging murder in the first degree. *State v. Camacho*, 337 N.C. 224, 232, 446 S.E.2d 8, 12 (1994). Defendant argues that his requested instruction on voluntary manslaughter was proper based on the theories of imperfect self-defense and heat of passion. Assuming *arguendo* that the evidence supported submission of voluntary manslaughter, we hold that the court's failure to submit the charge was harmless under the facts of this case.

Our law states that when the court improperly fails to submit a lesser included offense of the offense charged, and the jury had only two options in reaching a verdict—guilty of the offense charged and not guilty—then a verdict of guilty of the offense charged is not reliable, and a new trial must be granted. *E.g.*, *id.* at 234-35, 446 S.E.2d at 13-14; *State v. Thomas*, 325 N.C. at 599, 386 S.E.2d at 564; *State v. Davis*, 242 N.C. 476, 478, 87 S.E.2d 906, 908 (1955), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987). In *State v. Thomas*, where the court improperly failed to submit involuntary manslaughter, the jury was given two options: guilty of first-degree murder based on felony murder and not guilty. The jury found the defendant guilty of first-degree murder based on felony murder. This Court ordered a new trial. The decision was based on the following reasoning:

> in a case in which "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction" despite the existing doubt, because "the jury was presented

with only two options: convicting the defendant . . . or acquitting him outright."

State v. Thomas, 325 N.C. at 599, 386 S.E.2d at 564 (quoting *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973)) (emphasis in original); *see also Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980).

However, the reasoning explained in *Keeble v. United States*, and relied on in *State v. Thomas*, is not applicable to the facts of this case. Here, defendant was convicted of first-degree murder based on felony murder following submission by the court of four options for the jury to consider: (1) guilty of first-degree murder based on felony murder, (2) guilty of first-degree murder based on premeditation and deliberation, (3) guilty of second-degree murder, or (4) not guilty.

This Court has adopted the rule that when the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court's improper failure to submit voluntary or involuntary manslaughter. *E.g.*, *State v. Young*, 324 N.C. 489, 492-94, 380 S.E.2d 94, 96-97 (1989) (expressly disavowing prior decisions of this Court stating otherwise). Our case law has explained two different rationales for this rule. *Compare id.* at 492-94, 380 S.E.2d at 96-97, *with State v. Judge*, 308 N.C. 658, 664-65, 303 S.E.2d 817, 821-22 (1983). One rationale is that in finding the defendant guilty beyond a reasonable doubt of first-degree murder based on premeditation and deliberation and rejecting second-degree murder, the jury necessarily rejected, beyond a reasonable doubt, the possibilities that the defendant acted in the heat of passion or in imperfect self-defense (voluntary manslaughter) or that the killing was unintentional (involuntary manslaughter). *See State v. Young*, 324 N.C. at 492-94, 380 S.E.2d at 96-97; *State v. Bush*, 307 N.C. 152, 164-65, 297 S.E.2d 563, 571 (1982). This rationale is not directly applicable to the case at bar, where the jury rejected the verdict of first-degree murder based on premeditation and deliberation. However, the second rationale is applicable to the case at bar.

The second rationale has been explained as follows:

"A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his

> guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant."

State v. Judge, 308 N.C. at 664-65, 303 S.E.2d at 821-22 (quoting *State v. Freeman*, 275 N.C. 662, 668, 170 S.E.2d 461, 465 (1969)). This rationale focuses on the United States Supreme Court's concern in *Keeble* that a jury should not be coerced into a verdict because of a lack of a lesser included offense alternative which better fits the evidence. The United States Supreme Court applied this rationale in *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555 (1991), which is analogous to the case at bar.

In *Schad*, the prosecutor advanced the theories of felony murder and premeditation and deliberation. The trial court charged the jury on first-degree murder (Arizona characterized first-degree murder as a single crime as to which a jury need not agree on one of the alternative statutory theories of premeditated or felony murder), second-degree murder, and not guilty. The court refused the defendant's request for an instruction on robbery as a lesser included offense of felony murder. The jury convicted defendant of first-degree murder. On appeal, the defendant argued that "if the jurors had accepted his theory, they would have thought him guilty of robbery and innocent of murder, but would have been unable to return a verdict that expressed that view." *Id.* at 647-48, 115 L. Ed. 2d at 575. Therefore, according to defendant, the verdict was unreliable because the jurors were not given the opportunity to return a verdict in conformity with that reasonable view of the evidence. The United States Supreme Court rejected this argument based on the following reasoning:

> The argument is unavailing, because the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Id.

We believe that the reasoning of *Schad* applies to the case at bar. We cannot assume that a jury unconvinced that defendant was guilty of second-degree murder or of first-degree murder based on either felony murder or premeditation and deliberation, but loath to acquit him completely (because it was convinced he was guilty of voluntary manslaughter), might choose first-degree murder rather than second-degree murder as its means of keeping him off the streets. We recognize that in *Schad*, first-degree murder was a capital offense, whereas the case at bar was not capitally tried. However, we believe a jury still would recognize that first-degree murder is a more serious offense than second-degree murder.

Therefore, we conclude that the verdict of first-degree murder based on felony murder shows clearly that the jurors were not coerced, for they had the right to convict defendant of second-degree murder. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of voluntary manslaughter therefore could not have harmed the defendant. This assignment of error is overruled.

IV.

[4] Defendant next assigns error to the trial court's instructions to the jury on first-degree murder under the felony-murder theory. When the judge listed the elements of felony murder, he correctly instructed the jury that to convict defendant under the felony-murder rule, the State must prove that "during the commission of the felonious assault, defendant killed the victim." However, when the judge read the summary paragraph on felony murder, he omitted the phrase "during the commission of." In accordance with defendant's request, the judge later corrected the instruction by correctly repeating to the jury the summary paragraph in its entirety. Defendant argues that both the initial error and the later correction constituted prejudicial error. We disagree.

In arguing that the initial error was prejudicial, defendant relies on *State v. Cousins*, 289 N.C. 540, 549, 223 S.E.2d 338, 344 (1976), in which this Court held that "when the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part." However, the facts of the case at bar differ from those of *Cousins* because the instructions in the case at bar not only contained a correct and an incorrect instruction, but the judge also gave another correct instruction in

which he told the jury that he was correcting the earlier instruction. "[W]hen a trial judge makes an improper instruction earlier in the charge and then corrects it, the error is 'completely lacking in prejudicial effect.' " *State v. Reid*, 335 N.C. 647, 667, 440 S.E.2d 776, 787 (1994) (quoting *State v. Wells*, 290 N.C. 485, 498, 226 S.E.2d 325, 334 (1976)); *see also State v. Bromfield*, 332 N.C. 24, 45, 418 S.E.2d 491, 502-03 (1992). Therefore, defendant was not prejudiced by the trial judge's omission of the phrase "during the commission of" in the initial instruction because the judge later specifically corrected the instruction.

Defendant also argues that by giving the additional, curative felony-murder instruction, the judge erroneously enunciated felony murder as the proper choice for the jury. Defendant cites no case in which we have held that a trial court's correction of an erroneous instruction constituted prejudicial error because it enunciated the subject matter of the instruction as the proper verdict. In fact, N.C.G.S. § 15A-1234(a)(2) approves of the practice, providing: "After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [c]orrect or withdraw an erroneous instruction." After reviewing the instructions in their entirety, we conclude that the jury was correctly instructed on how to apply the law to the facts of the case. "Jurors are presumed to follow the instructions given to them by the court." *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995). We hold that the court's correction of the felony-murder instruction did not prejudice defendant. This assignment of error is overruled.

V.

Defendant finally contends that the trial court erred by failing to declare a mistrial based upon alleged prosecutorial misconduct. Defendant argues that the prosecutor intentionally misstated the evidence in her closing argument. However, the closing arguments to the jury were not recorded. Therefore, the record before us includes neither a transcript of the arguments nor a record of the specific objections made by defense counsel during the arguments. "The appellate courts can judicially know only what appears of record." *Jackson v. Housing Auth. of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988).

> This Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. [N.C. R. App. P. 9(a).] An appellate court cannot assume or speculate that

there was prejudicial error when none appears on the record before it. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983).

State v. Moore, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985).

Although the closing arguments were not recorded, the record does include a transcript of defendant's motion for a mistrial and the ensuing discussion on the motion, in the absence of the jury, among the trial judge and counsel for defendant and for the State. During this discussion, defense counsel attempted to reconstruct the portions of the prosecutor's closing argument that were related to the motion for a mistrial. Assuming, *arguendo*, that defense counsel's attempted reconstruction was accurate, we find no error in the trial judge's denial of the motion for a mistrial.

The record reveals no evidence of intentional misstatements by the prosecutor, nor can any improper intent be presumed simply by virtue of an alleged misstatement by counsel arguing to the jury. Defendant specifically alleges one misstatement of law and three misstatements of evidence by the prosecutor. A review of the transcript before us reveals that even if the prosecutor made the statements alleged by defendant, they fell within the wide latitude allowed to counsel in jury argument. "We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. Counsel may argue the facts in evidence *and all reasonable inferences* that may be drawn therefrom together with the relevant law in presenting the case." *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (emphasis added) (citations omitted), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

[5] If the alleged misstatement of law was made, it was cured by the trial court's correct jury instructions on the relevant law. *See id.* at 38, 366 S.E.2d at 469; *State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *State v. Harris*, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445 (1976).

[6] All of the factual statements alleged by defendant were either clearly reasonable inferences drawn from the evidence or inconsequential deviations in immaterial aspects of the evidence. Defendant first claims that the prosecutor stated that the scratches on the gun could have occurred when defendant was striking Mr. Hearn on the pavement. In fact, defendant testified that the scratches were not on the gun before the night that the crimes occurred and that he saw the

scratches when he was cleaning the blood off of the gun after the crimes occurred. This testimony clearly supports an inference that the scratches on the gun could have occurred when defendant was striking Mr. Hearn on the pavement.

Defendant also claims that the prosecutor stated that defendant was still beating Mr. Hearn when Mr. Hafer came over and that there was no evidence of defendant stopping the beating. Defendant testified that his gun slipped from his hand while he was attempting to hit Mr. Hearn with the gun. As he stepped back from Mr. Hearn, he saw Mr. Hafer already running towards him across the parking lot. This testimony supports an inference that defendant was still beating Mr. Hearn when Mr. Hafer began his approach. Even defendant's testimony supports an inference that defendant would not have stopped the beating if Mr. Hafer had not intervened. Defendant testified that he stopped the beating because he thought Mr. Hearn was "pretty well incapacitated at that point." Thus, it is reasonable to infer that had Mr. Hearn moved again, defendant would have continued to beat him.

Defendant also claims that the prosecutor stated that upon hitting Mr. Hearn, defendant's gun flew twenty-five feet across the parking lot. Defendant testified that the gun travelled about ten feet. Although we find no evidence that the gun travelled exactly twenty-five feet, we consider this to be an inconsequential deviation in an immaterial aspect of the evidence. This inconsequential deviation as well as any other immaterial discrepancy in either the prosecutor's or the defense counsel's version of events was cured by the court's following jury instruction:

> Now, members of the jury, you've heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized the evidence in this case. It is your duty to remember the evidence, whether it's been called to your attention or not, and if your recollection of the evidence differs from that of the District Attorney or of the defense attorney, you are to rely solely upon your recollection of the evidence in your deliberations.
>
> I wish to emphasize this. Therefore, I'm going to repeat it to you again.
>
> If your recollection of the evidence differs from that of the District Attorney or of the defense attorney, you are to rely solely upon your recollection of the evidence in your deliberations.

This instruction was sufficient in this case to cure any alleged misstatement by the prosecutor. *Cf. State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988) (trial judge's misstatement of the evidence was not prejudicial where judge instructed the jury that "[i]f your recollection of the evidence differs from mine or the attorneys in their speeches to you, you are to rely solely on your recollection of the evidence in your deliberations").

"The decision whether to order a mistrial lies within the discretion of the trial judge, to be exercised upon the happening of some prejudicial event rendering a fair and impartial trial impossible." *State v. Robinson*, 327 N.C. 346, 359, 395 S.E.2d 402, 410 (1990). Because the alleged statements fell within the wide latitude allowed counsel in closing argument and the curative instructions cured any misstatements, we find no basis for a conclusion that a fair and impartial trial was rendered impossible. Therefore, we hold that the trial court did not abuse its discretion in declining to grant a mistrial. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JOE CEPHUS JOHNSTON, JR.

No. 200A89-2

(Filed 11 October 1996)

1. Homicide § 558 (NCI4th)— first-degree murder—no instruction on voluntary manslaughter—no error

There was no error in a capital first-degree murder prosecution which resulted in a life sentence where the court refused to instruct the jury on voluntary manslaughter. The jury was instructed that it could find defendant guilty of first-degree murder based on premeditation, second-degree murder, or not guilty, and the jury found defendant guilty of first-degree murder. Any error in failing to instruct on voluntary manslaughter could not have prejudiced defendant.

Am Jur 2d, Homicide §§ 56-69.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter. 19 ALR4th 861.

2. Evidence and Witnesses § 1694 (NCI4th)— first-degree murder—photographs of victim—introduced to illustrate pathologist's testimony—used in cross-examination of defendant

The trial court did not err in a capital first-degree murder prosecution which resulted in a life sentence by permitting the prosecutor to use photographs of the victim to cross-examine defendant where the photographs had been admitted into evidence and published to the jury to illustrate the testimony of the pathologist and various other State's witnesses; the prosecutor asked defendant a limited number of questions requiring defendant to examine the photographs; and the photographs were not republished to the jury at that time. The manner in which the photographs were used to cross-examine defendant was not aimed solely at arousing the passions of the jury and did not result in any unfair prejudice.

Am Jur 2d, Evidence §§ 963, 964.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. 76 ALR Fed. 700.

3. Evidence and Witnesses § 728 (NCI4th)— murder—defendant's use of knife to skin deer—testimony not prejudicial error

There was no prejudicial error in a capital first-degree murder prosecution (with a life sentence) where the victim had been stabbed where the court permitted testimony describing defendant's use of a knife to skin a deer. Assuming that the detailed description of the deer-cleaning process was not relevant, the

error was harmless because the evidence of defendant's guilt was overwhelming. Defendant has not shown that a different result would have been reached had the witness not been permitted to describe defendant's use of his knife to skin a deer.

Am Jur 2d, Evidence §§ 347, 348; Witnesses § 625.

4. Evidence and Witnesses § 264 (NCI4th)— murder—testimony as to victim not carrying weapon—admissible

There was no prejudicial error in a capital prosecution for first-degree murder which resulted in a life sentence where the State introduced evidence of the victim's character for peacefulness before his character was put in issue. A witness who was with the victim at the time of the stabbing testified on direct examination that she had never known the victim to carry any type of weapon and that to her knowledge the victim was not carrying a weapon on the night of his murder. Testimony that the victim was unarmed and that a defendant continued to inflict deadly wounds on an unarmed victim, even after he is rendered helpless, is relevant to premeditation and peripheral questioning about whether the victim carried a weapon in the past was not prejudicial. Moreover, the evidence of defendant's guilt was overwhelming and defendant cannot show that there is a reasonable possibility that the outcome of the trial would have been different if the court had prohibited the testimony.

Am Jur 2d, Evidence § 373; Homicide § 308.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased. 34 ALR2d 451.

5. Evidence and Witnesses § 2750.1 (NCI4th)— murder—cross-examination—suggestion of facts with questions—door opened

There was no prejudicial error in a capital prosecution for first-degree murder which resulted in a life sentence where defense counsel asked the victim's girlfriend whether the victim was under the influence of alcohol the night of the murder, whether the victim was aggressive, and whether she and the victim were wanting to fight that night, and the prosecutor asked on redirect whether the witness and the victim had ever been in a fight with anybody else or if the victim had ever been in a fight in her presence. Defense counsel cross-examined the witness in a

manner suggesting that the victim was looking for a fight on the night of his murder; defendant having opened the door, the State was entitled to introduce rebuttal evidence. Regardless, the evidence of defendant's guilt was overwhelming and defendant cannot show prejudice.

Am Jur 2d, Evidence §§ 383, 388, 431; Homicide § 299.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses. 70 ALR2d 559.

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

6. Evidence and Witnesses §§ 788, 2913 (NCI4th)— murder—testimony as to victim's aggression excluded—other evidence

The trial court in a capital prosecution for first-degree murder which resulted in a life sentence did not err by not allowing defendant to elicit testimony from the victim's companion that the victim was in an aggressive posture the night he was murdered. The question objected to by the State had already been asked and answered and evidence to the same effect came in through another witness.

Am Jur 2d, Evidence § 356; Trial § 1472.

7. Evidence and Witnesses § 2750.1 (NCI4th)— murder—cross-examination—inference—door opened

There was no error in a capital prosecution for first-degree murder which resulted in a life sentence where the defense brought out on cross-examination of the pathologist who performed the autopsy on the victim that the pathologist had performed only three or four autopsies involving stab wounds at the time he did this autopsy and that he had consulted with two of his colleagues; the prosecutor had asked on redirect which colleagues had been consulted; and the pathologist identified his colleagues and further stated that they had concurred with his opinions. Defendant opened the door by creating an inference on cross-examination that the pathologist lacked expertise, had little confidence in his findings, and sought help from his colleagues.

Am Jur 2d, Trial § 564.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Cross-examining expert witness regarding his status as professional witness. 39 ALR4th 742.

8. Evidence and Witnesses § 2051 (NCI4th)— murder—testimony of victim's companion—no time to leave as defendant approached—instantaneous conclusion of mind

The trial court did not err in a capital prosecution for first-degree murder which resulted in a life sentence by allowing the victim's girlfriend to testify with respect to the victim's options in leaving the scene and with respect to defendant's intent at that time. The witness's testimony that defendant was "going to do something" and that they did not have time to leave before defendant approached represented an instantaneous conclusion based on her observation of a variety of facts; as such, the testimony may be characterized as a "shorthand statement of fact."

Am Jur 2d, Evidence § 558; Homicide § 163.

9. Jury § 131 (NCI4th)— murder—jury selection—possibility of hostile witnesses

The trial court did not abuse its discretion in a capital prosecution for first-degree murder which resulted in a life sentence by permitting the prosecutor to ask prospective jurors if they understood that the State might call family members and associates of defendant as "hostile" witnesses. Defendant objected to these questions primarily on the basis that only the trial court has the discretion to declare a witness hostile, but the prosecutor's statements that family and associates of defendant might be called as hostile witnesses did not suggest that testimony of these witnesses should be considered more carefully than other witnesses or that testimony by these witnesses unfavorable could be discarded. Defendant failed to show abuse of discretion or prejudice.

Am Jur 2d, Judges § 171.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Herring, J., at the 11 July 1994 Criminal Session of Superior Court, Halifax County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 May 1996.

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

Nora Henry Hargrove for defendant-appellant.

PARKER, Justice.

At defendant's first trial on an indictment charging him with the murder of Ralph Reese Bryant, defendant and codefendant Morris Wayne Johnson were found guilty of first-degree murder; and the trial court entered judgments sentencing defendant to death and Johnson to life imprisonment. This Court vacated the verdicts and judgments and remanded both defendant's case and Johnson's case for new trial. *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992). On remand defendant was tried separately and capitally on the indictment charging him with the victim's murder. The jury returned a verdict finding defendant guilty of first-degree murder. During a capital sentencing proceeding, the jury was unable to unanimously agree as to its sentencing recommendation; and the trial court imposed a mandatory sentence of life imprisonment. For the reasons discussed herein, we conclude that defendant's trial was free of prejudicial error and uphold his conviction and sentence.

At trial the State's evidence tended to show that on 20 February 1988, Jackie Jamerson (now Jackie Cutchin), Cindy Davis (now Cindy Griffin), and Bryant went to a nightclub in Roanoke Rapids, North Carolina. As Cutchin, Griffin, and Bryant left the nightclub, a group of people, including defendant, began making comments to Cutchin and Griffin. Cutchin and Griffin got into the car. Charlie Johnston brushed up against Bryant as Bryant was getting into the car, and the two exchanged words. Johnston then walked to a nearby hill where he joined defendant and his friends. One of the men in the group challenged Bryant to come across a fence located on the hill and fight. Bryant took off his boots and jumped to the other side of the fence, but no one in defendant's group approached him. Griffin got out of the car and suggested to Bryant that they leave, and Griffin and Bryant went back to the car.

As Bryant and the women drove away, Michael Ennis Smith, Jr. began chasing their car. Bryant stopped the car, caught Smith, and knocked him onto the pavement. Bryant told Smith that he wanted Smith's group to leave Bryant and the two women alone. After Bryant let Smith get up, Smith went back and joined his friends.

Defendant and approximately fifteen men then walked down the hill in Bryant's direction. Defendant said to Bryant, "If you want to f--- with somebody, you f--- with me." A fight ensued involving primarily Bryant, defendant, and Morris Johnson. Defendant pulled a knife from his pocket and began stabbing Bryant. Johnson also pulled something out of his pocket and began to strike Bryant in the back. Someone yelled "he's been hurt bad," and everyone scattered. Bryant was fatally wounded during the course of the altercation.

Phillip Lee Ricks, Jr., an emergency medical technician, responded to an emergency call from the Roanoke Rapids Police Department during the early morning hours of 21 February 1988. When Ricks arrived at the crime scene, the victim showed no signs of life. Ricks testified that he found a box cutter about ten or twelve feet from the victim's body. A fingerprint on the box cutter was later identified as belonging to Morris Johnson.

Pathologist Robert Patrick Dorion performed an autopsy on the body of the victim. Dr. Dorion testified that there were twenty-four different wounds on the victim's body, which cumulatively caused the victim's death. Dr. Dorion could not say which of the two weapons, the knife or the box cutter, caused the majority of the victim's wounds. Dr. Dorion did specifically opine that one of the lethal wounds was consistent with a wound which would have been inflicted by a knife, rather than a box cutter.

Defendant testified on his own behalf. Defendant stated that after leaving the nightclub the morning of 21 February, he saw Bryant fighting with Morris Johnson. Defendant testified that he reached down to pull Bryant off Johnson and Bryant spun around and kicked him in the head. Defendant claimed that Bryant's actions stunned him and that he "just lost it" and started fighting. Defendant stated that he never intended to do anything but break up the fight and that he did not recall taking his knife out of his pocket.

[1] In his first assignment of error, defendant contends that the trial court erred by refusing to instruct the jury on voluntary manslaughter. The record in this case shows that the trial court instructed the jury that it could find defendant (i) guilty of first-degree murder on the basis of premeditation and deliberation, (ii) guilty of second-degree murder, or (iii) not guilty. The jury having returned a verdict finding defendant guilty of murder in the first degree, any error in failing to instruct the jury on voluntary manslaughter could not have

prejudiced defendant. *State v. Leach*, 340 N.C. 236, 239-40, 456 S.E.2d 785, 787-88 (1995). This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court erred by permitting the prosecutor to use photographs of the victim to cross-examine defendant. During cross-examination of defendant, the prosecutor showed defendant two photographs of the deceased victim at the scene and asked defendant whether he recognized the victim. The trial court overruled defendant's objection, and defendant stated that he did not recognize the victim. The prosecutor then showed defendant five autopsy photographs and asked defendant to "[p]oint out what, if any, wounds on the body of that person that you inflicted." Over objection defendant responded that he did not know whether he inflicted any of the wounds depicted in the photographs. Defendant argues that the prosecutor's use of the photographs during his cross-examination was inflammatory, unfairly prejudicial, and in violation of the Rules of Evidence.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). The photographs used by the prosecutor to cross-examine defendant had been admitted into evidence and published to the jury to illustrate the testimony of the pathologist and various other State's witnesses. During cross-examination the prosecutor asked defendant a limited number of questions requiring defendant to examine the photographs, and the photographs were not republished to the jury at that time. We conclude that the manner in which the photographs were used to cross-examine defendant was not aimed solely at arousing the passions of the jury and did not result in any unfair prejudice to defendant. This assignment of error is overruled.

[3] In his next assignment of error, defendant contends that the trial court erred by permitting testimony describing defendant's use of a knife to skin a deer. Defendant argues that this testimony was irrelevant and that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.

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 evi-

dence." N.C.G.S. § 8C-1, Rule 401 (1992). Generally, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992). This Court has consistently stated that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992).

At trial Melody Sherrod, defendant's girlfriend, examined a knife which the State had previously introduced into evidence and testified that she had seen defendant wash blood off this knife shortly after the killing. Sherrod further testified that she had seen defendant sharpen the knife and use the knife to "clean deer" prior to the killing. Over defendant's objection Sherrod explained the process of cleaning a deer: "Well, you string—they string the deer up and then you cut it and skin it and then cut the guts out of it and pull the skin off and cut the head off."

Even if we assume *arguendo* that the detailed description of the deer-cleaning process was not relevant, the error in admitting this testimony was harmless. The evidence of defendant's guilt was overwhelming. Eyewitness testimony established that defendant brutally stabbed the victim to death. Defendant has not shown that, had the witness not been permitted to describe defendant's use of his knife to skin a deer, 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] In defendant's next assignment of error, he contends the trial court erred in allowing the State to introduce evidence of the victim's character for peacefulness, before his character was put in issue, in violation of N.C.G.S. § 8C-1, Rule 404(a). Rule 404(a) prohibits the admission of evidence of a person's character, or a trait of his character, for the purpose of proving conduct in conformity, except in certain limited circumstances. N.C.G.S. § 8C-1, Rule 404(a) (Supp. 1995). Rule 404(a)(2) allows the admission of evidence of a victim's peace-

ful character to rebut defense evidence that the victim was the first aggressor. N.C.G.S. § 8C-1, Rule 404(a)(2). During the direct examination of Jackie Cutchin, Cutchin testified that she had never known the victim to carry any type of weapon and that to her knowledge, the victim was not carrying a weapon on the night of his murder. Defendant contends that this testimony was inadmissible character evidence pursuant to N.C.G.S. § 8C-1, Rule 404(a)(2). Defendant's contention has no merit.

Cutchin's testimony was relevant and admissible to show that the victim was unarmed when he was murdered. Evidence that a victim was peaceful and unarmed at the time of his murder is relevant to prove that the victim did not provoke the defendant and that the murder was committed with premeditation and deliberation. *State v. Alford*, 339 N.C. 562, 453 S.E.2d 512 (1995). Similarly, evidence which shows that a defendant continued to inflict deadly wounds on an unarmed victim, even after he is rendered helpless, is probative to show premeditation and deliberation. *State v. Barbour*, 295 N.C. 66, 243 S.E.2d 380 (1978). Any peripheral questioning about whether the victim carried a weapon in the past was not prejudicial. *See Alford*, 339 N.C. at 569, 453 S.E.2d at 515. Thus, admission of Cutchin's testimony was not error.

[5] During the cross-examination of Cindy Griffin, the victim's girlfriend, defense counsel asked Griffin whether the victim was under the influence of alcohol the night of the murder and whether the victim was aggressive that night. Griffin responded negatively to each question. Defense counsel then asked Griffin whether she and the victim "were wanting to fight that night." Griffin again responded in the negative. On redirect examination the prosecutor asked Griffin, over objection, whether she and the victim had ever been in a fight with anybody else or if the victim had ever been in a fight in her presence. Griffin answered in the negative to these questions as well. Defendant contends that this testimony was also inadmissible character evidence pursuant to N.C.G.S. § 8C-1, Rule 404(a)(2). Again, defendant's contention has no merit.

The State has the right to introduce evidence to rebut or explain evidence elicited by defendant although the evidence would otherwise be incompetent or irrelevant. *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 100 (1996); *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981). Such evidence is admissible to dispel favorable inferences arising from defendant's

cross-examination of a witness. *Alston*, 341 N.C. 198, 461 S.E.2d 687; *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993); *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977). In the instant case defense counsel cross-examined Griffin in a manner suggesting that on the night of his murder, the victim was "looking for a fight." In *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991), this Court stated that although questions by defense counsel do not constitute evidence, they may suggest the fact sought to be propounded. Although Griffin responded on cross-examination that she and the victim were not looking for a fight, defense counsel suggested, through the language of his questions, the facts which he sought to elicit. Defendant having thereby opened the door, the State was entitled to introduce rebuttal evidence. Thus, admission of Griffin's testimony was not error.

Regardless, defendant cannot show that he was prejudiced by the testimony of either Cutchin or Griffin. The evidence of defendant's guilt in the instant case was overwhelming. Defendant cannot show that there is a reasonable possibility that the outcome of his trial would have been different if the trial court had prohibited Cutchin from testifying that she had never seen the victim carrying a weapon or had prohibited Griffin from testifying that the victim had not engaged in a fight during the time she had known him. *See* N.C.G.S. § 15A-1443(a). This assignment of error is overruled.

[6] In defendant's next assignment of error, he contends the trial court erred in not allowing defendant to elicit testimony from Jackie Cutchin that the victim was in an "aggressive posture" the night he was murdered. During the cross-examination of Cutchin, the following occurred:

> Q. You said before Mr. Bryant went over the fence, he took his boots off?
>
> A. Yes, sir.
>
> Q. Why did he do that?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Overruled. If you know, you may answer.
>
> A. I don't know.
>
> Q. Did Mr. Bryant know karate?
>
> A. Yes, I believe he did.

Q. He took his boots off because he was getting ready to fight, was he not?

[PROSECUTOR]: Objection.

THE COURT: Objection sustained.

The question at issue was asked during cross-examination, after Cutchin had testified to the victim's peacefulness. Defendant contends the question was propounded to rebut the State's evidence of the victim's peacefulness and to impeach this particular witness. Defendant further maintains that the fact that later witnesses testified that the victim was indeed in an aggressive posture does not make this alleged error harmless since "the impact did not have the same heft as it would have had [had] it been elicited from [the victim's] friends."

The trial court did not err in sustaining the State's objection to this question. Defense counsel asked Cutchin why defendant took his boots off, and Cutchin stated that she did not know. The question objected to by the State had already been asked and answered.

Furthermore, evidence to the same effect came in through another witness. Defense counsel subsequently introduced testimony suggesting that defendant took off his boots in order to fight. During the cross-examination of Cindy Griffin, the following occurred:

Q. Mr. Bryant took his boots off, didn't he?

A. Yes, Sir.

Q. Why did he take them off?

[PROSECUTOR]: Objection.

THE COURT: Overruled, if you know.

A. He was—he would have fought if somebody had come over to the other side of the fence.

Griffin then testified that the victim knew karate and did not wear his shoes when he practiced karate. This assignment of error is overruled.

[7] In defendant's next assignment of error, he contends the trial court erred in allowing Dr. Robert Patrick Dorion, the pathologist who performed the autopsy on the victim, "to bolster his findings by the hearsay statements of two of his colleagues." Defendant main-

tains that the trial court's action violated the Rules of Evidence, precluded defendant from cross-examining these declarants, and unfairly prejudiced defendant.

During the cross-examination of Dr. Dorion, the defense brought out the fact that Dr. Dorion had performed only three or four autopsies involving stab wounds at the time he did the autopsy in the instant case. The defense also elicited the fact that Dr. Dorion consulted with two of his colleagues before rendering an opinion in this case "[b]ecause of the nature of the case and the multiplicity of wounds." On redirect examination of Dr. Dorion, the prosecutor asked Dr. Dorion which of his colleagues he had consulted. Dr. Dorion stated that he had consulted with Drs. Levy and Zipf, who were also pathologists. Over objection Dr. Dorion further stated that the two doctors had concurred with his opinions in this case. Defendant argues that the fact that the two doctors concurred with Dr. Dorion bolstered the State's argument that one of the most serious wounds inflicted on the victim was inflicted by defendant's knife.

As stated previously this Court permits the introduction of evidence to dispel favorable inferences arising from defendant's cross-examination of a witness. *Alston*, 341 N.C. 198, 461 S.E.2d 687; *Lynch*, 334 N.C. 402, 432 S.E.2d 349; *Stanfield*, 292 N.C. 357, 233 S.E.2d 574. In the instant case the defendant "opened the door" to the introduction of any incompetent or irrelevant hearsay relative to Dr. Dorion's consultation with Drs. Levy and Zipf by creating an inference during Dr. Dorion's cross-examination that he lacked expertise, had little confidence in his findings, and sought help from his colleagues. By questioning Dr. Dorion about his consultation with his colleagues, defendant opened the door to the evidence testified to by Dr. Dorion on his redirect examination. This assignment of error is overruled.

[8] In his next assignment of error, defendant contends that the trial court erred by allowing Cindy Griffin's testimony with respect to the victim's options in leaving the scene and with respect to defendant's intent at that time. Over defendant's objection Griffin testified on redirect examination that (i) the victim would have been crazy to turn his back on the crowd because defendant was "going to do something"; (ii) anyone could tell that defendant was "going to do something"; and (iii) there was no way Griffin, Cutchin, and the victim could have gotten in their car and driven off before defendant

approached them. Defendant argues that this testimony was speculative, beyond Griffin's knowledge, and beyond the lay opinion permitted by N.C.G.S. § 8C-1, Rule 701.

N.C.G.S. § 8C-1, Rule 701 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); *accord State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987). This rule permits evidence which can be characterized as a "shorthand statement of fact."

> 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. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) (quoting *State v. Skeen*, 182 N.C. 844, 845-46, 109 S.E. 71, 72 (1921)), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *accord Williams*, 319 N.C. at 78, 352 S.E.2d at 432. Griffin's testimony that defendant was "going to do something" and that they did not have time to leave before defendant approached represented an instantaneous conclusion based on her observation of a variety of facts; and, as such, the testimony may be characterized as a "shorthand statement of fact." This assignment of error is overruled.

[9] In his final assignment of error, defendant contends the trial court erred by permitting the prosecutor to ask prospective jurors if the jurors understood that the State might call family members and associates of defendant as "hostile" witnesses. The following colloquy is an example of the line of inquiry which defendant contends was improper:

> Q. We may call some family members and some associates of this defendant, people that hung out with him. Do you understand what I'm saying.
>
> A. Yes.

Q. Do you understand that we may call these people as what's known as hostile witnesses?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q. Do you understand we may call some of these people as hostile witnesses? Do you understand?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. Yes, sir.

Q. Would you weigh their testimony—family members and associates of this defendant that we may call; would you weigh their testimony carefully?

A. Yes, I would look at the family members. They could say anything, you know. Family likes—a lot of times takes up for these things.

We note that defendant assigned error to more than forty instances in which the prosecutor pursued a substantially similar line of inquiry. Defendant contends that referring to family and associates of defendant as "hostile" witnesses improperly suggested that (i) witnesses who knew defendant were automatically hostile, (ii) the testimony of "hostile" witnesses should be scrutinized more carefully than other witnesses, and (iii) testimony from "hostile" witnesses could be discarded if it was not favorable to the State. Defendant argues that there was no factual basis for suggesting that any witness would be "hostile" and that referring to certain witnesses by that term created "automatic antipathy to and distrust of any friend or family member of the defendant."

"The trial court has the duty to supervise the examination of prospective jurors. Regulation of the manner and the extent of inquiries on *voir dire* rests largely in the trial court's discretion." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 547 (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." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 162 (1994).

After careful review of the transcript of jury *voir dire*, we conclude that the trial court did not abuse its discretion in permitting the prosecutor to ask prospective jurors whether they understood that he might call family and associates of defendant as "hostile" witnesses. Defendant objected to these questions primarily on the basis that only the trial court has the discretion to declare a witness "hostile." The prosecutor's statements that family and associates of defendant might be called as "hostile" witnesses did not suggest that testimony of these witnesses should be considered more carefully than other witnesses or that testimony by these witnesses unfavorable to the State could be discarded. We conclude that defendant has failed to show abuse of discretion or prejudice in the trial court's rulings on this issue. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JOHN BILLY FRAZIER

No. 17A96

(Filed 11 October 1996)

Evidence and Witnesses § 373 (NCI4th)— indecent liberties and rape—adolescent family members—sexual abuse of other family members—remoteness—admissibility to show common plan

In a prosecution of defendant for taking indecent liberties with and first-degree rape of his two adolescent stepgranddaughters, testimony by three other female members of defendant's family recounting how defendant had sexually abused them when they were young did not pertain to acts too remote in time to be admissible under Rule 404(b) to show defendant's common plan or scheme to sexually abuse female family members where the testimony tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern in that all the victims were adolescents at the time defendant began his sexual assaults; in each instance, defendant slowly began touching the

victim and gradually reached more serious abuse culminating in intercourse; defendant bought the victims gifts and gave them money during the period of abuse; defendant threatened each of them that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe sanction; all of the victims were related to defendant either through his own marriage or the marriage of his children; and all the victims lived with or near defendant during the course of the abuse. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Rape § 73.

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.

Justice WEBB dissenting.

Justice ORR joins in this dissenting opinion.

Appeal by defendant 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. 1, 464 S.E.2d 490 (1995), finding no prejudicial error in a trial that resulted in judgments entered by Davis (James C.), J., on 4 March 1994 in Superior Court, Northampton County, upon defendant's conviction of ten counts of taking indecent liberties with a minor and two counts of first-degree rape. Heard in the Supreme Court 9 September 1996.

Michael F. Easley, Attorney General, by Sondra C. Panico, Associate Attorney General, for the State.

Steven F. Bryant for defendant-appellant.

WHICHARD, Justice.

Defendant was found guilty of ten counts of taking indecent liberties with a child and two counts of first-degree rape. The trial court sentenced him to two consecutive life sentences. The victims were his two adolescent stepgranddaughters, identified here as L.B. and S.B.

At trial, fourteen-year-old L.B. testified that defendant began touching her inappropriately on her breasts and buttocks when

she was nine or ten. Defendant sexually molested her several times a week when no one else was present. When L.B. was ten years old, defendant raped her. He raped her a second time when she was between the ages of eleven and twelve. L.B. testified that on occasion, defendant would give her money and buy her candy, telling her it was for helping him out. She further testified that she did not tell anyone because defendant had threatened to send her away if she did.

Eventually, L.B. confided to her cousin that defendant had been sexually abusing her. This disclosure occurred after Polly, defendant's wife, took L.B. to a doctor who told them L.B. needed to be on birth control pills. L.B. also told her sister, S.B., who stated that defendant had "messed with her" as well. L.B. then disclosed the sexual abuse to a school psychiatrist and a police detective.

Sixteen-year-old S.B. also testified at trial. She stated that defendant sexually molested her two or three times a week from the time she was thirteen years old until she was fifteen. Defendant would kiss her on the lips, fondle her breasts, and put his hands down her pants. S.B. stated that during the time period over which defendant abused her, defendant gave her money, bought her things, and taught her how to drive his truck. S.B. testified that defendant told her not to tell anyone about the sexual activity.

Over defendant's objection, the trial court admitted the testimony of three other female members of defendant's family who recounted how defendant had sexually abused them when they were young. This testimony is the subject of defendant's first assignment of error. Defendant argues that the trial court violated Rule 404(b) of the North Carolina Rules of Evidence by admitting the testimony of these witnesses.

The first witness, one of Polly's daughters and the stepmother of L.B. and S.B., testified that she first met defendant around 1964 when she was approximately four years old, after defendant married her mother. When she was sixteen and began "filling out," defendant started "feeling" her around her waist, breasts, buttocks, and vagina. On occasion, defendant kissed her "in the mouth [and] on the face." She lived with an aunt for a year while defendant and Polly traveled with defendant's company. Defendant and Polly returned when the witness was seventeen, and defendant resumed touching her inappropriately.

This witness married her first husband when she was twenty and lived with him until she was twenty-one. Their son was born shortly after they separated. In 1983 or 1984, after she married her second husband (the father of L.B. and S.B.), defendant paid many of their expenses. In return for his financial contributions, defendant told her she needed to show him "some affection" or he would take her son away from her. Eventually, defendant had sexual intercourse with her while her husband was at work, her children were at school, and Polly was away. Defendant threatened to have S.B. and L.B. sent away and to raise her son himself if she told anyone about the sexual incidents.

The second witness, the first witness's sister and Polly's other daughter, also testified for the State. She stated that when she was young, defendant would kiss her on the mouth instead of the cheek. In approximately 1966, when she was twelve or thirteen, defendant got in the shower with her and began caressing her. He then placed her arms on the wall, lifted her leg, and had sexual intercourse with her in the shower. Defendant made it clear to her that if she told anyone, he would no longer protect her from the beatings Polly often gave her.

The third female family member to testify against defendant stated that she first met defendant when she was twelve years old because she and the second witness were good friends. When she was fourteen, she married Larry Frazier, defendant's sixteen-year-old son. The couple had a baby a short time later. Defendant began stopping by daily to check on the baby. When the witness was fifteen, defendant pulled her into the bedroom and had sexual intercourse with her while Larry was at work. Thereafter, Larry began working the third shift, and defendant came by almost every morning between five and six o'clock to have sexual intercourse with her. She testified that she did not want this to happen but that she was too young and afraid to say anything. This conduct continued for approximately two years until she finally told the second witness about it.

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). Thus,

> even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Here, the State argues that the three witnesses' testimony was admissible to demonstrate the existence of a common plan or scheme by defendant to sexually abuse adolescent female family members. The test for determining whether such evidence is admissible is whether the incidents establishing the common plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988).

Defendant contends that the testimony of these three witnesses was inadmissible to prove the existence of a common plan or scheme because the prior acts are alleged to have occurred over a time period of seven to twenty-seven years before the trial for the present charges. They are therefore too remote in time to be relevant or probative. In making this argument, defendant relies on *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988), a case involving alleged sexual abuse by a stepfather against his stepdaughter. In *Jones* the defendant was charged with first-degree rape and taking indecent liberties with a minor. The State presented the testimony of a female who stated that she had been subjected to similar sexual acts by defendant approximately seven years earlier. This Court held that the prior acts of sexual misconduct were too remote in time to be admissible under Rule 404(b). For the reasons that follow, we hold that *Jones* does not control here and that the trial court properly admitted the testimony in question.

This Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges. *State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990). Subsequent to *Jones*, it has permitted testimony as to prior acts of sexual misconduct which occurred more than seven years earlier. In *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989), a case tried prior to the effective date of the Rules of Evidence, we held that it was not error for the

trial court to admit the testimony of sisters of the victim that their father had also sexually abused them. There, the defendant's prior sexual misconduct with the sisters occurred during a twenty-year period. *Id.* at 447, 379 S.E.2d at 848. Likewise, we recently held that a ten-year gap between instances of similar sexual misbehavior did not render them so remote in time as to negate the existence of a common plan or scheme. *State v. Penland*, 343 N.C. 634, 653-54, 472 S.E.2d 734, 745 (1996).

Here, the testimony in question tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern. All of the victims were adolescents at the time defendant began his sexual assaults. In each instance, defendant slowly began touching the victim and gradually reached more serious abuse culminating in intercourse. During the period of the abuse, defendant bought his victims gifts and gave them money. He also threatened each of them that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe sanction. All of the victims were related to defendant either through his own marriage or the marriage of his children, and all lived with or near him during the course of the abuse.

We conclude that this evidence presents a classic example of a common plan or scheme. "When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *Shamsid-Deen*, 324 N.C. at 445, 379 S.E.2d at 847. We therefore affirm the Court of Appeals and hold that the prior acts were not too remote to be considered as evidence of defendant's common plan or scheme to sexually abuse female family members, including the victims here.

Defendant presents three additional assignments of error. First, defendant argues that the trial court erred in allowing the State to cross-examine him concerning prior acts of sexual misconduct because it forced him to defend himself against extrinsic allegations in addition to the pending charges. Second, he contends that the trial court erred by allowing improper cross-examination and impeachment of three defense witnesses. Finally, defendant argues that the prosecutor's improper comments, conduct, and arguments prejudiced defendant's ability to receive a fair trial.

The majority and minority opinions in the Court of Appeals agreed that error occurred in each of these instances. The majority

held, however, that the errors did not prejudice defendant and were therefore harmless. Judge John concluded in his dissent that even assuming *arguendo* that each error was harmless standing alone, when considered in combination, the prejudicial impact was such that defendant must receive a new trial.

In order to show prejudicial error, defendant must show 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) (1988); *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988). After reviewing the record, we conclude that there is no reasonable possibility that absent these errors, standing alone or cumulatively, the outcome of the trial would have been different.

Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice WEBB dissenting.

I dissent. The majority says, "This Court has been liberal in allowing evidence of similar offenses in trials on sexual crime charges." I would say that is an understatement and today we have outdone ourselves.

The majority says "the prior acts were not too remote to be considered as evidence of defendant's common plan or scheme to sexually abuse female family members, including the victims here." It is hard to understand how the earlier sex offenses showed he had a plan to molest L.B. and S.B. who were not alive when the incidents occurred.

What the evidence of previous offenses does show is that the defendant is the type person who sexually molests young girls in his family. This is evidence excluded by N.C.G.S. § 8C-1, Rule 404(b). To hold that evidence of bad acts proves the defendant had a plan to commit those acts and the act for which the defendant is being tried eviscerates the rule. If proof of a bad act is admissible because it proves a plan to commit another bad act it is hard to imagine what evidence of bad acts are excludable. Nevertheless, that is what we hold today. I do not believe we should sanitize evidence which is not otherwise admissible by adding an inference to it, as we have done in this case, which makes it admissible in form but not in substance.

I agree with Judge John's dissent in the Court of Appeals.

I vote for a new trial.

Justice ORR joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ANDRICK LAMONT LANE

No. 90A96

(Filed 11 October 1996)

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

There was sufficient evidence of premeditation and deliberation by defendant to support the submission to the jury of an issue as to defendant's guilt of first-degree murder where the evidence tended to show that defendant was armed with a gun; witnesses heard him say, "Let's go shoot up the project boys" as he rode his bicycle down the street toward the victim; after approaching the victim and shooting him two times, defendant inflicted three more gunshot wounds as the victim lay on the ground begging for his life; two of the wounds were to the victim's head; and there was no evidence that the victim provoked, spoke to, or threatened defendant in any way prior to the shooting.

Am Jur 2d, Homicide § 439.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

2. Homicide § 552 (NCI4th)— first-degree murder—instruction on second-degree murder not required

The trial court in a first-degree murder prosecution did not err by refusing to instruct the jury on second-degree murder where the State offered evidence that the murder was premeditated and deliberate, and defendant offered no evidence to negate those elements but simply denied that he was the perpetrator.

Am Jur 2d, Homicide § 482 et seq.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

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

Appeal of right pursuant to N.C.G.S § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brown (Frank R.), J., on 14 November 1995 in Superior Court, Edgecombe County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 1996.

Michael F. Easley, Attorney General, by Teresa L. Harris, Associate Attorney General, for the State.

Edward B. Simmons for defendant-appellant.

WHICHARD, Justice.

Defendant was tried noncapitally and convicted of the first-degree murder of Donald Ray Avent. The trial court imposed the mandatory sentence of life imprisonment without parole. N.C.G.S. § 14-17 (Supp. 1995). Defendant appeals from his conviction and sentence. We find no prejudicial error.

The State's evidence tended to show that on the night of 9 August 1995, defendant and two other individuals were riding bicycles along Hargrove Street in Rocky Mount. At the same time, Donald Avent was talking with Tiffany Richardson on nearby Daughtridge Street. Witnesses overheard defendant say, "Let's go shoot up the project boys." A few minutes later, defendant rode his bicycle down Daughtridge Street toward the location where Richardson and Avent had been talking. By that time, the conversation between Avent and Richardson had ended. Richardson had begun walking in the direction of Hargrove Street, and Avent had begun riding his bicycle down Daughtridge Street in the opposite direction. Defendant rode his bicycle past Richardson in the direction of Avent. When he approached Avent, he stopped his bicycle and fired two shots. Avent fell to the ground. Witnesses overheard Avent saying, "Don't shoot me. It won't me. It won't me. Don't kill me. I didn't have anything to do with it." Defendant fired additional shots, and witnesses ran to call the police. Rocky Mount police officers found Avent dead at the scene.

A short while later defendant, again riding his bicycle, approached the scene, where a crowd had gathered around Avent's

body. Police stopped defendant and prohibited him from entering the area, whereupon defendant left. Subsequently, Richardson, who had known defendant for six years, and Devita Harden, a witness who had known defendant for four years, made statements to police officers identifying defendant as the shooter. Defendant was arrested on the basis of those statements.

Defendant made no statement while in custody but testified on his own behalf at trial. He stated that on the night in question, he and some friends had been drinking at a friend's house. His cousin had left the house, and defendant had heard several gunshots shortly thereafter. He became concerned about his cousin and decided to ride his bicycle in the direction of the gunshots, where he saw a crowd gathering on the street. Defendant testified that after police refused to allow him to approach the scene, he left and located his cousin. Defendant denied ever having said that he was going to shoot a "project boy," and he denied that he shot Avent.

The State's rebuttal witness, Artayia Cooper, testified that during the early evening before the shooting, defendant had a gun in his possession and was wearing clothing that matched the witnesses' descriptions of the clothing the shooter had worn. Cooper saw defendant riding his bicycle toward the area where Avent was shot and heard gunshots within a minute after defendant had turned the corner on his bicycle. After the shooting, Cooper saw defendant again and noticed that defendant had changed his clothes.

At the end of the State's evidence and again at the conclusion of all the evidence, defendant moved that the charge of first-degree murder be dismissed for lack of evidence to support premeditation and deliberation. The trial court denied the motions; it also denied defendant's request for a jury instruction on second-degree murder.

[1] Defendant assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder. The unlawful killing of a human being committed with premeditation and deliberation is murder in the first degree. N.C.G.S. § 14-17; *State v. Gainey*, 343 N.C. 79, 82, 468 S.E.2d 227, 229 (1996). 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." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). 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.*

Defendant argues that there was insufficient evidence of premeditation and deliberation. 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). Thus, if there was any evidence reasonably tending to show that defendant formed the specific intent to kill the victim and that this intention was preceded by premeditation and deliberation, the denial of defendant's motion to dismiss was proper. *Gainey*, 343 N.C. at 85, 468 S.E.2d at 231.

Viewed in the light most favorable to the State, the evidence was clearly sufficient to establish that defendant acted with premeditation and deliberation. Defendant was armed with a gun. As he rode his bicycle down the street toward the victim, witnesses heard him say, "Let's go shoot up the project boys." There was no evidence that the victim provoked, spoke to, or threatened defendant in any way. After approaching the victim and shooting him two times, defendant inflicted three more gunshot wounds as the victim lay on the ground begging for his life. Two of the wounds were to the victim's head. This evidence raises a reasonable inference that defendant made a premeditated and deliberate decision to kill the victim. This assignment of error is therefore overruled.

[2] In his next assignment of error, defendant contends that the trial court committed reversible error when it denied his request for an instruction on second-degree murder. Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. N.C.G.S. § 14-17; *Gainey*, 343 N.C. at 83, 468 S.E.2d at 230. Although defendant denies having committed the offense, he nevertheless contends that the State's evidence would reasonably support an inference that the homicide, if he committed it, was done without premeditation and deliberation. Thus, he argues that the trial court should have instructed the jury on second-degree murder.

If the evidence satisfies the State's burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial, the trial court should exclude second-degree murder from the jury's consideration. *State v. Conner*, 335 N.C. 618, 634-

35, 440 S.E.2d 826, 835 (1994). Defendant has failed to point to any evidence which would support a second-degree murder conviction. We need not reiterate the State's evidence; the same evidence that required the denial of defendant's motion to dismiss also supports the refusal to instruct on second-degree murder. The State offered evidence that the murder was premeditated and deliberate, and defendant offered no evidence to negate these elements. Instead, he simply denied that he was the perpetrator. The trial court's refusal to give the second-degree murder instruction thus was proper. This assignment of error is overruled.

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

NO ERROR.

LINDA GAIL WILLIAMS v. BLALOCK PAVING, INC.

No. 100A96

(Filed 11 October 1996)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 121 N.C. App. 789, 467 S.E.2d 911 (1996), affirming an order granting summary judgment in favor of defendant entered by Farmer, J., on 20 February 1995 in Superior Court, Wake County. Heard in the Supreme Court 10 September 1996.

Rosenthal & Putterman, by Charles M. Putterman, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion of Judge Smith.

REVERSED.

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

STATE v. McBRIDE

[344 N.C. 623 (1996)]

STATE OF NORTH CAROLINA v. FRED DOUGLAS McBRIDE

No. 524PA95

(Filed 11 October 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. 623, 463 S.E.2d 403 (1995), dismissing defendant's appeal, after pleas of guilty and entry of judgments thereon on 31 May 1994 by Grant (Cy A., Sr.), J., to review an order denying a motion to suppress evidence entered by Cobb, J., on 9 May 1994 in Superior Court, New Hanover County. Calendared for argument in the Supreme Court 11 September 1996; determined on the briefs without oral argument.

Michael F. Easley, Attorney General, by Simoné Frier Alston, Associate Attorney General, for the State.

Judith T. Naef for defendant-appellant.

PER CURIAM.

AFFIRMED.

GOLDIE KIRK, MOTHER AND NEXT OF KIN TO ALAN PATRICK KIRK (DECEASED), EMPLOYEE v. STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED, CARRIER

No. 551PA95

(Filed 11 October 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 121 N.C. App. 129, 465 S.E.2d 301 (1995), which affirmed an Opinion and Award of the North Carolina Industrial Commission filed 19 July 1994. This Court allowed plaintiff's petition for discretionary review on 3 April 1996. Heard in the Supreme Court 13 September 1996.

Lore & McClearen, by R. James Lore, for plaintiff-appellant.

Michael F. Easley, Attorney General, by M.A. Kelly Chambers, Associate Attorney General, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NORTH CAROLINA DEPARTMENT OF CORRECTION v. JANICE HARDING

No. 491PA95

(Filed 11 October 1996)

On plaintiff's petition for writ of certiorari pursuant to N.C.G.S. § 7A-32(b) and on defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 451, 462 S.E.2d 671 (1995), vacating a judgment entered at the 24 October 1994 Civil Session of Superior Court, Wake County, by Greene, J., and remanding with instructions. Heard in the Supreme Court 13 September 1996.

Michael F. Easley, Attorney General, by Valerie L. Bateman, Assistant Attorney General, for plaintiff-appellant and -appellee.

Marvin Schiller for defendant-appellant and -appellee.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA DEPARTMENT OF CORRECTION v. GLENN E. MYERS

No. 489PA95-2

(Filed 11 October 1996)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of the Court of Appeals, 120 N.C. App. 437, 462 S.E.2d 824 (1995), affirming the judgment entered 25 October 1994 by Greene, J., in Superior Court, Wake County. Heard in the Supreme Court 13 September 1996.

Michael F. Easley, Attorney General, by Valerie L. Bateman, Assistant Attorney General, for the plaintiff-appellant.

Marvin Schiller for defendant-appellee.

PER CURIAM.

This Court allowed plaintiff North Carolina Department of Correction's petition for writ of certiorari to review the decision of the Court of Appeals only as to the issue of attorney's fees.

AFFIRMED.

FINNEY v. ROSE'S STORES, INC.

[344 N.C. 627 (1996)]

SHIRLEY FINNEY AND HUSBAND, J.W. FINNEY, JR. v. ROSE'S STORES, INC., AND DIVERSIFIED PRODUCTS CORPORATION

No. 554A95

(Filed 11 October 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. 843, 463 S.E.2d 823 (1995), affirming summary judgment in favor of defendants entered by Jones (Julia V.), J., on 18 October 1993 in Superior Court, Haywood County. Heard in the Supreme Court 9 September 1996.

Russell L. McLean, III, for plaintiff-appellants.

Kathy A. Gleason for defendant-appellee Rose's Stores, Inc.

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 remand to Superior Court, Haywood County, for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BEAMAN WALTERS, EMPLOYEE, PLAINTIFF v. ALGERNON BLAIR, EMPLOYER; UNITED STATES FIDELITY AND GUARANTY COMPANY, CARRIER, DEFENDANTS

No. 462A95

(Filed 11 October 1996)

Appeal of right by defendants pursuant to N.C.G.S. § 7A-30(1) from the decision of the Court of Appeals, 120 N.C. App. 398, 462 S.E.2d 232 (1995), reversing an order of the North Carolina Industrial Commission and holding that N.C.G.S. § 97-63 violates the Constitution of the United States and the North Carolina Constitution. Heard in the Supreme Court 11 September 1996.

Robin E. Hudson and Faith Herndon for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Thomas A. Farr and Peter D. Holthausen, for defendants-appellants.

PER CURIAM.

AFFIRMED.

ALDRIDGE v. FRASER

No. 163P96

Case below: 121 N.C. App. 787

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

BAKER v. BECAN

No. 416P96

Case below: 123 N.C. App. 551

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996.

DORSEY v. UNC-WILMINGTON

No. 202P96

Case below: 122 N.C. App. 59

Petition by plaintiff (Dorsey) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996.

FINCH v. QUALITY ELECTRIC CO.

No. 185P96

Case below: 122 N.C. App. 194

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

FRANKLIN v. BROYHILL FURNITURE INDUS.

No. 405P96

Case below: 123 N.C. App. 200

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996.

FREEMAN v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

No. 357P96

Case below: 122 N.C. App. 260

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

HINSON v. UNITED FINANCIAL SERVICES

No. 408P96

Case below: 123 N.C. App. 469

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

IN RE FORECLOSURE OF C AND M INVESTMENTS

No. 366PA96

Case below: 123 N.C. App. 52

Petition by petitioner (Walker Heirs, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

IN RE NORRIS

No. 186P96

Case below: 122 N.C. App. 194

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

IN RE YOUNG

No. 174A96

Case below: 122 N.C. App. 163

Petition by respondent (Dawn Christina Hayward) 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 10 October 1996.

LEAHY v. N.C. BD. OF NURSING

No. 360PA96

Case below: 123 N.C. App. 354

Petition by respondent (N.C. Bd. of Nursing) for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

LIBERTY FINANCE CO. v. BDO SEIDMAN

No. 397P96

Case below: 123 N.C. App. 515

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

MARTIN v. FERREE

No. 386P96

Case below: 123 N.C. App. 357

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

McNEILL v. BD. OF ADJUST. OF TOWN OF LAKE LURE

No. 395P96

Case below: 123 N.C. App. 357

Petition by respondent (Board of Adjustment For the Town of Lake Lure) for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

MOYER v. MOYER

No. 324P96

Case below: 122 N.C. App. 723

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

MUSE v. BRITT

No. 392P96

Case below: 123 N.C. App. 357

Petition by petitioner (Muse) for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

N .C. STEEL v. NATIONAL COUNCIL ON COMPENSATION INS.

No. 317PA96

Case below: 123 N.C. App. 163

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 11 September 1996.

PRESBYTERIAN-ORTHOPAEDIC HOSP. v.
N.C. DEPT. OF HUMAN RESOURCES

No. 329PA96

Case below: 122 N.C. App. 529

Petition by intervenor-respondent (Mercy Hospital) for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996. Petition by intervenor-respondent (Stanly Memorial Hospital for writ of supersedeas allowed 10 October 1996. Petition by intervenor-respondent (Stanly Memorial Hospital) for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996. Alternative motion by intervenor-respondent (Stanly Memorial Hospital) to vacate decision and dismiss appeal denied 10 October 1996.

RHONEY v. KISER

No. 382P96

Case below: 123 N.C. App. 357

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996.

SOTELO v. DREW

No. 398A96

Case below: 123 N.C. App. 464

Motion by defendant to dismiss appeal denied 10 October 1996.

SOUTHERLAND v. B. V. HEDRICK GRAVEL & SAND CO.

No. 331PA96

Case below: 123 N.C. App. 120

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

SOUTHERN FURNITURE CO. v. DEPT. OF TRANSPORTATION

No. 175PA96

Case below: 122 N.C. App. 113

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

STATE v. ADAMS

No. 361P96

Case below: 123 N.C. App. 357

Notice of appeal by defendant (substantial constitutional question) dismissed ex mero motu 10 October 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. ARTIS

No. 316P96

Case below: 123 N.C. App. 114

Petition by Attorney General for writ of supersedeas denied and stay dissolved 10 October 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. BRAWNER

No. 270P96

Case below: 122 N.C. App. 576

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. HICKS

No. 264P96

Case below: 122 N.C. App. 399

Notice of appeal by defendant (substantial constitutional question) dismissed ex mero motu 10 October 1996. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. HINES

No. 301PA96

Case below: 122 N.C. App. 545

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

STATE v. HUDSON

No. 356PA96

Case below: 123 N.C. App. 336

Petition by Attorney General for writ of supersedeas allowed 10 October 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

STATE v. JOHNSON

No. 434A96

Case below: 123 N.C. App. 790

Motion by Attorney General for temporary stay allowed 7 October 1996. Petition by Attorney General for writ of supersedeas denied and stay dissolved 10 October 1996.

STATE v. LAMBERT

No. 362P96

Case below: 123 N.C. App. 358

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. MOORE

No. 556A90-2

Case below: Forsyth County Superior Court

Motion by defendant (Moore) to file ex parte analysis of privileged documents denied 24 September 1996. Petition by defendant (Moore) for writ of certiorari to review the order of the Superior Court, Stokes County denied 24 September 1996.

STATE v. MOSELEY

No. 124A93-2

Case below: Forsyth County Superior Court

Petition by defendant (Moseley) for writ of certiorari to review the order of the Superior Court, Stokes County denied 10 October 1996.

STATE v. PETTY

No. 354P96

Case below: 123 N.C. App. 355

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. ROGERS

No. 367PA96

Case below: 123 N.C. App. 359

Petition by Attorney General for writ of supersedeas allowed 10 October 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

STATE v. ROGERS

No. 379P96

Case below: 123 N.C. App. 359

Notice of appeal by defendant (substantial constitutional question) dismissed ex mero motu 10 October 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. SANDERS

No. 88A85-3

Case below: Transylvania County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Transylvania County allowed 10 October 1996. Petition by defendant for writ of supersedeas allowed 10 October 1996.

STATE v. SHANLEY

No. 402P96

Case below: 123 N.C. App. 360

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. SIMONSON

No. 342P96

Case below: 123 N.C. App. 162

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 10 October 1996. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. WEAVER

No. 368P96

Case below: 123 N.C. App. 276

Petition by Attorney General for writ of supersedeas denied and stay dissolved 10 October 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996. Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 10 October 1996.

STATE v. WESLEY

No. 330P96

Case below: 123 N.C. App. 162

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE v. WILLIAMSON

No. 199P96

Case below: 122 N.C. App. 229

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 10 October 1996.

STATE EX REL. ALBERMARLE CHILD SUPPORT ENF. v. LAMBERT

No. 141P96

Case below: 344 N.C. 443

121 N.C. App. 628

Motion pro se by defendant (Lambert) for reconsideration or order denying notice of appeal and petition for discretionary review dismissed 10 October 1996.

STOUT v. CITY OF DURHAM

No. 156PA96

Case below: 121 N.C. App. 716

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

TOWN OF SPRUCE PINE v. AVERY COUNTY

No. 431A96

Case below: 123 N.C. 704

Petition by Attorney General for writ of supersedeas allowed 2 October 1996. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 10 October 1996.

WIEBENSON v. BD. OF TRUSTEES, STATE EMPLOYEES' RET. SYS.

No. 390PA96

Case below: 123 N.C. App. 246

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 is treated as a petition for writ of certiorari and is allowed 10 October 1996. Motion by petitioner (Wiebenson) to dismiss petition for discretionary review denied 10 October 1996.

YOUNG v. MASTROM, INC.

No. 365PA96

Case below: 123 N.C. App. 162

Petition by appellant (Mastrom, Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 10 October 1996.

STATE OF NORTH CAROLINA v. JAMES EDWARD THOMAS

No. 91A95

(Filed 8 November 1996)

1. Jury § 266 (NCI4th)— capital resentencing—swearing of jury

There was no plain error in a capital resentencing where defendant alleged that the case was not tried before a jury duly sworn in open court in the presence of defendant and his counsel. Defendant admits that he was present for the selection and impaneling of the jury and does not contend that he was not physically present when the jurors were given their oath of office. To the extent that the record shows anything, it shows that the jurors were duly sworn and defendant presents no evidence to the contrary.

Am Jur 2d, Jury §§ 217 et seq.

2. Evidence and Witnesses § 1693 (NCI4th)— capital resentencing—photographs of victim—admissible

The trial court did not err in a capital resentencing proceeding by admitting into evidence seven photographs where defendant argued that the photographs were introduced to prove that the killing was done in an especially heinous, atrocious, or cruel manner, an aggravating circumstance which the first jury had rejected. The photographs were neither cumulative nor excessive in number and their probative value was not substantially outweighed by the danger of unfair prejudice. Although some of the photographs were gruesome, they were relevant to illustrate the circumstances of the killing and tended to establish that the murder was committed during the commission of a sexual offense, which supported the N.C.G.S. § 15A-2000(e)(5) circumstance.

Am Jur 2d, Homicide §§ 417 et seq.

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

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

3. Criminal Law § 1343 (NCI4th)— capital resentencing—especially heinous, atrocious, or cruel circumstance—rejected at first hearing—references by prosecutor

There was no plain error in a capital resentencing where the previous jury had rejected the especially heinous, atrocious, or cruel aggravating circumstance, the trial court in this proceeding had granted defendant's motion that this circumstance not be allowed, and defendant argued that the prosecutor impermissibly called attention to the especially heinous, atrocious, or cruel aggravating circumstance by repeatedly referring to sexual "sadism" and "torture" during cross-examination of two defense witnesses and by repeatedly characterizing the case as "unique" during jury *voir dire*. A jury in a capital sentencing proceeding may consider all the circumstances surrounding the killing; the prosecutor did not mention the especially heinous, atrocious, or cruel language during the presentation of the evidence or the cross-examination of the defense witnesses. The prosecutor's repeated use of the word "unique" during jury *voir dire* was not so grossly improper as to require the court to intervene *ex mero motu*.

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

4. Criminal Law § 452 (NCI4th)— capital resentencing—especially heinous, atrocious or cruel aggravating circumstance not allowed—prosecutor's argument—references to torture and sadism

A prosecutor's argument in a capital resentencing hearing was not so grossly improper as to require the trial court to intervene *ex mero motu*, and did not lead the jury to return a sentence of death based on passion, prejudice, or other arbitrary factors, where the previous jury had rejected the especially heinous, atrocious, or cruel aggravating circumstance and the court in this proceeding had granted defendant's motion that this circumstance not be allowed, but defendant alleges that the prosecutor described defendant's offenses in ways that suggested the murder was especially heinous, atrocious, or cruel. Although the prosecutor's argument included repeated references to torture and sadism, neither the prosecutor nor the judge used the especially heinous, atrocious, or cruel language and the jury was not confused as to what aggravating circumstances it could consider.

Am Jur 2d, Trial §§ 648 et seq.

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

5. Criminal Law § 1303 (NCI4th)— capital resentencing—jury selection—prosecutor's statements

There was no error in a capital resentencing so grossly improper as to require the trial court to intervene *ex mero motu* where defendant contended that the prosecutor engaged in a series of lectures by which he attempted to establish rapport with the jurors and that, while technically accurate, the prosecutor's statements were unduly prejudicial because the statements led the jurors to expect a large number of mitigating circumstances and to believe that mitigating circumstances have less value than aggravating circumstances. The trial court had no opportunity to correct any perceived errors in the statements, the trial court properly instructed the jury regarding the aggravating and mitigating circumstances, and the law to be applied was as stated by the court rather than by the attorneys. The jury was not misled and its recommendation was not unduly influenced by the prosecutor's statements during *voir dire.*

Am Jur 2d, Criminal Law § 600.

6. Criminal Law § 352 (NCI4th)— capital resentencing—defendant seen in leg irons—no plain error

There was no plain error in a capital resentencing where the trial court did not err by not conducting an inquiry and not declaring a mistrial *ex mero motu* when a panel of prospective jurors was allowed to see defendant in leg irons. Defendant was not shackled or bound while in the courtroom, but may have been seen in restraints by prospective jurors as he was brought through the lobby of the courthouse. The jury was aware that this was a sentencing proceeding and that defendant's guilt had been determined, as he had been previously convicted of first-degree murder, and being temporarily observed in restraints did not infringe on defendant's presumption of innocence, since there was no such presumption.

Am Jur 2d, Criminal Law §§ 844-846.

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

7. Jury § 141 (NCI4th)— capital resentencing—jury selection—parole eligibility—questions not allowed

The trial court did not err in a capital resentencing by denying defendant's motion to question potential jurors concerning parole eligibility.

Am Jur 2d, Jury §§ 205, 206.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

8. Criminal Law § 1322 (NCI4th)— capital resentencing—parole eligibility—jury question—instruction

The trial court did not err in a capital resentencing by informing the jury, in response to specific questions from the jury, that eligibility for parole is not a proper matter for the jury to consider and that it should determine the question of death as though life imprisonment means exactly what the statute says.

Am Jur 2d, Trial §§ 286, 1443.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR2d 769.

9. Criminal Law § 1312 (NCI4th)— capital resentencing—aggravating circumstance—previous conviction involving violence—1976 California plea

There was no prejudicial error in a capital resentencing where the State introduced in support of the aggravating circumstance of a previous conviction involving violence a copy of a 1976 California change of plea and order indicating that defendant had pleaded guilty to one count of armed robbery with a .22 caliber pistol, that defendant had pleaded guilty to a second count of felony robbery, and that two additional armed robbery charges had been dropped. Assuming that the exhibit would not have been admissible over a proper objection, its admission did not impact the jury's recommendation in light of the evidence that was properly admitted and the fact that the jury was properly instructed. Additionally, defense counsel admitted the existence of this aggravating circumstance in his argument to the jury.

Am Jur 2d, Criminal Law § 328.

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.

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

A sentence of death was proportionate where the record fully supported the two aggravating circumstances found by the jury, and there is no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary consideration. The victim was found dead in her home, with bite marks on her breasts, her inner thighs bruised, her head covered by a pillow, and a telephone inserted inside her vagina; there were signs of both manual and ligature strangulation which was determined to be the cause of death; and defendant had been convicted previously of armed robbery, a violent felony. This case has the characteristics of first-degree murders for which the death penalty has been upheld.

Am Jur 2d, Criminal Law § 628.

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

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that 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 Thompson, J., at the 13 February 1995 Criminal Session of Superior Court, Wake County. Heard in the Supreme Court 12 September 1996.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Elizabeth G. McCrodden for defendant-appellant.

FRYE, Justice.

On 23 June 1986, defendant James Edward Thomas was indicted for murder and first-degree sexual offense. At the 6 July 1987 Criminal Session of Superior Court, Wake County, he was tried capitally to a jury, found guilty, and sentenced to death for the first-degree murder conviction and to a consecutive term of life imprisonment for the sexual offense conviction. On appeal, this Court ordered a new capital sentencing proceeding on the first-degree murder conviction based on the United States Supreme Court's decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991). Defendant's new capital sentencing proceeding was held 13 through 24 February 1995, Judge Jack Thompson presiding.

At defendant's new 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 defendant had been previously convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3) (1988) (amended 1994); and that the murder had been committed while defendant was engaged in a sexual offense, N.C.G.S. § 15A-2000(e)(5). The jury also found twenty-six of the twenty-nine statutory and nonstatutory mitigating circumstances submitted to it. On 24 February 1995, Judge Thompson, upon the jury's recommendation, imposed a sentence of death.

Defendant appeals to this Court as of right from the sentence of death. On this appeal, defendant makes eleven arguments, supported by fourteen assignments of error. We reject each of these arguments 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.

The evidence supporting defendant's conviction is summarized in this Court's prior opinion, *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141, in which we vacated defendant's death sentence for *McKoy* error and remanded the murder case for a new capital sentencing proceeding. That evidence will not be repeated here, except where necessary to discuss the issues before us.

[1] In his first argument, defendant contends that the trial court committed plain error at his capital resentencing proceeding by allowing the case to be tried before a jury that had not been duly sworn in open

court in the presence of defendant and his counsel. We reject defendant's argument since there is no evidence that the case was tried before a jury that had not been duly sworn.

Under our Constitution, the accused in a criminal trial is entitled to trial by an impartial jury. N.C. Const. art. I, § 24. Our legislature has provided statutory procedures for selection, excusal, and swearing of jurors. *See, e.g.*, N.C.G.S. §§ 9-6 (Supp. 1995), 9-14, 9-15 (1986). These statutes contemplate a procedure whereby each juror is sworn to "truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence." N.C.G.S. § 9-14. However, once all jurors, including alternate jurors, have been selected to try a particular criminal case, they are impaneled by the clerk as follows:

> "Members of the jury, you have been sworn and are now impaneled to try the issue in the case of State of North Carolina versus ..... You will sit together, hear the evidence, and render your verdict accordingly."

N.C.G.S. § 15A-1216 (1988).

Our Constitution also provides that a defendant has the right to be present at every stage of the trial. *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990). This right cannot be waived in capital trials. *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969). We have declined to extend the nonwaivable right to be present in capital trials to pretrial jury selection matters. *State v. McCarver*, 341 N.C. 364, 381, 462 S.E.2d 25, 34 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d 482 (1996); *see also State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996).

Defendant admits that he was present for the selection and impaneling of the jury selected for his capital sentencing proceeding. He does not even contend that he was not physically present when the jurors were given their oath of office. He contends, rather, that the record does not affirmatively show whether the jurors were sworn and, if sworn, the form of the oath taken by them and whether the oath was taken in his presence in open court. Admitting that no objection was made at trial, and that no question was raised as to whether the jurors were sworn or the circumstances surrounding any oaths taken by the jurors, defendant nevertheless contends that this Court should find plain error because he was not tried by a jury that had been duly sworn.

In *Baldwin v. Kansas*, 129 U.S. 52, 32 L. Ed. 640 (1889), the United States Supreme Court held that a journal entry to the effect that the oath has been given is sufficient to overcome the contention that a jury was not adequately sworn. In *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982), this Court noted the presumption of regularity in a trial, stating that "where the record is silent on a particular point, it will be presumed that the trial court acted correctly." *See also State v. Bennett*, 308 N.C. 530, 534, 302 S.E.2d 786, 789 (1983); *State v. Sanders*, 280 N.C. 67, 72-73, 185 S.E.2d 137, 140 (1971). In the instant case, however, the record is not silent. As defendant concedes, there are two notations in the record to the effect that the jury had been duly sworn. The judge stated to the jury: "You have taken an oath as jurors that you will try all matters that come before you and render true verdicts according to the evidence." The record also includes a statement by the clerk: "Members of the jury, you have all been duly sworn." Thus, to the extent that the record in the instant case shows anything, it shows that the jurors were duly sworn. Defendant presents no evidence to the contrary. Accordingly, we reject defendant's argument that he was tried by a jury that had not been duly sworn.

[2] Defendant's second argument is based on two assignments of error. In one assignment of error, defendant contends that the trial court erred in denying his motion to exclude photographs of the victim on the grounds that the photographs were prejudicial and unnecessary. In the other assignment of error, defendant contends that the trial court erred in partially denying his motion regarding the especially heinous, atrocious, or cruel aggravating circumstance and then by allowing the State thereafter to conduct its *voir dire* of prospective jurors and to present evidence or question witnesses in ways suggesting that the crime was especially heinous, atrocious, or cruel.

Before trial, defendant filed several motions, including a "Motion to Exclude Photographs," which the trial court denied. Defendant also filed a "Motion to Prevent the State of North Carolina from Submitting N.C.G.S. § 15A-2000(e)(9), Which Was Previously Rejected by the Jury, as an Aggravating Factor and to Exclude Evidence Tending to Show that the Murder of Teresa Ann West was Heinous, Atrocious and Cruel." The trial court granted defendant's motion insofar as it requested that the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" not be allowed. The trial court denied the motion as it related to the State's presentation of evidence concerning the circumstances of the killing.

Addressing the photographs first, defendant concedes that, pursuant to N.C.G.S. § 15A-2000(a)(3), the jury in a capital sentencing proceeding may consider all the circumstances surrounding the killing. However, defendant argues that the photographs of the victim were introduced to prove that the killing was done in an "especially heinous, atrocious, or cruel" manner, an impermissible circumstance in this case since defendant's first jury rejected this circumstance. We disagree with defendant's contention that the trial court erred in denying his motion to exclude the photographs.

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

> 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)). "Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Rose, 335 N.C. at 319, 439 S.E.2d at 528.

Admissible evidence may be excluded, however, under Rule 403 of the North Carolina Rules of Evidence if the probative value of such evidence is substantially outweighed by its prejudicial effect. "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each . . . lies within the discretion of the trial court." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

In this case, seven photographs were introduced into evidence. Although some of the photographs were gruesome, they were relevant to illustrate the circumstances of the killing and tended to establish that the murder was committed during the commission of a sexual offense which supported the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance. These photographs were neither cumulative nor excessive in number and their probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not err in admitting these photographs into evidence.

[3] In the other assignment of error supporting his second argument, defendant contends that the prosecutor impermissibly called attention to the especially heinous, atrocious, or cruel aggravating circumstance by repeatedly referring to sexual "sadism" and "torture" during cross-examination of two defense witnesses and by repeatedly characterizing the case as "unique" during jury *voir dire*. Defendant did not object at the time to the prosecutor's cross-examination or *voir dire*.

First, as to counsel's questions on cross-examination, we note that the jury in a capital sentencing proceeding may consider all the circumstances surrounding the killing. N.C.G.S. § 15A-2000(a)(3) (Supp. 1995). N.C.G.S. § 15A-2000(a)(3) provides:

> In the [capital sentencing] proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

In the instant case, a new jury was impaneled for defendant's new capital sentencing proceeding and the prosecutor presented evidence to support the aggravating circumstances and cross-examined the witnesses for the defense as to the extent of their knowledge of the crime and the defendant. Since the trial court had ruled that it would not submit the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance, the prosecutor did not mention the "especially heinous, atrocious, or cruel" language during the presentation of the evidence or the cross-examination of the defense witnesses. In light of the foregoing and the fact that the questions were relevant to the circumstances of the killing, including the violent sexual assault, we hold that the prosecutor did not impermissibly call attention to the especially heinous, atrocious, or cruel aggravating circumstance.

Second, in reviewing counsel's arguments, we have said:

> Control of counsel's argument is largely left to the trial court's discretion. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). 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. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

State v. Howell, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994). We conclude that the prosecutor's repeated use of the word "unique" during jury *voir dire* in this capital sentencing proceeding was not so grossly improper as to require the court to intervene *ex mero motu*. Accordingly, we reject defendant's second argument.

Defendant's third argument is in two parts. First, the essence of defendant's argument is that it was improper for the prosecutor to describe defendant's offenses in ways that suggested the murder was especially heinous, atrocious, or cruel, and that any argument suggesting such required the trial court to intervene *ex mero motu*. Second, defendant contends that the jury returned the death sentence under the influence of passion, prejudice, and other arbitrary factors because of the prosecutor's impermissible argument. We disagree with both contentions.

[4] We will first address defendant's contentions regarding the prosecutor's argument. Since defendant did not object at trial, we must determine whether the prosecutor's argument was so grossly improper as to require the trial court to intervene *ex mero motu*. *Howell*, 335 N.C. at 471, 439 S.E.2d at 124.

This Court rejected a similar argument in *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 1083 (1995). In *Bacon*, the defendant contended that his due process rights were violated when the prosecutor repeatedly emphasized future dangerousness and brutality during his closing argument where the especially heinous, atrocious, or cruel aggravating circumstance could not be considered. This Court held that the defendant suffered no undue prejudice from the prosecutor's arguments because neither the trial court nor the district attorney ever mentioned the especially heinous, atrocious, or cruel aggravating circumstance and it was clear to the jury what aggravating circumstance could be considered. *Id.* at 93, 446 S.E.2d at 556.

In the instant case, the prosecutor's argument included repeated references to torture and sadism. Here, as in *Bacon*, neither the prosecutor nor the trial judge used the "especially heinous, atrocious,

or cruel" language, and we are satisfied that the jury was not confused as to what aggravating circumstances it could consider. The prosecutor's argument was not so grossly improper as to have required the trial court to intervene *ex mero motu*. *Id.* For similar reasons, we also reject defendant's contention that the prosecutor's argument led the jury to return a sentence of death based on passion, prejudice, or other arbitrary factors.

[5] In his fourth argument, defendant contends that the trial court committed prejudicial error in failing to intervene *ex mero motu* to prevent the prosecutor's *voir dire* of prospective jurors. Defendant contends that the prosecutor engaged in a series of lectures by which the prosecutor was attempting to establish rapport with the jurors. In addition, defendant contends that, while technically accurate, the prosecutor's statements during *voir dire* were unduly prejudicial because the statements led the jurors to expect a large number of mitigating circumstances and to believe that mitigating circumstances have less value than aggravating circumstances.

Defendant cites the following as an example of the prosecutor's improper statements:

> And those things go to the nature of the person, how they were brought up, how they were raised, you might hear some psychological reports, that sort of thing. And they are not limited [in] numbers, they are just—submit fifty mitigating factors and—and it should be that way. But you don't, on the other hand, you don't compare the numbers of factors. You don't add up one aggravating factor and three mitigating factors and say the mitigating factors win. You've got to use your common sense and put value on what they mean.
>
> For example, somebody could have a terrible childhood, one brother or one sister, and do bad and the other child could do wonderful; so, it might not mean anything in some circumstances.

We note first that defendant did not object to the prosecutor's statements. Thus, the trial court had no opportunity to correct any perceived errors in the statements. Assuming, *arguendo*, that the statements may have raised the jury's expectation regarding the number of mitigating circumstances to be submitted, the statements clearly were not so grossly improper as to require the trial court to intervene *ex mero motu*. *See State v. Frye*, 341 N.C. 470, 491, 461 S.E.2d 664, 674 (1995), *cert. denied*, —— U.S. ——, 134 L. Ed. 2d

526 (1996) (comments during jury selection constituting shorthand summaries of the definitions of aggravating and mitigating circumstances which were substantially correct were not so grossly improper as to require the trial court to intervene *ex mero motu*, even if slightly slanted toward the State's perspective). We note further that the trial court properly instructed the jury regarding the aggravating and mitigating circumstances, and that the law to be applied was as stated by the court rather than by the attorneys. Under these circumstances, we are convinced that the jury was not misled and that its recommendation was not unduly influenced by the prosecutor's statements during *voir dire*. Accordingly, we reject defendant's fourth argument.

[6] In his fifth argument, defendant, relying on *State v. Johnson*, 341 N.C. 104, 459 S.E.2d 246 (1995), contends that the trial court committed plain error in not conducting an inquiry and in not declaring a mistrial *ex mero motu* when a panel of prospective jurors was allowed to see defendant in leg irons. In *Johnson*, this Court found no error in the trial court's denial of the defendant's motion for a mistrial where the trial court conducted *voir dire* upon the defendant's motion, determined that the jurors had seen the defendant in handcuffs and leg restraints, gave corrective instructions, and inquired as to whether the jurors would be influenced by what they had seen. Unlike in *Johnson*, defendant here made no motion for a mistrial or for curative instructions to the jury.

In *State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976), this Court reaffirmed its holding and reasoning in *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976), which recognized that as a general rule a defendant in a criminal case is entitled to appear at trial free from shackles, except in extraordinary circumstances, in order to protect the presumption of innocence. Nevertheless, this Court held that the trial court did not err by refusing to grant the defendant's motion for mistrial because the jury observed him in handcuffs while being escorted from the jail to the courtroom. In so holding, this Court noted:

> [I]t is readily apparent that [the] instant case differs factually from *Tolley*. Here defendant was never shackled or bound while in the courtroom. The only basis upon which the trial judge could have granted a new trial was that the fleeting view of the handcuffed defendant while being transported from the jail to the courtroom may have suggested to some of the jurors that defend-

> ant was "an obviously bad and dangerous person whose guilt is a foregone conclusion."

Montgomery, 291 N.C. at 250, 229 S.E.2d at 912-13 (quoting *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367). In *Montgomery*, this Court further stated:

> [S]ome of the jurors may have momentarily viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse. It is common knowledge that bail is not obtainable in all capital cases and the officer having custody of a person charged with a serious and violent crime has the authority to handcuff him while escorting him in an open, public area. Indeed, it would seem that when the public safety and welfare is balanced against the due process rights of the individual in this case, such action was not only proper but preferable. Under the circumstances of this case, the trial judge correctly denied defendant's motion for a mistrial.

Id. at 252, 229 S.E.2d at 913-14.

In the present case, as in *Montgomery*, defendant was not shackled or bound while in the courtroom, but may have been seen in restraints by prospective jurors as he was brought through the lobby of the courthouse. Further, this was a sentencing proceeding; therefore, defendant's guilt had already been determined as defendant had been previously convicted of first-degree murder. The jury was aware of this. Thus, being temporarily observed in restraints did not infringe on defendant's presumption of innocence, since there was no such presumption. Accordingly, the trial court did not err in not conducting an inquiry and granting a mistrial.

[7] In defendant's sixth argument, defendant first contends that the trial court erred by denying defendant's "Motion to Question Potential Jurors Concerning their Beliefs as to Parole Eligibility." We recently addressed the issue of the denial of a similar motion in *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994), *cert. denied*, — U.S. —, 131 L. Ed. 2d 292 (1995), and held against defendant's position. In *Payne*, we said:

> We previously have held that evidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense. The United States Supreme Court's recent decision in *Simmons v. South Carolina*,

[512] U.S. [154], 129 L. Ed. 2d 133 (1994), does not affect our prior rulings on this issue. There, the Court ruled that a sentencing jury must be informed that a defendant is parole ineligible when the State argues to the jury for the death penalty based on the premise that the defendant will be dangerous in the future. The Court, however, noted that where a defendant is eligible for parole, "[s]tates reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide 'greater protection in [the States'] criminal justice system than the Federal Constitution requires.' " *Id.* at [168], 129 L. Ed. 2d at 145 (quoting *California v. Ramos*, 463 U.S. 992, 1014, 77 L. Ed. 2d 1171, 1189 (1983)); *see also State v. Bacon*, 337 N.C. 66, 97-98, 446 S.E.2d 542, 558-59, (1994). Here, defendant would have been eligible for parole had he been given a life sentence. We continue to adhere to our prior rulings on this issue. This assignment of error is overruled.

Payne, 337 N.C. at 516-17, 448 S.E.2d at 99-100 (citations omitted). We reject defendant's argument relating to the denial of his motion for reasons similar to those stated in *Payne*.

[8] Defendant further contends that the trial court erred by giving the jury a false response to its inquiry during deliberations concerning parole eligibility. In response to specific questions from the jury, the trial court informed the jury that eligibility for parole is not a proper matter for the jury to consider, and in determining whether to recommend death or life imprisonment, it "should determine the question as though life imprisonment means exactly what the statute says: imprisonment for life in the State's prison." Defendant contends that this answer is false.

We have rejected similar contentions in *State v. Skipper*, 337 N.C. 1, 43-44, 446 S.E.2d 252, 275-76 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995), and *State v. McLaughlin*, 341 N.C. 426, 454-55, 462 S.E.2d 1, 16 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 879 (1996). Having found no compelling reason to depart from our prior holdings, we reject defendant's sixth argument.

[9] In his seventh argument, defendant seeks a new capital sentencing proceeding on the basis of the admission of inadmissible and prejudicial evidence offered by the State. The State introduced into evidence in support of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance (previous conviction of a felony involving the use or

threat of violence to a person) State's Exhibit No. 73, a copy of a 1976 California change of plea and an order indicating that defendant had pleaded guilty to one count of armed robbery with a .22-caliber pistol. State's Exhibit No. 73 also indicated that defendant had pleaded guilty to a second count of felony robbery, and that two additional armed robbery charges had been dropped. Although defendant did not object to the admission of this exhibit, he now contends that the trial court's admission of this exhibit into evidence entitles him to a new capital sentencing proceeding since the jury may have relied upon this exhibit in recommending a sentence of death. This contention is without merit.

Assuming, *arguendo*, that State's Exhibit No. 73 would not have been admissible over a proper objection, we nevertheless conclude that its admission did not impact the jury's recommendation in light of the evidence that was properly admitted and the fact that the jury was properly instructed as to the requirement for finding the existence of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance. In addition, defense counsel candidly admitted the existence of this aggravating circumstance during his argument to the jury. Accordingly, we reject this assignment of error.

In his eighth argument, defendant contends that the jury returned the death verdict under the influence of passion, prejudice, and other arbitrary factors. Defendant's argument is based on his previous assignments of error, and having rejected defendant's arguments on those assignments of error, we reject defendant's eighth argument.

PRESERVATION ISSUES

Defendant also raises two additional arguments that he concedes have been decided contrary to his position previously by this Court: (1) the trial court erred in its instructions on nonstatutory mitigating circumstances, permitting jurors to reject submitted mitigating circumstances on the basis that they had no mitigating value; and (2) the trial court erred in using the word "may" in its instructions in sentencing Issues Three and Four, on the ground that the court's action denied the jurors discretion to find these circumstances to have 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

[10] Having concluded that defendant's capital sentencing 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).

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. The jury also convicted defendant of first-degree sexual offense. During defendant's resentencing proceeding, the trial court submitted three aggravating circumstances to the jury: that defendant had been previously convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3); that the murder was committed while defendant was engaged in the commission of a sexual offense, N.C.G.S. § 15A-2000(e)(5); and that the murder was committed to disrupt or hinder the enforcement of the law, N.C.G.S. § 15A-2000(e)(7). The jury found the (e)(3) and (e)(5) aggravating circumstances to exist. Of the statutory mitigating circumstances submitted, the jury found that the murder was committed while the 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 law was impaired, N.C.G.S. § 15A-2000(f)(6), but rejected the catchall mitigating circumstance, N.C.G.S. § 15A-2000(e)(9). Of the twenty-six nonstatutory mitigating circumstances submitted, the jury found twenty-four. 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 case in which this Court has found the death penalty disproportionate.

In support of his argument that his death sentence is disproportionate, defendant submits that the instant case is comparable to two first-degree murder cases involving sexual offenses in which juries did not return death sentences: *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), and *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). We find these cases distinguishable.

In *Powell*, the sole basis for the conviction was felony murder. By contrast, in the instant case, defendant was convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. "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); *see also State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87 (1996). Accordingly, the instant case is unlike *Powell*.

In *Prevette*, the defendant was convicted of first-degree murder and first-degree kidnapping. The charge of first-degree sexual offense was dismissed by the State prior to trial. That case is also distinguishable from the instant case. First, in the instant case, defendant was convicted of first-degree sexual offense. Further, the sexual offense in this case was more brutal and dehumanizing than may have occurred in *Prevette*. *See Prevette*, 317 N.C. at 152, 345 S.E.2d at 162 (autopsy revealed small superficial lacerations along the wall of the vagina which might have been caused by a male penis or by a pair of scissors). Finally, the jury in the instant case found the (e)(5) aggra-

vating circumstance, that the murder was committed during a sexual offense, and that circumstance was not found in *Prevette*.

It is also proper to compare this case to those where the death sentence was found not disproportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. "[W]e have never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted." *Kandies*, 342 N.C. at 455, 467 S.E.2d at 86. In addition, we have noted that "juries tend to return death sentences in murder cases involving a sexual assault on the victim." *State v. Campbell*, 340 N.C. 612, 644, 460 S.E.2d 144, 161 (1995), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 871 (1996).

In *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93, this Court upheld a death sentence when the only aggravating circumstance found by the jury was the (e)(5) circumstance that the murder was committed during commission of a sexual offense. In that case, the location of the murder, which was the victim's home, was an important consideration. *Id.* at 537, 448 S.E.2d at 112; *see also Brown*, 320 N.C. at 231, 358 S.E.2d at 34 (a murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure"). Further, the Court found it significant in *Payne* that the defendant was found guilty of murder based on both the felony murder rule and on malice, premeditation, and deliberation.

In the instant case, the jury found the (e)(3) aggravating circumstance (previously convicted of a violent felony) as well as the (e)(5) aggravator. This Court has 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.

There are four statutory aggravating circumstances which, standing alone, this Court has held sufficient to sustain death sentences. *Bacon*, 337 N.C. at 110 n.8, 446 S.E.2d at 566 n.8. Both the (e)(3) and (e)(5) aggravators are among them. *Id.* 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 and that the murder was committed during the commission of a sexual offense.

The aggravating circumstances found in this case have been present in other cases where this Court has found the sentence of

death proportionate. *See, e.g., State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995) (affirming a death sentence based on both the (e)(3) and the (e)(5) aggravators); *Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (affirming a death sentence based on the (e)(5) factor alone); *Brown*, 320 N.C. 179, 358 S.E.2d 1 (affirming a death sentence based on the (e)(3) factor alone).

In this case, the victim was found dead in her home, with bite marks on her breasts, her inner thighs bruised, her head covered by a pillow, and a telephone inserted inside her vagina. There were signs of both manual and ligature strangulation which was determined to be the cause of death. Further, defendant had been convicted previously of armed robbery, a violent felony.

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 capital sentencing proceeding free of prejudicial error, and that the sentence of death is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTONIO ORLANDO MILLER

No. 544A94

(Filed 8 November 1996)

1. Evidence and Witnesses §§ 1246, 1261 (NCI4th)— first-degree murder—juvenile defendant—warning of rights—presence of parent

There was no error in a capital first-degree murder prosecution which resulted in a life sentence where defendant was seventeen years old when arrested; the arresting officers could not find a juvenile rights form and instead used an adult *Miranda* form and inserted an additional clause at the end, "Do you wish to answer questions without your parents/parent present?"; defendant stated that he understood his rights after each of the

first eight questions, stated that he did not want a lawyer and was willing to answer questions; stated when asked that he wanted his mother present; no more questioning occurred until defendant's mother was present; defendant was readvised of his rights and gave the same responses in her presence; defendant signed the rights form; defendant appeared embarrassed and ill at ease during the questioning; he replied that "She might as well leave" when asked if he would like for his mother to step out of the room; defendant's mother sat on a bench outside an open doorway where defendant could see her if he leaned forward and she was told she could come back in at any time; and defendant then made a full statement.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 28, 41, 80.

Comment Note.—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

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

Admissibility of pretrial confession in criminal case—Supreme Court cases. 16 L. Ed. 2d 1294.

2. Robbery § 85 (NCI4th)— attempt—approaching and shooting victim—overt acts beyond mere preparation

There was sufficient evidence to support convictions for attempted armed robbery and first-degree murder under the felony-murder rule where there was sufficient evidence of intent to commit armed robbery and overt acts toward its commission. Although defendant argues that the evidence was insufficient to show that his actions advanced beyond a mere preparation to commit robbery and that even if they did, he abandoned his robbery attempt as a matter of law when he ran away voluntarily after shooting the victim in the head, defendant clearly intended to rob the victim and took substantial overt actions toward that end. The sneak approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery, not to mention the two fatal shots fired thereafter. It was only after seeing what he had done that defendant became scared and ran away.

Am Jur 2d, Evidence § 558; Homicide §§ 72-75.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

3. Robbery § 85 (NCI4th)— attempt—cause of cessation—no culpability distinction after overt act

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by instructing the jury on attempted armed robbery that defendant's use of the firearm would have resulted in the robbery had it not been stopped or thwarted by defendant becoming scared and running away. The law draws no culpability distinction between voluntary or involuntary modes or causes of cessation; however, once a defendant engages in an overt act the offense is complete.

Am Jur 2d, Criminal Law § 159.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

4. Robbery § 85 (NCI4th)— running away after shooting victim—overt act—abandonment of attempted armed robbery—not possible

Defendant's contention in a prosecution for first-degree murder and attempted armed robbery that he had abandoned his robbery attempt when he ran away after shooting the victim is untenable. The evidence clearly shows that defendant had committed an overt act in furtherance of the crime well before he left the scene; once defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing the victim, he could no longer abandon the crime of attempted armed robbery.

Am Jur 2d, Criminal Law § 159.

What constitutes termination of felony for purpose of felony-murder rule. 58 ALR3d 851.

5. Criminal Law § 757 (NCI4th)— instructions—reasonable doubt—"fully satisfies or entirely convinces" omitted—no error

There was no error in a prosecution for first-degree murder and attempted armed robbery where defendant had requested the pattern jury instruction regarding the legal concepts of burden of proof and reasonable doubt and the court gave a version which it had written. The instruction given by the court was substantially similar to that approved in *State v. Brackett*, 218 N.C. 369, and

clearly passes the test established in *Victor v. Nebraska*, 511 U.S. 1. The instruction in no way lowered the burden of proof to less than beyond a reasonable doubt and was thus a correct statement of law. Additionally, the trial court's instruction complied substantially with defendant's requested instruction in that both explained that reasonable doubt is based on reason and common sense, both expressed the precept that a reasonable doubt must arise from evidence established or lacking at trial, and both explained that a defendant can be found guilty only if the jurors are satisfied of defendant's guilt beyond a reasonable doubt.

Am Jur 2d, Homicide § 246; Trial §§ 1168-1175.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

6. Criminal Law § 468 (NCI4th)— closing arguments—objections to defendant's argument sustained—defendant allowed to present his version of facts

There was no error in a prosecution for first-degree murder and attempted armed robbery where defendant contended that sustaining two objections to his closing argument impinged on his right to present a defense and violated the law regarding closing argument. In light of the circumstances surrounding the argument and the discretion afforded the trial court in controlling closing argument, it is evident that defendant was able to fully present in argument his version of the facts.

Am Jur 2d, Trial §§ 533, 538, 705, 709.

Measures taken by trial judge to keep argument in proper bounds. 62 ALR2d 249.

7. Evidence and Witnesses §§ 173, 876 (NCI4th)— first-degree murder—statements of victim—admissible

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by admitting statements the victim made within hours of his death. Testimony that the victim did not want to turn his back either on a teenage boy in general or on defendant in particular was relevant to show that the two of them did not have a close, trusting personal relationship, notwithstanding the fact that they were neighbors. To the extent the testimony shows any ill will between them, it also supports

the theory that defendant had a motive to kill the victim, and the testimony also corroborates defendant's admission to his cousin that he was going to kill "this neighbor" if he did not get some money soon. Even if considered hearsay, the testimony was admissible under the state-of-mind exception.

Am Jur 2d, Evidence §§ 661-663, 690, 696; Homicide § 280.

Comment Note.—Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration. 53 ALR3d 785.

Comment Note.—Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration. 53 ALR3d 1196.

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 Small, J., at the 21 March 1994 Criminal Session of Superior Court, Bertie County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for attempted armed robbery was allowed 14 February 1995. Heard in the Supreme Court 10 April 1996.

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

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

LAKE, Justice.

The defendant was indicted on 27 April 1992 for the 8 April 1992 murder of Walter Lee Moore. On 17 August 1992, the grand jury returned a second bill of indictment charging defendant with the attempted armed robbery of Moore. The defendant was tried capitally, and the jury found him guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. Defendant was also convicted of attempted armed robbery. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the murder conviction. The trial court imposed this sentence and a consecutive

thirty-five-year sentence for the attempted robbery conviction. For the reasons discussed herein, we conclude that defendant received a fair trial, free from prejudicial error.

At trial the State presented evidence tending to show that on 8 April 1992, Walter Lee Moore was shot to death as he sat in his van, which was parked in the driveway of his home located near Powellsville, North Carolina. Defendant Antonio Orlando Miller was seventeen years old at the time of the murder. He lived next door to Moore with his mother, Myra Porter, and his brother, Daric Miller.

Moore worked as a mechanic and maintenance man in Smithfield, Virginia; drove a blue Dodge van; and provided transportation for several riders who also worked in Smithfield. Moore generally left his home around 3:30 a.m. in order to get everyone to work on time. He was known to carry large sums of money, to always pay in cash and occasionally to sleep in his van.

On the evening of 7 April 1992, Moore was at the Red Apple, a twenty-four-hour convenience store located near his home. Vanessa Peele, an acquaintance, stopped to get gas and talked with Moore. They had a discussion about Ms. Porter and her sons, and Moore told Peele that "Snoot" (defendant) had asked to borrow some money from him and that defendant had to go to court for something. That same evening, Moore's sister, Mary Vinson, arrived at the Red Apple between 8:00 and 9:00 p.m. As Moore came out to talk with her, Vinson noticed defendant standing outside alone, looking into the store. Vinson then noticed defendant behind her car with both hands in his pockets, "just prancing around like something was bothering him." She asked Moore why defendant was standing out there watching him. Moore replied, "I don't know, but let me turn my back from him because I don't know what might would happen. Cause a dude like that, you can never tell, you know." Moore also stated to Vinson that defendant's mother had asked Moore to loan her $300 or $400 for defendant to go to court, but that he had refused her request. Moore and Vinson left soon thereafter, and Vinson saw defendant walking down the road toward his house.

Around 1:00 a.m. on the morning of 8 April 1992, Moore returned to the Red Apple and after talking briefly with a friend, drove away in the direction of Moore's house. He did not pick up his riders later that morning. One of them walked to Moore's house to check on him about 4:00 a.m. He discovered Moore's body inside his van, observed blood running down the side of Moore's head, and walked to the Red

Apple to call for help. When investigating officers arrived, Moore's body was in his van, and two nine-millimeter shell casings were found on the ground on the driver's side of the van.

An autopsy performed by Dr. Lawrence Stanley Harris revealed that Moore sustained two gunshot wounds to the face. The first, and probably fatal, wound was over the left side of the face outside the eye. It contained multiple slivers of glass, but no gunshot residue, suggesting that the bullet passed through glass. This bullet struck a major artery in the neck and came to rest in the back of the right shoulder. Its track suggested that Moore's face was turned away from the muzzle when the shot was fired. The impact of this bullet would have caused immediate unconsciousness and would have resulted in death within five minutes. The second bullet struck the central part of the face beside the nose. This wound was surrounded by a halo of black and red dots characteristic of powder burns. The distance of the gun's muzzle from the skin when the second shot was fired was approximately ten to twelve inches.

Special Agent Dwight Ransome and Deputy Steve Johnson interviewed defendant's mother at her residence. They also interviewed defendant's brother and several acquaintances. Thereafter, they began looking for defendant and eventually traced him to a mobile home. When the officers arrived at the mobile home, they saw defendant run from the back of the home and head for some woods. He was caught by the arresting officers before he entered the trees. A nine-millimeter pistol was found in a ditch behind the mobile home.

Agent Eugene Bishop, an expert in firearms and toolmark identification, examined the nine-millimeter weapon recovered and analyzed the two fired cartridges from the shooting scene along with the two bullets recovered from the body of Moore. He concluded that the two bullets and the two fired cartridges all had been fired from the nine-millimeter pistol found in the ditch.

After defendant was arrested, he was taken to the sheriff's office and advised of his rights. Since defendant was only seventeen years old, the arresting officers looked for a juvenile rights form but could not find one. Instead, they used an adult *Miranda* form and inserted an additional clause at the end, "Do you wish to answer questions without your parents/parent present?" After each of the first eight questions, defendant stated that he understood his rights. He also stated that he did not want a lawyer and was willing to answer ques-

tions. When defendant was asked if he wanted to answer questions without his parent(s) present, he replied, "No, I want her here." No more questioning occurred until defendant's mother was present.

The sheriff located and brought defendant's mother to the station. In her presence, defendant was readvised of his rights, and he gave the same responses. Defendant was not asked again if he wished to answer questions without his parents present since his mother was there. Agent Ransome told defendant, "Your mother's here. You wanted her here so you could talk with us." Defendant responded, "Yes, that's what I wanted." After going back over the rights form, defendant signed it, certifying that he had been advised of his rights. His signature was witnessed by his mother and Deputy Johnson.

After the officers asked about his whereabouts the preceding few days, defendant indicated he had arrived home at 11:00 the night before. One of the officers then said that defendant was wrong, that they knew from talking with his mother and others that he had not arrived home until 2:00 a.m. and had left shortly after that. Defendant then appeared embarrassed and ill at ease. He was asked, "Are you comfortable talking in front of your mom or would you like for her to step out of the room?" When defendant replied, "She might as well leave," his mother stood, left the room and sat on a bench outside the open doorway where defendant could see her if he leaned forward. She was told she could come back in at any time.

Defendant then made a full statement, confessing to the killing of Moore. He explained how he got up about 2:00 a.m. on the morning of 8 April 1992, got dressed, and left home about 2:30 a.m. He started walking to the home of his cousin Trina Sessoms, which took him past Moore's home. Defendant stated he walked toward Moore's house and crept up on the van that was in the driveway. He heard a car coming and hid in the bushes. After the car left, defendant crept back up on the driver's side of the van and stooped to pass the driver's seat. He thought he saw Moore's hand move but could not tell whether Moore was asleep. Defendant stated he then took out the pistol, aimed it at Moore and pulled the trigger. However, the pistol did not fire because the safety was on. Defendant bent down and took off the safety. He then stood up, again pointed the gun at Moore, turned his head, and "the gun shot twice." Defendant stated he did not take any of Moore's money because he was scared. Defendant also confessed to having thrown the nine-millimeter pistol into the ditch while running from the mobile home. At this point, defendant's

mother returned to the room, and they talked about everything he had said. She then announced she was leaving and departed with defendant's apparent consent.

Defendant made a pretrial motion to suppress this statement. After a hearing and findings of fact, the trial court denied the motion, and defendant's confession was admitted at trial. The State's evidence further showed that two days before the killing, defendant told his cousin Kenyon Askew that if he did not get any money for court, he was going to kill his next-door neighbor, Moore. The State and defendant stipulated that, "The defendant was scheduled to appear in court on April 9, 1992, because he was $200 in arrears on a $395 obligation or court indebtedness."

The defendant presented no evidence.

[1] In his first assignment of error, defendant contends the trial court erred in denying defendant's motion to suppress his confession on the grounds that neither he nor his mother was advised expressly that defendant had the right to his mother's presence during questioning and that he did not waive his right to have her present. This assertion is not supported by the evidence.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that a suspect must be informed of his rights upon being arrested: that is, to remain silent, to an attorney and that any statement made may be used as evidence against him. In addition to the above-mentioned constitutional rights, our legislature has granted to juveniles the right to have a parent, guardian or custodian present during questioning. N.C.G.S. § 7A-595(a)(3) (1995). Words that convey the substance of prequestioning warnings are sufficient. *State v. Haskins*, 278 N.C. 52, 61, 178 S.E.2d 610, 615 (1971).

The State may not use evidence obtained as a result of custodial interrogation against the juvenile at trial unless and until it demonstrates that the warnings were made and that the juvenile knowingly, willingly and understandingly waived them. N.C.G.S. § 7A-595(d). The State bears the burden of proving that a defendant made a knowing and intelligent waiver. *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Id.* The totality of the circumstances must be carefully scrutinized when

determining if a youthful defendant has legitimately waived his *Miranda* rights. *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983).

In this case, it is clear that the additional language which the officers added to the adult rights form adequately conveyed the substance of defendant's right to have his parent(s) present during questioning. It is clear that defendant understood his rights, evidenced by his asking for his mother to be present, not giving any statement until she arrived and then beginning to answer and continuing to answer questions in her presence. Defendant's mother left the room only when defendant got embarrassed and showed that he wanted her to leave. Defendant appears to have known what he was doing, why he wanted her to leave and where she was in case he wanted her back in the room. This constituted a knowing and intelligent waiver of his right to her imminent presence during custodial interrogation. Further, the trial court found, following the pretrial hearing, that in the ten- by twelve-foot interrogation room, defendant could hear one of the officers tell his mother in the hall that she could come back in whenever she wanted just as easily as she was able to hear him say that she might as well leave. The trial court then found that, under these circumstances, defendant's mother was in effect present if defendant wished to counsel or confer with her while he made his statement. The evidence supported these findings, and the findings sustain the conclusion that defendant's statement was not taken in violation of his additional juvenile *Miranda* rights.

[2] In his next assignment of error, defendant argues there was insufficient evidence of attempted armed robbery and that the convictions for that offense and for first-degree murder under the felony murder rule should be vacated. Defendant asserts the evidence was insufficient to show that his actions advanced beyond a mere preparation to commit robbery and that even if they did, he abandoned his robbery attempt as a matter of law when he ran away voluntarily after shooting Moore in the head. We disagree.

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). "An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal

property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987).

In *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971), this Court summarized the requirement of an overt act as follows:

> "In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."

280 N.C. at 158, 184 S.E.2d at 869 (quoting *State v. Parker*, 224 N.C. 524, 525-26, 31 S.E.2d 531, 531-32 (1944), *overruled on other grounds by State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982)).

Defendant cites *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991), for the proposition that not all unlawful killings constitute robbery attempts. He then seeks to analogize this case to *McDowell*. However, missing from the facts in *McDowell* was any clear statement by the defendant that the purpose for firing his weapon at the victim was robbery. *Id.* at 389-90, 407 S.E.2d at 215. The evidence there raised no more than a suspicion that the defendant intended to commit robbery. *Id.* The *McDowell* opinion does not suggest that shooting a gun at someone is an insufficient overt act to support a charge of attempted robbery, just that there must be evidence of an intent to rob the victim.

Here, defendant clearly intended to rob Mr. Moore and took substantial overt actions toward that end. His intent is evidenced by, *inter alia*, his statement to his cousin and his own admission to the authorities. In furtherance of the intended robbery, defendant took out his nine-millimeter handgun, sneaked up on Moore, tried to fire, took the gun back down, removed the safety, and then fired two lethal shots into the head of the victim. It was only *after* seeing what he had done that defendant became scared and ran away. The sneak

approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery, not to mention the two fatal shots fired thereafter. See *infra* discussion of *State v. Powell*, 277 N.C. 672, 178 S.E.2d 417 (1971). Thus, there is sufficient evidence of intent to commit armed robbery and overt acts toward its commission, and so, by extension, to support the convictions for attempted armed robbery and first-degree murder under the felony murder rule.

[3] In a related assignment of error, defendant contends that the trial court erred in instructing the jury on attempted armed robbery by stating that defendant's use of the firearm "would have resulted in the robbery had it not been stopped or thwarted by the defendant becoming scared and running away." Citing a jury instruction approved by this Court in *State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965), defendant argues that, in order for a failed criminal endeavor to amount to an attempt, the stopping must have been the result of an *outside force* acting upon the defendant. Defendant contends that as a matter of law, there is a distinction between criminal attempts abandoned by the defendant himself and those in which an intervening force ends the robbery attempt. Thus, defendant argues the trial court's instruction improperly lowered the State's burden of proof by misstating or failing to state the significance of the fact that defendant voluntarily abandoned his intent to rob Mr. Moore. This contention is without merit in that the law does not support such a distinction.

In North Carolina, an intent does not become an attempt so long as the defendant stops his criminal plan, or has it stopped, prior to the commission of the requisite overt act. Defendant's contention that an outside force must stop the criminal plan is simply unfounded in the law. The law draws no culpability distinction between voluntary or involuntary modes or causes of cessation. A defendant can stop his criminal plan short of an overt act on his own initiative or because of some outside intervention. However, once a defendant engages in an overt act, the offense is complete, and it is too late for the defendant to change his mind. *State v. Davis*, 340 N.C. 1, 12-13, 455 S.E.2d 627, 632-33, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 83 (1995). This Court held in *State v. Powell* that the evidence was sufficient to support a conviction for attempted armed robbery where the defendant placed his hand on a pistol and began to withdraw it from a purse with the intent of completing the substantive offense of armed robbery through its use. *Powell*, 277 N.C. at 677-79, 178 S.E.2d at 420-21.

[4] Defendant's contention that he abandoned his robbery attempt is likewise untenable. An abandonment occurs when an individual voluntarily forsakes his or her criminal plan prior to committing an overt act in furtherance of that plan. There is ample evidence in this case that defendant did not legally abandon his plan to commit armed robbery. The evidence clearly shows he had already committed an overt act in furtherance of the crime well before he left the scene. Once defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing Mr. Moore, he could no longer abandon the crime of attempted armed robbery. *See id.* The fact that he did not take the money is irrelevant. We therefore find no error in the trial court's instruction, and this assignment of error is overruled.

[5] Next, defendant asserts that he is entitled to a new trial because of error in the reasonable doubt instruction given at his trial. He argues that his request for an instruction stating that "proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt" is a correct statement of the law that was not given in substance. We find, however, that the instruction given by the trial court on reasonable doubt substantially complied with defendant's request.

During the charge conference conducted at the conclusion of the evidence and before closing arguments, counsel for defendant asked the trial court to instruct the jury, pursuant to N.C.P.I.—Crim. 101.10, regarding the legal concepts of burden of proof and reasonable doubt. The pattern instruction requested by defendant reads in pertinent part:

> 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.

Upon defendant's request for this instruction, the trial court informed counsel that it had rewritten the reasonable doubt instruction and showed counsel a copy of the instruction it intended to give. After reviewing the document, defense counsel expressed dissatisfaction with the trial court's intended instruction, requesting specifically that the trial court include within its charge that "proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt." The trial court denied the request for this specific language, and defendant took exception.

In his charge to the jury, the trial judge instructed on reasonable doubt as follows:

> Under our system of justice when a defendant pleads not guilty, he is not required to prove his innocence. The defendant is presumed to be innocent. This presumption goes with him throughout the trial and until the jury is satisfied of his guilt beyond a reasonable doubt.
>
> This does not mean satisfied beyond all doubt. Neither does it mean satisfied beyond some shadow of a doubt or a vain, imaginary, or fanciful doubt. Rather, it means exactly what it implies. A reasonable doubt is a doubt based upon common sense and reason. It is a doubt generated by the insufficiency of the proof or the lack of proof or some defect in it.

At the conclusion of the jury charge, defendant renewed his request for his version of the instruction. Again the request was denied. Absent a specific request, the trial court is not required to define reasonable doubt, but if the trial court undertakes to do so, the definition must be substantially correct. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976); *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973). Where there is a specific request for a reasonable doubt instruction, the law does not require the trial court to use the exact language of the requested instruction. However, if the request is a correct statement of the law and is supported by the evidence, the trial court must give the instruction in substance. *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797, *cert. denied*, — U.S. —, 130 L. Ed. 2d 174 (1994); *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

In this case, the reasonable doubt instruction given by the trial court was substantially similar to that approved in *State v. Brackett*, 218 N.C. 369, 372, 11 S.E.2d 146, 148 (1940).[1] The instruction also clearly passes the United States Supreme Court's test established in *Victor v. Nebraska*, 511 U.S. 1, 127 L. Ed. 2d 583 (1994) (reasonable doubt can be defined in many different ways; each is proper so long as it does not indicate that the burden of proof is less than "beyond a

1. The instruction in *Brackett* stated:

> The defendant is presumed to be innocent, and this presumption goes with him throughout the entire trial and until the jury is satisfied beyond reasonable doubt of his guilt; not satisfied beyond any doubt, or all doubt, or a vain or fanciful doubt, but rather what that term implies, a reasonable doubt, one based upon common sense and reason, generated by insufficiency of proof.

reasonable doubt"). Here, the trial court's instruction merely expanded on the concept of reasonable doubt by explaining what kinds of doubt would or would not constitute reasonable doubt. The instruction in no way lowered the burden of proof to less than beyond a reasonable doubt. Thus, the definition was a correct statement of the law. *See State v. Wells*, 290 N.C. 485, 226 S.E.2d 325.

In addition, the trial court's instruction on reasonable doubt complied substantially with the defendant's requested instruction. Both the requested instruction and the given instruction explained that reasonable doubt is based on reason and common sense. Both instructions also expressed the precept that a reasonable doubt must arise from evidence established or lacking at trial. Moreover, both instructions explained that a defendant can be found guilty only if the jurors are satisfied of the defendant's guilt beyond a reasonable doubt. Thus, the trial court's instruction conveyed the substance of defendant's requested instruction. We find no error in the denial of defendant's requested instruction. This assignment of error is overruled.

[6] Defendant next contends that he is entitled to a new trial because the trial court sustained two objections to his trial counsel's closing argument, thereby impinging on his right to present a defense and violating the law regarding closing argument. We disagree.

The prosecution's first objection followed this argument by defense counsel:

> He's going to tell you about interested witnesses and I would say that the law enforcement officers are interested in this crime being—
>
> MR. BEARD: Objection.
>
> THE COURT: Sustained.
>
> MR. LEWIS: Well, whether or not a person has any interest in this particular case, whether it's—for whatever reason they may think it's—they have an interest in it.

The second objection followed this argument:

> [T]he State's whole case is built upon that motive that a person would take another person's life because they had to go to court and pay a $200 debt when they had $400 available already.
>
> MR. BEARD: Objection to $400 available for the defendant, Your Honor.

THE COURT: Objection sustained. That contention is not warranted by the evidence that it was available.

The right of a defendant charged with a criminal offense to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution. *See Faretta v. California*, 422 U.S. 806, 818, 45 L. Ed. 2d 562, 572 (1975); *Washington v. Texas*, 388 U.S. 14, 18-19, 18 L. Ed. 2d 1019, 1023 (1967); *State v. Locklear*, 309 N.C. 428, 436, 306 S.E.2d 774, 778 (1983). Improper restrictions on the defendant's opportunity to make a closing argument may constitute a denial of the constitutional right to counsel as well as the right to present a defense. *See Herring v. New York*, 422 U.S. 853, 45 L. Ed. 2d 593 (1975). Arguments of counsel are left largely to the control and discretion of the trial court. *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995); *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994); *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991).

In this case, defendant was able to present the jury with his version of the facts and inferences to be drawn, notwithstanding the sustaining of these objections to defense counsel's argument. With regard to the testimony about law enforcement interest, defendant presented no evidence regarding interest of the police. The trial court's instructions permitted the jury to evaluate the testimony of all prosecution witnesses for interest, including that of the law enforcement officers. Furthermore, immediately after the trial court sustained the objection, defense counsel argued that the police did have an interest in the case. The jury was free therefore to evaluate whether the law enforcement officers' testimony should be believed in light of any interest they might have had in the outcome of the trial. The only thing excluded by the trial court was defense counsel's improper expressions of personal opinion that the law enforcement officers were interested witnesses.

With regard to the argument relating to the $400, defense counsel still argued their salient point to the jury—that the stipulated facts were inconsistent with a motive to rob. Immediately after the objection was sustained, defense counsel argued:

The stipulation is that Roosevelt Askew had posted a $400 bond. And I think the court will instruct you that you are the sole

> judges. You decide what the weight is to be given to that stipulation. If you look at the entire case and you base it on that motivation and you square that motivation off with that stipulation, you have no motivation.

Therefore, in light of the circumstances surrounding the argument and the discretion afforded the trial court in controlling closing argument, it is evident that defendant was able to fully present in argument his version of the facts. Thus, we find no merit to defendant's assignment of error.

[7] Lastly, defendant argues the trial court erred in admitting statements the victim made within hours of his death to his sister, Mary Vinson, and a friend, Vanessa Peele, on the grounds that the statements are inadmissible hearsay and that their probative value is outweighed by their prejudicial impact.

As to the testimony of Vinson, a *voir dire* of the disputed evidence was conducted at which Vinson testified that she saw and spoke with Moore at the Red Apple on the evening of 7 April 1992. Vinson noticed defendant standing beside the icebox and then, a few minutes later, behind her car. Vinson asked Moore why defendant was standing there watching him. Moore responded, "I don't know, but let me turn my back from him because I don't know what might would happen. Cause a dude like that, you can never tell, you know." Moore also stated that defendant's mother had asked Moore to loan her $300 or $400 for defendant to go to court, but that he had refused her request.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. 8C-1, Rule 801(c) (1988). "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15-16, 316 S.E.2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

The testimony in question was probative of something other than the truth of the matter asserted. The testimony that Moore did not want to turn his back either on a teenage boy in general or on defendant in particular was relevant to show that the two of them did not have a close, trusting personal relationship, notwithstanding the fact that they were neighbors. To the extent the testimony shows any ill

will between them, it also supports the theory that defendant had a motive to kill Moore. *See State v. Greene*, 324 N.C. 1, 15-16, 376 S.E.2d 430, 439 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). The testimony also corroborates defendant's admission to his cousin that he was going to kill "his neighbor" if he did not get some money soon. It was therefore admissible on this basis.

Further, even if considered hearsay, this testimony was admissible under the state of mind exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1988). "Evidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value." *State v. Locklear*, 320 N.C. 754, 760, 360 S.E.2d 682, 685 (1987). Under the state of mind exception, when intent is directly in issue, a declarant's statements "relative to his then existing intention are admitted without question." 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 218, at 92 (4th ed. 1993); *see State v. Palmer*, 334 N.C. 104, 431 S.E.2d 172 (1993) (victim's statement that she would not give defendant money admissible to show motive to kill her); *Maynard*, 311 N.C. 1, 316 S.E.2d 197 (in this pre-Rules case, murder victim's statement that he would testify against defendant properly admitted as evidence of defendant's motive). Here, the victim's state of mind regarding his intention not to give defendant the money defendant wanted was relevant to the issue of defendant's motive. The testimony in question thus was admissible under the state of mind exception to the hearsay rule.

As to the testimony of Peele, defendant failed to object at trial and did not assign as error this part of the testimony among the transcript pages to which assignments of error were made. A failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. *State v. Hartman*, 90 N.C. App. 379, 382, 368 S.E.2d 396, 398 (1988). Thus, defendant has waived this issue for appeal.

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

NO ERROR.

DEBRA KAY LYLES v. THE CITY OF CHARLOTTE AND MOTOROLA, INC.

No. 439PA95

(Filed 8 November 1996)

1. Municipal Corporations § 443 (NCI4th)— city's participation in risk management program—no waiver of sovereign immunity

The City of Charlotte did not participate in a local government risk pool which waived its sovereign immunity for tort claims by its agreement with Mecklenburg County and the Charlotte-Mecklenburg Board of Education creating a Division of Insurance and Risk Management (DIRM) to handle liability claims against the three entities because the agreement did not require the pool to pay all claims for which a member incurs liability where each entity pays funds into separate trust accounts from which the DIRM pays claims against each entity; each entity must pay from its trust account the first $500,000 of any claim against it; if an entity does not have sufficient funds in the DIRM to pay a claim exceeding $500,000, the entity may use funds that another entity has in the DIRM to pay the amount in excess of $500,000; but this money must be repaid with interest. Another indication that the DIRM was not a local government risk pool was the failure of the entities to meet statutory requirements for giving notice to the Commissioner of Insurance, for creating boards of trustees and adopting operating procedures, and for maintaining claim reserves. Therefore, participation by defendant City of Charlotte in the DIRM did not waive its sovereign immunity in plaintiff's action to recover for the death of her police officer husband allegedly caused by the improper training he received from defendant regarding use of a portable radio to call for help.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 5-10, 37, 41, 138, 139.

Governmental or proprietary nature of function. 40 ALR2d 927.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR4th 1194.

2. Municipal Corporations § 444 (NCI4th)— city's liability insurance—*Woodson* claim—no waiver of sovereign immunity

Defendant city did not waive its sovereign immunity for plaintiff's *Woodson* claim for the death of her police officer husband by its purchase of liability insurance for accidental injury to city employees which excluded coverage for "bodily injury intentionally caused or aggravated by or at the direction of the Insured" because plaintiff's allegation that defendant city's action in instructing its officers how to use a portable radio was substantially certain to cause death or serious injury of an officer was an allegation that the occurrence was not accidental and removed the claim from coverage under the city's policy.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 37-41.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Justice FRYE dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 120 N.C. App. 96, 461 S.E.2d 347 (1995), affirming the denial of defendant City's motion for judgment on the pleadings or, in the alternative, motion for summary judgment by Gray, J., on 27 October 1993, in Superior Court, Mecklenburg County. Heard in the Supreme Court 8 April 1996.

The plaintiff, as duly appointed administratrix of the estate of Milus Terry Lyles, brought this action for the wrongful death of her husband. Defendant City of Charlotte filed a motion for judgment on the pleadings or, in the alternative, motion for summary judgment.

The papers filed in support of and in opposition to the motion tended to show the following. The plaintiff's intestate was killed while on duty as a Charlotte police officer. While the plaintiff's intes-

tate was transporting a prisoner in an automobile, the prisoner was able to get control of a pistol and shoot the plaintiff's intestate twice in the back. A bullet-proof vest kept the shots from entering the officer's back, but he lost control of the automobile. The officer left the vehicle and attempted to call for help on his portable radio as he had been instructed. The radio did not work, and the officer started towards his automobile to use the radio in the vehicle. He was then shot to death by the prisoner. The plaintiff alleged that the defendants had intentionally instructed her intestate to use the portable radio in a certain way, knowing that if used that way, the radio would not function and that there was a substantial certainty that this improper use would result in the death or serious injury of an officer.

The City of Charlotte had entered into an agreement with Mecklenburg County and the Charlotte-Mecklenburg Board of Education under the terms of which a Division of Insurance and Risk Management (DIRM) was created to handle liability claims asserted against the three entities. Each entity pays funds into separate trust accounts from which DIRM pays claims against each entity. The funds are not commingled. Each entity must pay from its trust account the first $500,000 of any claim against it. If an entity has a claim against it that exceeds $500,000 and that entity does not have sufficient funds in the DIRM to pay it, the entity may use funds that one of the other entities has in the DIRM in excess of $500,000. This money must be repaid with interest. The DIRM will not pay any claim in excess of $1,000,000.

The City also had in force at that time an insurance policy with General Reinsurance Corporation for claims by employees between $250,000 and $1,250,000. This policy paid for claims "because of bodily injury by accident or bodily injury by disease." It excluded coverage for "bodily injury intentionally caused or aggravated by or at the direction of the Insured."

The superior court denied the City's motion for judgment on the pleadings or, in the alternative, motion for summary judgment, and the Court of Appeals affirmed. We allowed the City's petition for discretionary review.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., G. Russell Kornegay, III, and Richard B. Fennell, for plaintiff-appellee.

Smith Helms Mulliss & Moore, by L.D. Simmons, II, and Leigh F. Moran, for defendant-appellant City of Charlotte.

WEBB, Justice.

[1] The Court of Appeals based its decision on its holding that the City of Charlotte had waived its sovereign immunity by participating in a local government risk pool. N.C.G.S. § 160A-485 provides that a city may waive its sovereign immunity for civil liability in tort by purchasing liability insurance or by participating in a local government risk pool pursuant to article 23 of General Statutes chapter 58. N.C.G.S. § 58-23-5 provides in part:

> In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another . . . .

N.C.G.S. § 58-23-5 (1994). N.C.G.S. § 58-23-15 provides in part:

> A contract or agreement made pursuant to this Article must contain provisions:
>
> . . . .
>
> (3) Requiring the pool to pay all claims for which each member incurs liability during each member's period of membership, except where a member has individually retained the risk, where the risk is not covered, and except for amount of claims above the coverage provided by the pool.

N.C.G.S. § 58-23-15(3) (1994).

The plaintiff argues and the Court of Appeals held that because the City has the right, in certain circumstances, to use funds contributed by the other entities for the payment of claims, the entities had pooled retention of their risks for liability claims and provided for the payment of such claims made against any member of the pool on a cooperative or contract basis. This, says the plaintiff, makes the agreement a local government risk pool within the meaning of N.C.G.S. § 58-23-5. The plaintiff says it does not matter that the City must repay funds it has drawn from another entity. The plaintiff contends this does not keep the agreement from providing for the payment of claims made against a member on a cooperative or contract

basis with one another, which is the essence of a local government risk pool. We disagree.

In determining whether the City has joined a local government risk pool, we look first at N.C.G.S. § 58-23-1, which defines "local government." Only counties, cities, and housing authorities are defined as local governments for purposes of joining a local government risk pool. The Charlotte-Mecklenburg Board of Education could not join a risk pool pursuant to this statute. We need not determine the effect this would have on the agreement because we do not believe the agreement in any event constitutes a local government risk pool.

In *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), we held that the City of Winston-Salem did not enter a local government risk pool when it organized a corporation to handle claims against it. We held that two or more local governments must join to create a local government risk pool. There are no other cases interpreting the statute as to what constitutes a local government risk pool.

As we read the statute, there must be more risk-sharing than is contained in the City's agreement in order to create a local government risk pool. N.C.G.S. § 58-23-15 provides that a local government risk pool agreement must contain a provision that the pool pay all claims for which a member incurs liability. We do not believe the pool has paid a claim if it is reimbursed for it.

N.C.G.S. § 58-23-5 provides that local governments may enter risk pools "to pool retention of their risks for . . . liability claims." As we read this language, the risks of the parties must be put in one pool for the payment of claims in order to have a local government risk pool. This was not done in this case.

Article 23 of General Statutes chapter 58 provides for the creation of local government risk pools. There are statutory requirements for organizing such a pool. The parties must give the Commissioner of Insurance thirty days' notice before organizing the pool. N.C.G.S. § 58-23-5. There are detailed requirements for creating boards of trustees and for adopting procedures for operating the pools. N.C.G.S. § 58-23-10 (1994). There are requirements for maintaining claim reserves. There is nothing in the record to show that any of these requirements have been met. While it may not by itself be determinative, the fact that the City has not complied with the statutory

requirements in creating a local government risk pool should be given some weight.

The question as to whether the creation of the DIRM was *ultra vires* for the City was not raised by the parties and we do not address it. The dissent raises the question and in order to prevent holding that the DIRM is *ultra vires* determines it is a local government risk pool. The General Assembly has provided that sovereign immunity may be waived by participating in a local government risk pool, and has provided for certain requirements to establish such an organization. We believe it would be a mistake to hold that a local government may ignore these statutory requirements and create a risk pool to its own liking. The City did not intend to join a local government risk pool, and we do not believe we should hold it has done so by accident.

We hold that the City of Charlotte has not joined a local government risk pool.

[2] The plaintiff also argues that the City, by the purchase of the General Reinsurance policy, has waived its sovereign immunity for the amount of each claim in excess of $250,000 but for not more than $1,250,000. This policy covers claims for bodily injury of City employees by accident and excludes coverage for "bodily injury intentionally caused or aggravated by or at the direction of the Insured."

The plaintiff brought this action as a *Woodson* claim, alleging that the defendant knew or should have known that its action in instructing its officers how to use the radios was substantially certain to cause the death or serious injury of an officer. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We presume this was done so that the workers' compensation claim would not be plaintiff's exclusive remedy. We do not pass on the question of whether the papers filed in this case show that the evidence would support a *Woodson* claim. The parties have not raised that question, and on this appeal, we shall assume the plaintiff has a *Woodson* claim.

The defendant says that by bringing an action based on the allegation that the City knew its action was substantially certain to cause death or serious injury, the plaintiff has alleged a claim that is not covered by the General Reinsurance policy. It says the policy covers accidents and excludes injuries intentionally caused. The plaintiff says the death of her husband was accidental and was not caused intentionally.

In this argument, defendant City must prevail. In *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992), we held that an intentional act is an accident within the meaning of a homeowner's insurance policy if the injury incurred was not intended or substantially certain to be the result of the intentional act. We are bound by *Stox* to hold that when the plaintiff alleged the City's action was substantially certain to cause an injury, she alleged the occurrence was not accidental. This allegation removed the claim from coverage under the policy for purposes of this action.

In *Woodson*, we held that facts which may support a civil action because they show a substantial certainty of injury may also support a workers' compensation claim on the theory that the claim is based on an accident. We said that the language of the Workers' Compensation Act required this result. *Woodson v. Rowland*, 329 N.C. 330, 348, 407 S.E.2d 222, 233. The plaintiff in this case is not making a workers' compensation claim, and the provisions of the Workers' Compensation Act are not available to her in determining whether her claim is based on an accident.

For the reasons stated in this opinion, we reverse the Court of Appeals.

REVERSED AND REMANDED.

Justice FRYE dissenting.

I disagree with the majority's holding in this case. The issues in this case are: (1) whether the City of Charlotte has waived its governmental immunity by entering into a joint risk-management program with other units of local government, and (2) whether the liability insurance policy provides coverage for the City against a *Woodson* claim.

"[U]nder the common law, a municipality is immune from liability for the torts of its officers committed while they were performing a governmental function." *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49-50, 326 S.E.2d 39, 43 (1985). However, N.C.G.S. § 160A-485(a) establishes an exception to the common law rule:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insur-

> ance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

Additionally, N.C.G.S. § 58-23-5 provides:

> In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another, or may enter into a trust agreement to carry out the provisions of this Article. In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article to establish a separate workers' compensation pool to provide for the payment of workers' compensation claims pursuant to Chapter 97 of the General Statutes or to establish pools providing for life or accident and health insurance for their employees on a cooperative or contract basis with one another; or may enter into a trust agreement to carry out the provisions of this Article. A workers' compensation pool established pursuant to this Article may only provide coverage for workers' compensation, employers' liability, and occupational disease claims. Such local governments shall give the Commissioner 30 days' advance written notification, in a form prescribed by the Commissioner, that they intend to organize and operate risk pools pursuant to this Article.

Thus, a city may waive immunity in its governmental capacity through the purchase of liability insurance or by joining a local government risk pool. N.C.G.S. § 160A-485(a) (1994); *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992) (addressing purchase of insurance). However, a city generally retains immunity from civil liability in its governmental capacity to the extent it does not purchase liability insurance or participate in a local government risk pool pursuant to article 23 of chapter 58 of the General Statutes. N.C.G.S. § 160A-485; *see also Wall v. City of Raleigh*, 121 N.C. App.

351, 354, 465 S.E.2d 551, 553 (1996); *Jones v. Kearns*, 120 N.C. App. 301, 302, 462 S.E.2d 245, 246, *disc. rev. denied*, 342 N.C. 414, 465 S.E.2d 541 (1995).

In the instant case, clearly, the City of Charlotte is a local government within the meaning of N.C.G.S. § 58-23-1, which defines "local government" as "any county, city, or housing authority located in this State." Thus, the City may waive its governmental immunity by purchasing liability insurance or by participating in a government risk pool. Otherwise, the City has no "risk" to protect itself against since the City is immune from suit in tort.

The City of Charlotte has purchased liability insurance for accidental injury to City employees, but contends that the claim asserted in the instant action is not covered by its liability insurance because of a specific exclusion in the policy. Although it has entered into an elaborate risk-management program with the County and the School Board, the City of Charlotte contends that it is not participating in a local government risk pool so as to waive governmental immunity. I believe that the City has waived its governmental immunity, both by the purchase of liability insurance and by entering a risk-management program which should be deemed a local government risk pool.

The problem with allowing local governments to enter into "joint undertaking" contracts, such as the one at issue in the instant case, is that it gives local governments the unbridled discretion to pay some claims and to assert governmental immunity as to those claims that it does not wish to pay. Under such a scheme, the decision of the local government officials is not reviewable, and the awards to injured parties may be distributed on an arbitrary basis without any opportunity for the injured party to have the decision of the local government reviewed by the courts. *Even the State of North Carolina does not have such unbridled discretion.* Thus, I conclude that a municipal corporation may not benefit by participating with other local governments in a risk-management program which is tantamount to a statutory local government risk pool without losing its governmental immunity for claims covered by the risk-management program.

Article 23 of Chapter 58 of the North Carolina General Statutes is known as the Local Government Risk Pool Act. The Local Government Risk Pool Act provides in pertinent part:

> In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local gov-

> ernments may enter into contracts or agreements pursuant to this Article for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another, or may enter into a trust agreement to carry out the provisions of this Article. . . . Such local governments shall give the Commissioner 30 days' advance written notification, in a form prescribed by the Commissioner, that they intend to organize and operate risk pools pursuant to this Article.

N.C.G.S. § 58-23-5 (1994).

In *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), this Court examined a government risk-management program and concluded that it did not operate as a waiver of sovereign immunity. The City of Winston-Salem had organized a corporation named Risk Acceptance Management Corporation (RAMCO) to handle claims against the City of $1,000,000 or less. All officers and directors of RAMCO were employees of the City. RAMCO obtained part of its funds for operations by issuing tax exempt certificates with payment of the certificates guaranteed by the City. The City agreed to pay to RAMCO $600,000 annually and to reimburse RAMCO for operating expenses, borrowed funds, and all other costs. We held that because the City of Winston-Salem had not joined with any other local government unit in the operation of RAMCO, it was not participating in a statutory risk pool.

In *Blackwelder*, the parties, as did the members of this Court, assumed that a City had the authority to enter into such a government risk-management program. Therefore, we were not asked to consider whether such a program was *ultra vires*. However, in *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995), this Court reaffirmed the principle that a municipality must have a legal obligation to make a payment in order to distribute governmental funds. Justice Orr, writing for the majority, quoted with approval *Brown v. Board of Comm'rs of Richmond Co.*, 223 N.C. 744, 746, 28 S.E.2d 104, 105-06 (1943):

> "[T]he Legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. Nor may it lawfully authorize a municipal corporation to pay gifts or gratuities out of public funds. . . . [A] municipality cannot law-

> fully make an appropriation of public moneys except to meet a legal and enforceable claim . . . ."

Id. at 120, 462 S.E.2d at 479. A municipality has a legal obligation to pay a legitimate claim when it has waived sovereign immunity. On the other hand, to the extent a municipality retains its sovereign immunity, it has no authority to pay the claim against it.

"It is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them." *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994). By what authority does the City of Charlotte negotiate, settle, and pay tort claims against it under the risk-management program? I find no statutory authority to pay such claims unless the City has waived its governmental immunity, either by the purchase of liability insurance or by participation in a local government risk pool. The City cannot have it both ways. Either it has waived governmental immunity by entering into this risk-management program, or its payment of government funds to settle tort claims to which governmental immunity applies would appear to be *ultra vires*. I presume that the City acted pursuant to article 20 of chapter 160A of the North Carolina General Statutes as recited in the agreement establishing the risk-management program, meaning its actions are not *ultra vires*. Therefore, I would deem the participation in the risk-management program to be participation in a local government risk pool, thereby waiving governmental immunity. Accordingly, I would affirm the decision of the Court of Appeals which affirmed the trial court as to this issue.

I now consider whether the City has waived governmental immunity for plaintiff's *Woodson* claim by the purchase of liability insurance. To the extent that the plaintiff's *Woodson* claim falls under the coverage provisions of the City's liability policy, the City has waived its governmental immunity. N.C.G.S. § 160A-485; *see also Wall*, 121 N.C. App. at 354, 465 S.E.2d at 553; *Jones*, 120 N.C. App. at 302, 462 S.E.2d at 246. Relying on this Court's decision in *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), the majority holds that plaintiff's allegation that the City's action was substantially certain to cause injury removed the claim from coverage under the policy for purposes of this action. I do not believe that *Stox* requires this result.

First, *Stox* does not involve a *Woodson* claim. In fact, I have found no case from this Court discussing the applicability of liability cover-

age for a *Woodson* claim. To the extent applicable, however, I believe that *Stox* would suggest that the policy in this case would cover most *Woodson* claims. As Justice (now Chief Justice) Mitchell wrote for a unanimous Court in *Stox*:

> The primary issue to be resolved in this appeal is whether liability for personal injuries suffered by the defendant Louise Hooks Stox, which occurred when she fell as the result of a push by the defendant Gordon Owens, is covered by a policy of homeowners liability insurance issued to Owens by Farm Bureau. We conclude that under the language of the policy in question, coverage is provided.

Id. at 699, 412 S.E.2d at 320.

The exclusion at issue in the instant case is for "bodily injury intentionally caused or aggravated by or at the direction of the insured." In *Stox*, the exclusion was for "bodily injury . . . which is expected or intended by the insured." In that case, we considered whether the policy's exclusion placed Owens' liability for injury to Stox outside the coverage of the policy. We said:

> The trial court found from competent evidence before it that, although Gordon Owens intentionally pushed Louise Stox, he had no specific intent to cause her injury. Thus, the injuries she sustained were "the unintended result of an intentional act." These findings supported the trial court's conclusion that "the 'expected or intended injury' exclusion contained in the policy is inapplicable."

Id. at 703, 412 S.E.2d at 322. In *Stox*, the Court of Appeals relied upon *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983), in holding that the exclusion applied. In *Commercial Union*, the Court of Appeals properly held that a person's actions in shooting into an occupied automobile were excluded from coverage under his homeowner's policy by the "expected or intended injury" exclusion. This Court distinguished *Commercial Union* as follows: "Under the rules of construction which govern this exclusionary provision in the Farm Bureau homeowners policy, we disagree with the Court of Appeals and conclude that it is the resulting injury, not merely the volitional act, which must be intended for this exclusion to apply." 330 N.C. at 703-04, 412 S.E.2d at 322. Firing a pistol into an occupied vehicle and pushing an individual are both intentional acts,

but the former, and not the latter, is excludable under the homeowner's policy.

Returning to the instant case, the policy excludes from coverage "bodily injury intentionally caused or aggravated by or at the direction of the insured." Construing this provision narrowly, as we must, it does not apply to this case. There is no allegation in the complaint, or in the summary judgment materials before this Court, which indicates that plaintiff believes or contends that the police department did anything with the intent to injure or to kill Mr. Lyles or anyone else. Nor is such an intent required in order to state a *Woodson* claim. As we said in *Woodson*:

> Thus, both courts and legislatures in a fair number of other jurisdictions have rejected the proposition that actual intent to harm is required for an employer's conduct to be actionable in tort and not protected by the exclusivity provisions of workers' compensation. Our adoption of the substantial certainty standard does the same.

Woodson v. Rowland, 329 N.C. 330, 344, 407 S.E.2d 222, 230 (1991).

The complaint in *Woodson* stated a claim against Rowland, not because Rowland intended to injure Woodson by requiring him to remain in the dangerous trench, but because Rowland insisted on Woodson's continuing to work in the trench notwithstanding the substantial likelihood of injury. As we said in our *per curiam* reversal of the Court of Appeals in *Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 453 S.E.2d 160 (1995):

> We reemphasize that plaintiffs in *Woodson* actions need only establish that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was "substantially certain" to cause serious injury or death and, thus, the conduct was "so egregious as to be tantamount to an intentional tort." *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993).

339 N.C. at 604, 453 S.E.2d at 161. There may be a fine line between intentional torts and conduct "so egregious as to be tantamount to an intentional tort," but it is a line that this Court has drawn. This line is emphasized by our continued disavowal of the "bomb throwing" language used in certain opinions of the Court of Appeals.

In summary, I disagree with the majority's conclusion that this wrongful death claim falls under the exclusionary provisions of the policy. For purposes of plaintiff's claim against the City, Officer Lyles' injuries resulted from an accident within the coverage section of the liability policy, and were not "intentionally caused or aggravated by or at the direction of the insured" within the meaning of the policy exclusion. Accordingly, I would hold that the liability insurance policy purchased by the City in the instant case covers the plaintiff's *Woodson* claim, if a *Woodson* claim is properly alleged and proved.

For the foregoing reasons, I respectfully dissent from the decision of the majority of this Court.

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

STATE OF NORTH CAROLINA v. SAMUEL R. FLIPPEN

No. 178A95

(Filed 8 November 1996)

1. Homicide § 253 (NCI4th)— first-degree murder—premeditation and deliberation—injuries suffered by child

The State's evidence was sufficient to support an inference of premeditation and deliberation by defendant and thus to support submission of an issue of defendant's guilt of first-degree murder where the evidence tended to show that defendant's two-year-old stepdaughter was brutally beaten by defendant, during which time she received multiple, extensive blows to numerous areas of her body; the pathologist testified that the victim ultimately died from internal bleeding due to severe tearing of her liver and pancreas; the victim suffered six external injuries to her head, at least three injuries to her chest, injuries to her pelvis, hip bone, eye, and forehead, and bruises on her arms and right thigh; and the pathologist opined, based upon the pattern and extent of these injuries, that the injuries could not have been caused by an accidental fall from a high chair as defendant maintained, but that they were caused by multiple blows from a fist.

Am Jur 2d, Homicide §§ 52, 228, 266, 268, 439, 501.

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

2. Evidence and Witnesses § 1685 (NCI4th)— victim's injuries—photographs and slides not repetitious or excessive

Photographs and slides introduced by the State in a prosecution of defendant for the murder of his two-year-old stepdaughter were neither repetitious nor unfairly prejudicial where the first photograph illustrated testimony by the victim's mother about the victim's appearance at the hospital; the second photograph illustrated testimony by the victim's mother about an indentation in a wall where defendant had punched his fist following an argument about the way defendant reprimanded the victim; three other photographs depicted external injuries to the victim's body and illustrated the testimony of several paramedics who first responded to assist the victim; and eight autopsy slides, each of which depicted a separate area of the victim's body, were admitted to illustrate the pathologist's testimony concerning the nature and extent of the victim's external injuries.

Am Jur 2d, Evidence §§ 960-967; Homicide §§ 416-419; Trial §§ 507, 1678.

Prejudicial error in admission in evidence of colored photographs. 53 ALR2d 1102.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

3. Evidence and Witnesses § 1693 (NCI4th)— autopsy photograph not authenticated—absence of prejudice

Assuming *arguendo* that the trial court erred by admitting an autopsy photograph on the ground that it was not properly authenticated as a fair and accurate representation of the victim's mouth and lips at the time she received treatment from emergency medical personnel, defendant was not unfairly prejudiced by its admission where the photograph illustrated the pathologist's testimony concerning injuries to the victim's head and neck; the pathologist testified that the apparent injury to the victim's mouth and lips appeared to be the natural degenerative process of drying of the lips; and there was substantial evidence

showing multiple blunt-force impact injuries over the victim's entire body.

Am Jur 2d, Evidence §§ 960-967; Homicide §§ 416-419; Trial §§ 507, 1678.

Prejudicial error in admission in evidence of colored photographs. 53 ALR2d 1102.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

4. Evidence and Witnesses § 1958 (NCI4th)— medical records—triage nurse's report—insufficient authentication

A triage nurse's report was not sufficiently authenticated to be admissible as part of the medical records the pathologist relied upon to formulate his opinion as to a murder victim's injuries where the pathologist was unable to state with certainty that he had either read the document or relied upon it in preparing his autopsy report, he was not the custodian of the nurse's report, and he was unaware of the circumstances under which the report had been maintained.

Am Jur 2d, Evidence §§ 933, 1032-1048.

Admissibility under Uniform Business Records as Evidence Act or similar statute of medical report made by consulting physician to treating physician. 69 ALR3d 104.

Physician-patient privilege as extending to patient's medical or hospital records. 10 ALR4th 552.

5. Jury § 222 (NCI4th)— death penalty views—excusal for cause

The trial court in a capital trial did not err by excusing for cause a prospective juror who stated in response to questions by the trial court and the prosecutor that she did not think she could vote for the death penalty.

Am Jur 2d, Jury §§ 228, 229.

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

6. Jury § 226 (NCI4th)— death penalty views—excusal for cause—no opportunity for rehabilitation

The trial court in a capital trial did not err by excusing prospective jurors for cause on the basis of their death penalty views without allowing defendant an opportunity to rehabilitate them where the excused jurors clearly and unequivocally stated that their opposition to the death penalty would cause them to vote against its imposition under any circumstances; defendant did not request an opportunity to rehabilitate any of the prospective jurors; and there was no showing that further questioning by defendant would have produced different answers.

Am Jur 2d, Jury §§ 228, 229.

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

7. Evidence and Witnesses § 2267 (NCI4th)— pathologist's testimony—cause of death—"homicidal assault"

The trial court did not err by permitting a pathologist's testimony that the child victim died as a result of a "homicidal assault" where the pathologist testified on *voir dire* that he used this term to characterize the victim's death in order to differentiate it from death resulting from injuries sustained over a period of time; the term "homicidal assault" was not a legal term of art and did not correlate to a criminal offense; and the testimony related to a proper opinion for an expert in the field of forensic pathology.

Am Jur 2d, Evidence § 351; Trial § 720.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death. 65 ALR3d 283.

Admissibility of testimony of coroner or mortician as to cause of death in homicide prosecution. 71 ALR3d 1265.

8. Criminal Law § 683 (NCI4th)— capital sentencing—no significant criminal history—stipulation—mandatory peremptory instruction required

The trial court erred by failing to give a mandatory peremptory instruction on the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity where the State and defendant stipulated that

defendant had no significant history of prior criminal activity. Because of the stipulation, whether defendant had a significant history of prior criminal activity was not a factual matter for the jury to determine, and the trial court should have instructed the jury that the (f)(1) circumstance existed as a matter of law and must be given weight.

Am Jur 2d, Trial § 1169.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions. 49 ALR3d 128.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by McHugh, J., on 7 March 1995, in Superior Court, Forsyth 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 Ralf F. Haskell, Special Deputy Attorney General, for the State.

White and Crumpler, by Fred G. Crumpler, Jr., David B. Freedman, and Dudley A. Witt, for defendant-appellant.

MITCHELL, Chief Justice.

Defendant was tried capitally upon an indictment charging him with the first-degree murder of Brittany Hutton. The jury returned a verdict finding defendant guilty of first-degree murder on the theory of premeditation and deliberation. Following a separate capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The trial court, as required by law in light of the jury's recommendation, sentenced defendant to death for the first-degree murder. Defendant appeals to this Court as a matter of right from the judgment and sentence of death imposed for first-degree murder. For the reasons set forth in this opinion, we conclude that defendant received a fair trial, free from prejudicial error, but that the trial court committed error at the capital sentencing proceeding. Thus, we remand for a new capital sentencing proceeding.

The State presented evidence at trial tending to show that on 12 February 1994 defendant fatally beat his two-year-old stepdaughter, Brittany Hutton. At approximately 9:15 that morning, Tina Flippen, Brittany's mother and defendant's wife, left for work, leaving

Brittany alone with defendant. At 10:11 a.m., defendant called 911 to report that Brittany had fallen and was having difficulty breathing. Five emergency medical personnel from both the Clemmons Rescue Squad and the Forsyth County EMS responded to defendant's trailer. Several members of the rescue teams testified that when they arrived at the scene, Brittany was pale, her lips were ash gray, her pupils were fixed and dilated, and she was making gasping-type respirations. Despite rescue efforts, Brittany was pronounced dead at the North Carolina Baptist Hospital in Winston-Salem at 10:51 a.m.

Dr. Donald Jason, a forensic pathologist who performed an autopsy on the victim, testified that he observed injuries to Brittany's head, neck, chest, abdomen, back, and extremities. Dr. Jason testified that Brittany died as a result of internal bleeding due to severe tearing of her liver and pancreas. He opined that these injuries could not have been caused by an accident such as a single fall, but rather that the injuries were consistent with one or more very powerful punches or blows to Brittany's abdomen.

Defendant testified that on the morning of Brittany's death, he placed her in a high chair and then went into another room where he could not see her. While there, defendant heard a loud noise, at which time he returned to find that the child had fallen and was having difficulty breathing. Thereafter, defendant called 911 for emergency assistance.

[1] By an assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder. Defendant contends the evidence was insufficient to establish premeditation and deliberation. When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651 (1982). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 895 (1995). "Premeditation means that the act

was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836.

The State's evidence tended to show that Brittany Hutton, age two years and four months, was brutally beaten, during which time defendant delivered multiple, extensive blows to numerous areas of the child's body. Dr. Jason testified that the victim ultimately died from internal bleeding due to severe tearing of her liver and pancreas. However, he also enumerated numerous external injuries that Brittany sustained, including six injuries to her head; at least three injuries to her chest; injuries to her pelvis, hip bone, eye, and forehead; and bruises on her arms and right thigh. Dr. Jason opined that based upon the pattern and extent of these injuries, Brittany's injuries could not have been caused by an accidental fall as defendant maintains, but that they were instead caused by multiple blows from a fist. When viewed in the light most favorable to the State, this forensic evidence alone is sufficient to permit an inference that defendant premeditated and deliberated the killing. The severity and extent of the injuries sustained by the helpless two-year-old child belie defendant's claim that Brittany fell from her high chair, and the trial court did not err in denying defendant's motion to dismiss. *(Cf. State v. Greene*, 332 N.C. 565, 572-73, 422 S.E.2d 730, 734 (1992); *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 350 (1987)). This assignment of error is overruled.

[2] In another assignment of error, defendant argues that the trial court erred by admitting into evidence an excessive number of photographs and slides that depicted the deceased victim. Specifically, defendant contends that these exhibits should have been excluded because they were repetitious and their probative value was substantially outweighed by the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (1992). What represents an excessive number of photographs and whether the photographic evidence is more probative than prejudicial are matters within the sound discretion of the trial court. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Repetitive photographs may be introduced, even if they are gruesome or revolting, as long as they are used for illustrative pur-

poses and are not offered solely to arouse prejudice or passion in the jury. *Id.* at 284, 372 S.E.2d at 526.

The photographs and slides about which defendant complains were neither repetitious nor unfairly prejudicial. Two of the photographs were introduced during the testimony of Tina Flippen, the victim's mother. The first photograph illustrated Mrs. Flippen's testimony with respect to her observation of the victim's appearance at the hospital. The second photograph depicted an indentation in a wall where defendant had punched his fist following an argument about the way defendant reprimanded the victim, an event about which Mrs. Flippen testified. Three other photographs depicted external injuries to the deceased's body and were admitted to illustrate the testimony of several paramedics who first responded to assist the victim. Finally, a series of eight autopsy slides, each of which depicted a separate area of the victim's body, was admitted to illustrate Dr. Jason's testimony concerning the nature and extent of the victim's external injuries. We conclude defendant has failed to establish an abuse of discretion in the admission of these photographs and slides.

[3] In a related assignment of error, defendant argues that State's exhibit number eight, an autopsy photograph of the victim's head and neck, was not a fair and accurate representation of the victim's mouth and lips at the time she received treatment from emergency medical personnel. In support of this argument, defendant notes that none of the paramedics who reported to the crime scene testified that they noticed any injuries to the external portions of the victim's mouth or lips. In fact, one paramedic specifically testified that he did not remember the victim's lips being in the dried and bruised condition as the photograph depicted. Thus, defendant contends State's exhibit number eight was not adequately authenticated. Defendant also argues that he was unduly prejudiced by the introduction of the photograph in that it "plants in the juror's [sic] minds the unsupported contention that the defendant brutally struck the child about her face and head prior to death."

Assuming *arguendo* that the trial court erred by admitting State's exhibit number eight on the grounds that it was not properly authenticated, we conclude that defendant was not unfairly prejudiced by its admission. In addition to showing an apparent injury to the victim's outer mouth and lips, the photograph illustrated Dr. Jason's testimony concerning injuries to the victim's forehead and neck. Further,

Dr. Jason testified that the apparent injury to the outer mouth and lips appeared to be a drying of the lips, which is a natural degenerative occurrence after death. In light of the substantial evidence showing multiple blunt-force impact injuries over the victim's entire body, we cannot conclude that a different result might have occurred had the photograph not been admitted. Defendant's assignment of error is therefore overruled.

[4] In his next assignment of error, defendant argues that the trial court erred by denying his request to introduce into evidence defendant's exhibit number two, the triage nurse's medical report. Defendant argues that the nurse's report was relevant and admissible because it constituted a part of the medical records that Dr. Jason reviewed and relied upon to formulate his opinion as to the victim's injuries. The trial court excluded the nurse's report, ruling that "it was not properly authenticated as a medical record. The witness upon whom it was called to be authenticated was not a custodian of the records but otherwise—or otherwise affiliated with the recordkeeping facility." We agree with the trial court. Dr. Jason testified that he was unable to state with certainty that he had either read the document or relied upon it in preparing his autopsy report. While he did identify defendant's exhibit number two as a triage nurse's report, he was not the custodian of the report. Further, he was unaware of the circumstances under which the report had been maintained. Thus, the trial court committed no error.

Defendant also argues that the trial court erred in refusing to allow him the opportunity to cross-examine Dr. Jason about the triage nurse's report. However, defendant failed to assign this issue as error; therefore, it is not properly before this Court for review. N.C. R. App. P. 10. Defendant's assignment of error is overruled.

[5] In another assignment of error, defendant argues that the trial court erred in allowing the State's challenge for cause of prospective juror Judith Peebles without allowing him the opportunity to rehabilitate her. In *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85 (1968), 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." 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 v. Witt*,

469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985). 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 (1986)) (emphasis omitted).

When questioned by the trial court and the prosecutor, prospective juror Peebles stated that she was opposed to the death penalty and that she did not think she could vote for the death penalty. Peebles' responses indicated with unmistakable clarity that her bias against the death penalty would substantially impair her ability to perform her duties as a juror, and the trial court so ruled. The ruling of the trial court in such situations will not be disturbed absent an abuse of discretion. *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985). Based on Peebles' responses, we conclude that the trial court did not abuse its discretion in excusing her for cause. Defendant's assignment of error is overruled.

[6] Defendant next assigns error to the trial court's refusal to afford him an opportunity to rehabilitate prospective jurors excused for cause pursuant to *Witherspoon*, 391 U.S. at 522, 20 L. Ed. 2d at 780. We find no error with respect to any of the jurors.

While defendant has referred this Court to specific pages of the transcript to support his argument, he fails to discuss specific allegations or instances in which the trial court denied his request to rehabilitate prospective jurors or otherwise examine the venire. Nevertheless, we have carefully reviewed the relevant portions of the transcript. Under questioning by the prosecutor and the trial court, the excused jurors clearly and unequivocally stated that they were opposed to the death penalty and that their opposition to the death penalty would cause them to vote against its imposition under any circumstances. It is well established that "[t]he defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). We note further that defendant did not request an opportunity to rehabilitate any of the prospective jurors, and only once did defendant take exception to a prospective juror's excusal. In the absence of any such request, and there being no showing that further questioning by defendant would have produced different answers, it was not error for the trial court to deny defendant

the opportunity to question the prospective jurors further. This assignment of error is overruled.

[7] By another assignment of error, defendant argues that the trial court erred by overruling his objection to Dr. Jason's testimony that the victim died as a result of a "homicidal assault." During *voir dire* outside the presence of the jury, Dr. Jason explained that the term "homicidal assault" is a specific term of art in the field of forensic pathology. He stated he uses the term "homicidal assault" to characterize the victim's death in order to differentiate from death resulting from injuries that were sustained over a length of time, sometimes referred to as battered child syndrome. After this explanation, the trial court allowed Dr. Jason's testimony.

In support of his assignment of error, defendant argues that the characterization of the victim's death by Dr. Jason implied to the jury that the assault necessarily was premeditated and deliberate. Further, defendant argues that the testimony was of no assistance to the jury. *See* N.C.G.S. § 8C-1, Rule 704 (1992). Finally, defendant contends that the testimony's probative value was outweighed by its prejudicial effect on the jury. *See* N.C.G.S. § 8C-1, Rule 403 (1992).

Dr. Jason's use of the term "homicidal assault" is not a legal term of art, nor does it correlate to a criminal offense. The testimony related a proper opinion for an expert in the field of forensic pathology, in light of the foundation previously laid by Dr. Jason's *voir dire* testimony. Thus, the trial court did not err in allowing Dr. Jason's testimony; the probative value was not obscured by any prejudicial effect. Defendant's assignment of error is overruled.

We conclude for the foregoing reasons that defendant's trial was free from prejudicial error. Thus, we now turn to defendant's assignments of error relating to the separate capital sentencing proceeding conducted in this case.

[8] By another assignment of error, defendant contends that the trial court erred by failing to give a *mandatory* peremptory instruction on N.C.G.S. § 15A-2000(f)(1), that defendant had "no significant history of prior criminal activity." The State and defendant stipulated that defendant had no significant history of prior criminal activity, yet the jury declined to find the existence of the (f)(1) mitigator. Defendant argues the trial court erred by failing to instruct the jury that because of the stipulation, it must find the (f)(1) mitigating circumstance to

exist and must also give the circumstance mitigating weight in its decision. We agree.

The trial court gave the following peremptory instruction during its charge to the jury:

> First, consider whether the defendant has no significant history of prior criminal activity. . . . Whether any history of prior criminal activity is significant is for the jury to determine from all of the facts and circumstances found from the evidence. All of the evidence presented in this case, members of the jury, tends to show that the defendant has no significant history of prior criminal activity. Furthermore, the defendant and the State in this case have stipulated that the defendant has no significant history of prior criminal activity.
>
> Accordingly as to this mitigating circumstance, I instruct you that if one or more of you finds the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after the mitigation circumstance one on the issues and recommendation form.
>
> Second, you must consider whether the defendant has no criminal prior history and whether you deem this to have mitigating value. . . . All of the evidence tends to show that the defendant has no prior criminal history and accordingly as to this mitigating circumstance I charge that if one or more of you find the facts to be as all of the evidence tends to show and further deems or considers that to have mitigating value, you would so indicate by having your foreman write "yes" in the space provided after mitigating circumstance two on the issues and recommendation form.

The State argues that this requested peremptory instruction complies with this Court's mandate that "in those cases where the evidence is truly uncontradicted, the defendant is, at most, entitled to a peremptory instruction when he requests it." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). The State further contends that the jury simply declined to find the mitigating circumstance, an action within its prerogative. *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995) cert. denied, —— U.S. ——, 134 L. Ed. 2d 100 (1996). In *Alston*, this Court said, "even where all the evidence supports a finding that the mitigating circumstance exists and a peremptory instruction is given, the jury may nonetheless reject the evidence and not

find the fact at issue if it does not believe the evidence." *Id.* at 256, 461 S.E.2d at 719. We continue to recognize the well-established rule that jurors may reject the existence of an uncontroverted statutory mitigating circumstance even after a peremptory instruction. *Id.* However, the case at bar is not controlled by that rule.

Unlike *Alston* where the *evidence* tended to show the existence of an uncontroverted statutory mitigating circumstance, in the case at bar, the State and defendant *stipulated* to the existence of the mitigating circumstance contained in N.C.G.S. § 15A-2000(f)(1). A stipulation entered into between the parties has the effect of removing a question of fact from the jury's consideration. Neither party need present evidence or show proof of the existence of such facts that are contained within the stipulation. In other words, "[t]he stipulation is substituted for proof and dispenses with the need for evidence." *State v. Mitchell*, 283 N.C. 462, 469, 196 S.E.2d 736 (1973). Because both parties stipulated to the existence of the statutory mitigating circumstance, whether defendant had a significant history of prior criminal activity was not a factual matter for the jury to determine. Thus, the trial court erred by failing to instruct the jury that the N.C.G.S § 15A-2000(f)(1) mitigating circumstance existed as a matter of law and must be given weight.

Once the existence of a statutory mitigating circumstance is established, the "jury may not refuse to give it weight or value" in its decision. *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988) sentence vated on other grounds, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990); *see also State v. Kirkley*, 308 N.C. 196, 220-21, 302 S.E.2d 144, 157-58 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). Our legislature has determined as a matter of law that when statutory mitigating circumstances exist, they are deemed as a matter of law to have mitigating value. *Fullwood*, 323 N.C. at 396, 373 S.E.2d at 533; *State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988); *see* N.C.G.S. § 15A-2000(f) (Supp. 1995). This Court has consistently held that if a statutory mitigating circumstance exists, the jury is not free to refuse to consider the circumstance and must give it some weight in its final sentencing determinations. However, the amount of weight any circumstance may be given is a matter left to the jury. *State v. Keel*, 337 N.C. 469, 447 S.E.2d 748 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 147 (1995); *see also 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).

The result of the trial court's erroneous peremptory instruction was to allow the jury to answer "no" to the existence of the statutory (f)(1) mitigator and thus disregard the stipulation. As a matter of well-established law, the trial court's failure to give a *mandatory* peremptory instruction was therefore error.

Furthermore, we cannot state that had this statutory mitigating circumstance been weighed against the aggravating circumstance, the jury would still have returned a sentence of death. Therefore, we are unable to hold that the trial court's error permitting the jury to fail to find and weigh this mitigating circumstance was "harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (1988). Accordingly, we vacate the death sentence in this case and remand it to the Superior Court, Forsyth County, for a new capital sentencing proceeding.

NO ERROR IN THE GUILT PHASE. DEATH SENTENCE VACATED AND REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING.

STATE OF NORTH CAROLINA v. MICHAEL JEROME BRAXTON

No. 551A94

(Filed 8 November 1996)

1. Evidence and Witnesses § 1278 (NCI4th)— first-degree murder—defendant's statement—waiver of rights

There was no error in a capital prosecution for first-degree murder and other crimes in which the death penalty was not recommended where defendant's motion to suppress his confessions and statements to law enforcement officers was denied. The evidence in the record from a hearing on remand supports the trial judge's findings and conclusions that defendant was not improperly interrogated and that he did not invoke his right to counsel where defendant was immediately informed of his *Miranda* warnings upon his initiating conversation and was silent for the remainder of the ride; defendant neither made statements to nor requested an attorney from the detective while being transported to the police station; his only comments involved the crimes for which he was charged, information that could have been estab-

lished from the arrest warrants alone; defendant was again informed of his rights at the police station; and the court found that he knowingly, intelligently and voluntarily waived them and signed a waiver form.

Am Jur 2d, Criminal Law § 797.

Comment Note.—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

2. Criminal Law § 537 (NCI4th)— first-degree murder—audience wearing badges—photographs of victim—mistrial denied

The trial court did not err in a prosecution for first-degree murder and other crimes by not declaring a mistrial on the grounds that members of the audience were wearing badges with photographs that defendant alleged were of one of the victims. There are no facts in the record showing the number and identity of the spectators wearing the buttons, the identity of the person shown in the photograph, whether the jury noticed the buttons; there was no showing that the individuals in the audience belonged to a well-known organization; and there was no evidence that the badges exclaimed a specific message. Where the record is incomplete or silent, the reviewing court will not presume the facts to be as the party contends; here the record is incomplete and the Supreme Court will not assume a relationship between the murder victims and the spectators wearing badges and thereby infer their intention to influence the jury's verdicts.

Am Jur 2d, Trial §§ 254, 255.

Coaching of witness by spectator at trial as prejudicial error. 81 ALR2d 1142.

3. Evidence and Witnesses § 929 (NCI4th)— first-degree murder—statement by accomplice—spontaneous declaration

The trial court did not err in a prosecution for first-degree murder and other crimes by allowing one of defendant's accomplices to testify that another accomplice had said, after defendant and that accomplice returned to the car from the convenience store where the first shooting occurred, "I didn't believe you would shoot him." The hearsay declarant had just been involved in a double robbery and had just witnessed the shotgun shooting

of an innocent being. He and defendant ran out of the store, jumped in the getaway car, hollered at the driver to go, and at that point the accomplice made the statement to defendant; clearly, the declarant was still experiencing the witnessing of an extremely startling event and there was no time to reflect on his thoughts or fabricate a story, thus making the declaration spontaneous. N.C.G.S. § 8C-1, Rule 803(2) (1992).

Am Jur 2d, Evidence § 685.

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.

Time element as affecting admissibility of statement or complaint made by victim of sex crime as *res gestae*, spontaneous exclamation, or excited utterance. 89 ALR3d 102.

Necessity, in criminal prosecution, of independent evidence of principal act to allow admission, under *res gestae* or excited utterance exception to hearsay rule, of statement made at time of, or subsequent to, principal act. 38 ALR4th 1237.

4. Criminal Law § 113 (NCI4th)— first-degree murder—witness's statement—failure to disclose—mistrial denied

The trial court did not abuse its discretion, particularly under these circumstances, by denying defendant's motion for a mistrial in a prosecution for first-degree murder and other crimes where defendant's girlfriend testified concerning a statement made to her by defendant and defendant argued that the State failed to disclose the substance of the statements, but the motion for a mistrial was not filed until after the jury returned its verdicts and defendant articulated the specific basis for his objection only then. Defendant's own delay prevented the trial court from any timely consideration of the challenged testimony. N.C.G.S. § 15A-903(a)(2).

Am Jur 2d, Trial § 1746.

5. Homicide § 506 (NCI4th)— felony murder—three robberies—instruction not ambiguous—judgment arrested on one only

The trial court did not err by denying defendant's motion to arrest judgment on each of the robbery convictions underlying

defendant's felony murder conviction where the trial court arrested judgment in the case of the robbery which was the basis of the felony murder conviction. Although defendant maintained that the trial court's instruction was ambiguous and that it is impossible to determine which of the three robberies the jury relied upon in reaching its murder conviction, the instructions viewed in their entirety clearly informed the jury that the felony underlying the murder was the robbery of the murder victim and no other.

Am Jur 2d, Homicide §§ 498, 506.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two consecutive sentences of life imprisonment entered by Barnette, J., at the 16 May 1994 Criminal Session of Superior Court, Wake County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for robbery with a firearm and first-degree kidnapping was allowed 10 July 1995. Heard in the Supreme Court 12 March 1996.

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

Daniel Shatz for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 8 March 1993 for two counts of first-degree murder, three counts of robbery with a dangerous weapon and one count of first-degree kidnapping. The defendant was tried capitally, and the jury found him guilty of the first-degree murder of Emmanuel Oguayo on the basis of the felony murder rule. He was also found guilty of the first-degree murder of Donald Ray Bryant on the basis of malice, premeditation, and deliberation and under the felony murder rule. In addition, defendant was convicted of three counts of robbery with a firearm and one count of first-degree kidnapping. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the murder of Emmanuel Oguayo but was unable to reach a unanimous recommendation for sentencing in the murder of Donald Bryant. Defendant received the mandatory life sentence for each murder, these to run consecutively, and consecutive sentences of forty, forty and thirty years on two counts of armed robbery and second-

degree kidnapping. The trial court arrested judgment on one count of armed robbery and as to first-degree kidnapping. For the reasons discussed herein, we conclude that defendant received a fair trial, free from prejudicial error.

The State's evidence tended to show that on 12 February 1993, defendant Michael Jerome Braxton and two other men, Kjellyn Leary and Robin Moore, drove around Raleigh while they talked about finding people to rob. They went to a party near Saint Augustine's College for this purpose. Moore had a shotgun in an orange duffel bag. One of the victims, Donald Bryant, walked up to defendant and asked if he had any crack cocaine. Defendant told Bryant he did not have any. As Bryant walked back to his car, Moore pulled the shotgun on Bryant and made him get into the backseat. Defendant and Leary also got into Bryant's car. Defendant went through Bryant's pockets and took twenty dollars and two marijuana cigarettes. Defendant, Leary and Moore later decided to put Bryant in the trunk of the car.

After smoking the marijuana cigarettes and drinking two twelve-packs of beer they bought with the money taken from Bryant, Moore drove to a Fast Fare in North Raleigh and parked behind the building. Leary and defendant went inside the store while Moore waited in the car. Defendant carried the shotgun. Defendant walked up to Lindanette Walker, a customer in the store, and told her to get on the floor. He took her coat, watch and pocketbook. Meanwhile, the store clerk, Emmanuel Oguayo, began to fight with Leary. Defendant ran behind the counter, aimed the shotgun at Oguayo and pulled the trigger. The shotgun failed to fire. Defendant then reloaded and fired, this time hitting Oguayo in the abdomen. Defendant and Leary ran back to the car, got in and shouted at Moore to "go." Moore drove away. As they were driving down the road, Leary said to defendant, "I didn't believe you would shoot him." An audit of the cash register revealed that ninety-eight dollars was missing. Oguayo died from the wound.

Later that night, defendant and Leary drove to some woods in North Raleigh. Defendant got Bryant out of the trunk and shot him in the head. Bryant died instantly.

On either Valentine's Day or the day after, defendant gave his girlfriend, Letita Bridges, a leather coat and a watch. Sometime after giving Bridges the coat and watch, defendant told Bridges that he shot "some guy" at the Fast Fare. He said he did not know why. Thereafter, Bridges gave the police the coat and the watch. They were identified as being objects stolen from Lindanette Walker.

On 17 February 1993, Detective Gabriel Sanders of the Raleigh Police Department was driving south on South Blount Street when defendant's father motioned for him to stop. Defendant's father told Detective Sanders that his son had been involved in the commission of some crimes and wanted to turn himself in to the police. Detective Sanders radioed the Raleigh Police Department and confirmed the existence of an outstanding arrest warrant. Detective Sanders then took defendant into custody, handcuffed him and placed him in Detective Sanders' vehicle.

Defendant informed Detective Sanders that the charges against him concerned a robbery and murder in North Raleigh. Defendant then tried to begin a conversation with Detective Sanders. Because of the seriousness of the charges, Detective Sanders immediately advised defendant of his *Miranda* rights. The warnings were given verbally from Detective Sanders' memory, and included the right to remain silent, the warning that anything the defendant said could be used against him, the right to have a lawyer present, the right to have a lawyer appointed if he could not afford one, and the right to stop answering questions at any time. After being advised of his rights, defendant was silent for the remainder of the ride to the police station. He did not make any statements, nor did he request to talk with a lawyer or have a lawyer appointed. Detective Sanders also did not ask defendant any questions. There was no conversation between the two from the time of the *Miranda* warnings until the time Detective Sanders left defendant at the fourth floor of the Raleigh Police Department.

Upon arrival at the fourth floor of the police department, defendant was taken to an interview room. Detectives Malley Bissette and William Liles interviewed the defendant for approximately fifty minutes. At the beginning of the interview, Detective Bissette explained to the defendant his *Miranda* rights from a preprinted form of the Raleigh Police Department. The defendant indicated he understood his rights and signed the form acknowledging that he understood and desired to talk with the officers. He gave a statement in which he admitted robbing Lindanette Walker and shooting Emmanuel Oguayo. Defendant also admitted he shot Donald Bryant in the head. Defendant later assisted the police in locating the body of Donald Bryant.

[1] In his first assignment of error, defendant contends the trial court erred by denying defendant's motion to suppress his confessions and

statements made to law enforcement officers. Specifically, defendant contends that there was insufficient evidence to support the trial court's finding that defendant was advised of his *Miranda* rights and that he voluntarily waived them. Defendant asserts that law enforcement officers initiated custodial interrogation before reading him his rights. He also maintains that he requested an attorney at his first contact with law enforcement. Therefore, he contends subsequent interrogation initiated by the officers was not voluntary, making the statements inadmissible. Upon careful review of the record, we conclude this assignment of error is without merit.

Statements made by a defendant resulting from custodial interrogation are admissible at trial only if, prior to questioning, the defendant has been fully advised of his rights to remain silent and to have counsel present during questioning. These rights may be waived by a defendant by a voluntary, knowing and intelligent waiver. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). "The ultimate test of the admissibility of a confession is whether the statement was in fact voluntarily and understandingly made." *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). *Miranda* and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), together establish that custodial interrogation must cease when an accused requests an attorney and may not be resumed by police officers without an attorney present unless the interrogation is thereafter initiated by the accused. A suspect is in custody when, considering the totality of the circumstances, "a reasonable person in the suspect's position would [not] feel free to leave at will [but would] feel compelled to stay." *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993).

On defendant's motion *in limine*, a pretrial hearing was conducted before Judge Robert Farmer on 10 December 1993, to determine the admissibility of defendant's custodial statements. Evidence was presented by the State and the defendant. Defendant himself testified at the hearing, asserting breach of his constitutional rights under *Miranda*. At the close of the evidence, Judge Farmer made findings of fact and conclusions of law that defendant was fully informed of his constitutional rights and knowingly and voluntarily waived them, and ruled that the statements were given knowingly, intelligently and voluntarily and were therefore admissible. Later, at trial, defendant renewed his motion to suppress, contending that the statements to police were made after he had invoked his right to an attorney and were, therefore, inadmissible.

Following a hearing on a motion to suppress evidence, the trial court must make findings of fact and conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. "If there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

Because, in the instant case, it was unclear from the record and from the trial court's findings of fact and conclusions of law as to whether defendant invoked his right to counsel, we remanded for a further hearing and findings of fact with respect to the *Edwards* issues of custody and request for counsel. Judge Farmer presided over this further hearing, at which the State presented the testimony of Detective Sanders. Defendant was present at the hearing but did not testify or offer evidence on his own behalf. Defendant's counsel did cross-examine Detective Sanders. The trial court made additional findings of fact that defendant was advised of his *Miranda* rights by Detective Sanders, that there was no custodial interrogation by Detective Sanders at any time, and that defendant did not request an attorney during transport to the police station by Detective Sanders.

The evidence in the record from this further hearing supports Judge Farmer's findings of fact and conclusions of law that the defendant was not improperly interrogated and that he did not invoke his right to counsel in transit to the police department or later at the station. Defendant was immediately informed of his *Miranda* rights upon his initiating conversation, and he was silent for the remainder of the ride. He neither made statements to nor requested an attorney from Detective Sanders while being transported to the police station. Defendant's only comments involved the crimes for which he was charged, information that could have been established from the arrest warrants alone. Defendant was again informed of his rights at the police station, and the trial court found that he knowingly, intelligently and voluntarily waived them and signed a waiver form. Thus, the trial court's findings and conclusions are supported by competent evidence, and we find no error in the denial of defendant's motion to suppress.

[2] In his next assignment of error, defendant contends that the trial court erred by denying his motion for a mistrial on the grounds that members of the audience were wearing badges that appeared to be

photographs of one of the victims. Defendant argues that the wearing of badges by spectators was an attempt to influence the jury and was inherently prejudicial to defendant's right to a fair trial. We disagree.

The trial court is authorized to control the conduct of spectators in the courtroom. N.C.G.S. §§ 15A-1033, -1034 (1988). Although this issue appears to be one of first impression in North Carolina, defendant cites several cases from other states where the wearing of certain items of clothing or accessories led to declarations of mistrial. *Woods v. Dugger*, 923 F.2d 1454 (11th Cir.) (presence of numerous uniformed prison guards in the audience of a trial for the murder of a prison guard deprived defendant of a fair trial), *cert. denied*, 502 U.S. 953, 116 L. Ed. 2d 355 (1991); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) (presence of female spectators wearing large buttons with the slogan "women against rape" in the audience of a trial for kidnapping and sexual intercourse without consent deprived defendant of a fair trial); *State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985) (wearing by several spectators, including the sheriff, of MADD lapel buttons in trial for driving under the influence resulting in death deprived defendant of a fair trial).

We find these rulings distinguishable from the present case. There are no facts in the record showing the number and identity of the spectators wearing the buttons, the identity of the person shown in the photograph, and whether the jury even noticed the buttons. There was no showing that the individuals in the audience belonged to a well-known organization, such as MADD, NOW, or the Rape Task Force, or that they were prison guards. Similarly, there is no evidence that the badges exclaimed a specific message. The trial judge was left merely to assume that the people were members of the victims' families and that the photographs were of the victims. The trial judge even commented that he did not know how the jury could have known who was shown in the photographs.

Where the record is incomplete or silent, the reviewing court will not presume the facts to be as a party contends. *State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995). The record in this case is incomplete, and this Court will not assume a relationship exists between the murder victims and the spectators wearing the badges and thereby infer their intention to influence the jury's verdicts. As a result, we find no error in the trial court's exercise of discretion regarding the wearing of buttons with photographs in this case. This assignment of error is overruled.

[3] Defendant also assigns error to the trial court's allowing Robin Moore to testify to a statement made by Kjellyn Leary. Moore testified that after the defendant and Leary returned to the car, Leary stated, "I didn't believe you would shoot him." Defendant contends that this was a hearsay statement not covered by any exception and that it should have been disallowed. This assignment of error is without merit.

Any hearsay statement, as defined in N.C. R. Evid. 801(c), is "inadmissible except as provided by statute or the rules of evidence." *State v. Rogers*, 109 N.C. App. 491, 498, 428 S.E.2d 220, 224, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994); *see also* N.C.G.S. § 8C-1, Rule 802 (1992). 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). This Court has held that for a statement to be admitted as an excited utterance, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

In this case, the hearsay declarant Leary had just been involved in a double robbery and had just witnessed the shotgun shooting of an innocent being. He and defendant ran out of the store, jumped in the getaway car, and hollered at the driver Moore to "go." It was at this point that Leary made the statement "I didn't believe you would shoot him" to defendant. This statement itself evidences surprise. Clearly, Leary was still experiencing the witnessing of an extremely startling event, the shooting of another person. There was no time to reflect on his thoughts or fabricate a story between the shooting and the actual statement, thus making the declaration spontaneous. Hence, Moore's testimony regarding the statement fits squarely within the excited utterance exception to the hearsay rule and was properly admitted. This assignment of error is overruled.

[4] Defendant next asserts that the trial court erred by overruling defendant's objection to Letita Bridges' testimony concerning a statement made to her by defendant and by denying defendant's later motion for a mistrial on that ground. Defendant argues that the State was aware that Bridges would testify that defendant admitted to her that he shot Oguayo and that the failure to disclose the substance of

the statements pursuant to N.C.G.S. § 15A-903(a)(2) serves as grounds for a mistrial. We disagree.

"Sanctions for failure to make timely discovery are within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Wynne*, 329 N.C. 507, 521, 406 S.E.2d 812, 819 (1991). In this case, the trial court considered the motion at length. Further, the motion for mistrial was not filed until after the jury returned its verdicts, and it was only then that defendant articulated the specific basis for his objection. Thus, defendant's own delay prevented the trial court from any timely consideration of the challenged testimony. The record does not disclose any abuse of discretion by the trial court, particularly under these circumstances. This assignment of error is overruled.

[5] Finally, defendant argues that the trial court erred by denying defendant's motion to arrest judgment on each of the robbery convictions underlying his felony murder conviction. Defendant was convicted of three separate counts of robbery with a dangerous weapon against Emmanuel Oguayo, Lindanette Walker and Donald Bryant. At sentencing, defendant moved to arrest judgment as to these convictions. The trial court arrested judgment in the case of robbery against Oguayo because it was the felony submitted to the jury as the basis of the first-degree murder conviction under the felony murder theory. Defendant now contends that the trial court also should have arrested judgment as to his robbery convictions of Walker and Bryant. Defendant maintains that the trial court's instructions were ambiguous because the jury was not instructed specifically that Oguayo had to be killed during the robbery committed against him. Because of this alleged ambiguity, defendant claims that it is impossible to determine which of the three robberies the jury relied upon in reaching its murder conviction. We do not agree with defendant's characterization of the instructions as ambiguous.

The trial court instructed the jury on the theory of felony murder with regard to Emmanuel Oguayo as follows:

> I charge for you to find the defendant guilty of first-degree murder under the theory of the Murder Felony Rule [sic], the State must prove three things beyond a reasonable doubt: First, that the defendant, Michael Jerome Braxton, committed or attempted to commit or was acting in concert with someone who was committing or attempted to commit—to commit robbery. . . . And, second, that while committing or attempting to commit the

robbery or acting in concert with someone who was attempting or committing or attempting to commit robbery, that the defendant, Michael Jerome Braxton, killed Emmanuel Oguayo with a deadly weapon. And, third, that the defendant's act was a proximate cause of Emmanuel Oguayo's death. A proximate cause, like I have told you, is a real cause, a cause without which Emmanuel Oguayo's death would not have occurred.

Pursuant to N.C.G.S. § 14-17, "a killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction." *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992).

After being instructed on the possible verdicts in the murder of Donald Bryant, the jury was instructed separately on the robberies of Bryant, Oguayo and Walker. The trial court instructed the jury so that the connection between the robbery of Oguayo and his murder was clear to the jury and in such a manner that there was no reliance on the robberies of Walker or Bryant as the underlying felony on the theory of felony murder. When viewed in their entirety, the instructions clearly informed the jury that the felony underlying the Oguayo felony murder conviction was the robbery of Mr. Oguayo and no other. Thus, we find no error, and this assignment of error is overruled.

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

NO ERROR.

PRECISION FABRICS GROUP, INC. v. TRANSFORMER SALES AND SERVICE, INC.

No. 568PA95

(Filed 8 November 1996)

1. Trial § 60 (NCI4th)— affidavit opposing summary judgment—timely filing on date of hearing

An affidavit by plaintiff's expert in opposition to defendant's motion for summary judgment was filed within five days of service as required by Rule 5(d) where plaintiff served the affidavit on

1 July by mailing it to defendant's attorney and filed it with the court on 5 July, the date of the summary judgment hearing. N.C.G.S. § 1A-1, Rule 5(d).

Am Jur 2d, Summary Judgment § 20.

2. Trial § 60 (NCI4th)— affidavit opposing summary judgment—time for filing

Nothing in Rule 56(c) or any other rule requires the "filing" of an affidavit in opposition to a summary judgment motion prior to the day of the summary judgment hearing. N.C.G.S. § 1A-1, Rule 56(c).

Am Jur 2d, Summary Judgment § 20.

3. Trial § 60 (NCI4th)— affidavit opposing summary judgment—deposit in mail—service prior to day of hearing

An affidavit by plaintiff's expert in opposition to defendant's motion for summary judgment was served on defendant's attorney within the meaning of Rule 5(b) when her attorney deposited it in the mail on 1 July addressed to defendant's attorney. Furthermore, plaintiff met the requirement of Rule 56(c) that the opposing affidavit be served "prior to the day of the hearing" and the requirement of Rule 6(d) that it be served "not later than one day before the hearing" where the hearing was scheduled for 5 July. N.C.G.S. § 1A-1, Rules 5(b) and 6(d).

Am Jur 2d, Summary Judgment § 20.

4. Trial § 60 (NCI4th)— affidavit opposing summary judgment—time for serving—Rule 6(e) inapplicable

Rule 6(e), which allows a party an additional three days "to do some act or take some proceedings" when notice is served by mail, was inapplicable to the computation of time for plaintiff to serve an affidavit in opposition to defendant's motion for summary judgment since there was no act or proceeding for defendant to complete within a prescribed period of time upon service of plaintiff's affidavit. N.C.G.S. § 1A-1, Rule 6(e).

Am Jur 2d, Summary Judgment § 20.

5. Trial § 60 (NCI4th)— affidavit timely served and filed—court's refusal to consider—summary judgment improper

Where the affidavit of plaintiff's expert was timely served by mail four days before the hearing on defendant's motion for sum-

mary judgment and was timely filed with the court on the day of the hearing, the trial court erred by refusing to consider the affidavit even if defendant's attorney had not yet received it. Therefore, the trial court erred in entering summary judgment for defendant based upon its conclusion that plaintiff had presented no evidence in opposition to defendant's summary judgment motion.

Am Jur 2d, Summary Judgment § 20.

Chief Justice MITCHELL dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 120 N.C. App. 866, 463 S.E.2d 787 (1995), affirming an order allowing defendant's motion for summary judgment entered by Eagles, J., at the 5 July 1994 Civil Session of Superior Court, Guilford County. Heard in the Supreme Court 11 September 1996.

Cozen and O'Connor, by Paul A. Reichs, for plaintiff-appellant.

Mast, Morris, Schulz & Mast, P.A., by Bradley N. Schulz and George B. Mast, for defendant-appellee.

ORR, Justice.

In this case, we must decide whether the Court of Appeals erred in affirming the trial court's order granting defendant's motion for summary judgment. Specifically, this action involves interpretation of the statutory time periods for serving and filing affidavits in opposition to a motion for summary judgment. The trial court's summary judgment order was based upon its conclusion that plaintiff had presented no evidence in opposition to defendant's motion. At the hearing, the trial court refused to consider plaintiff's expert's affidavit contesting the motion on the grounds that the affidavit had not been served on defendant nor filed with the court in a timely fashion.

In summary, this case arises out of the sale of a purportedly defective transformer by defendant, Transformer Sales and Service, Inc. (TSS), to plaintiff, Precision Fabrics Group, Inc. The initial complaint in the case was filed on 25 June 1992. Subsequently, plaintiff filed an amended complaint on 17 August 1992, alleging breach of implied warranty and negligence after a transformer manufactured by defendant failed to operate properly. Plaintiff's negligence claim stated that defendant failed to properly design the transformer; failed

to properly manufacture the winding coils and use uncontaminated oil; failed to properly inspect the transformer; and "otherwise fail[ed] to use that degree of skill, care, caution and prudence reasonably expected of a manufacturer and a distributor in similar circumstances." Plaintiff further alleged that defendant breached implied warranties of merchantability and fitness. Defendant answered, denying any breach of warranty or negligence and asserting several affirmative defenses, including contributory negligence and assumption of risk.

On 21 June 1994, defendant served plaintiff by mail with a motion for summary judgment along with the supporting affidavits of William F. Outlaw, defendant's vice-president of transformer sales, and John B. Dagenhart, a registered professional engineer. Defendant also included in the mailing to plaintiff a document entitled "Notice of Hearing." This document stated that the motion for summary judgment was to be heard in Superior Court, Guilford County, on Tuesday, 5 July 1994, at 10:00 a.m. The motion, supporting affidavits, and notice of hearing were also mailed to the Guilford County Clerk of Superior Court on 21 June 1994 and filed with the court on 23 June 1994.

William Outlaw's affidavit stated, among other things, that defendant's design of the transformer "meets and exceeds all the requirements needed for proper performance of this unit" and "[e]ngineering guidelines utilized in the design . . . are in accordance with ANSI (American National Standard Institute) and NEMA [National Electrical Manufacturers Association] maintenance standards." Further, the transformer was thoroughly tested before leaving the plant, and tests did not indicate any defect within the unit. The materials used to construct the transformer were new and "were represented by the suppliers as being of good quality."

The other affidavit submitted by defendant, that of John B. Dagenhart, stated, among other things, that "[t]he materials used by TSS to construct the transformer were represented to them by the suppliers as being of good quality." Also, the "tests conducted by TSS during and after construction did not indicate any defect within the transformer." Dagenhart further stated that "[t]here is no evidence that TSS knowingly shipped a defective transformer or negligently produced a defective transformer." He concluded by stating that "PRECISION's continued use of the transformer without notifying TSS of the overheating problem was unreasonable and may have

directly contributed to the damages which PRECISION seeks to recover from TSS."

On 1 July 1994, plaintiff mailed to defendant an affidavit in opposition to the summary judgment motion and attached an unverified purchase order. These documents were filed with the court on 5 July 1994, the day the hearing was scheduled. The record is unclear as to whether the filing occurred before, during, or immediately after the hearing. However, counsel for plaintiff and defendant have stipulated that the affidavit in opposition to the summary judgment motion was filed in the clerk's office at 10:55 a.m. Motion hearings for that day were scheduled to begin at 10:00 a.m., but the record does not reflect at what time this motion was actually heard.

Based upon representations made by counsel at oral argument and findings of fact by the trial court, the summary judgment hearing proceeded as follows: First, counsel for defendant argued in favor of the motion and submitted to the court the affidavits of John Dagenhart and William Outlaw, the deposition of John Dagenhart, and defendant's answers to plaintiff's first set of interrogatories. At the conclusion of defendant's argument, counsel for plaintiff inquired as to why no mention was made of plaintiff's affidavit in opposition to the motion during defendant's argument. The trial court then asked counsel for plaintiff what affidavit he was speaking of, as the trial court had no such affidavit in the file. At that point, plaintiff attempted to tender his affidavit in opposition to the summary judgment motion. Defendant objected to the admission of the affidavit on the grounds that he had not been served with a copy of it. Upon further inquiry of defendant's counsel, the trial court learned that defendant's counsel had not seen plaintiff's affidavit in opposition to the motion until plaintiff's tender of the affidavit at the hearing.

The trial court subsequently declined to accept plaintiff's affidavit for consideration. This was transcribed into an order granting defendant's motion for summary judgment, including findings of fact and conclusions of law made by the trial court because of the special circumstances involved in this particular hearing. In its order, the trial court concluded that plaintiff's affidavit had not been properly served on defendant or filed with the court "at least one day prior to this matter coming on for hearing on July 5, 1994" and "[p]ursuant to *Battle v. Nash* [*Technical College*], 103 N.C. App. 120, [404] S.E.2d [703] (1991), the Rules of Civil Procedure, and in its discretion, the

Court chooses not to receive" plaintiff's affidavit in opposition to the motion. The trial court further concluded: "Based on the pleadings, discovery, Affidavits of John Dagenhart and William Outlaw, and the deposition of John Dagenhart, the Court finds that there is no genuine question as to any material fact, and defendant is entitled to [summary] judgment as a matter of law." The Court of Appeals affirmed the trial court's order.

Plaintiff contends the trial court erred in excluding the affidavit, thereby resulting in the granting of defendant's motion for summary judgment. Under Rule 56(c), a motion for summary judgment "shall be rendered . . . if the pleadings, depositions, . . . affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). In the case before us, the trial court granted summary judgment because there was no evidence admitted in opposition to the summary judgment motion and because defendant's evidence was sufficient, since uncontested, to grant summary judgment to defendant. Plaintiff's expert's affidavit, the only evidence presented in opposition to the motion, was excluded on the grounds that it had not been served on defendant or filed with the court in a timely fashion. We hold that the trial court's grant of summary judgment, which was based upon its refusal to consider the affidavit, was error.

[1] We will first address the issue of whether plaintiff's opposing affidavit was timely filed with the court. Rule 5(d) concerns the filing requirements for pleadings subsequent to the complaint and other papers, requiring that they shall be

> *filed with the court either before service or within five days thereafter* . . . . With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served.

N.C.G.S. § 1A-1, Rule 5(d) (1990) (emphasis added). In the present case, plaintiff complied with Rule 5(d) by filing the affidavit with the court on the day of the hearing. As the affidavit was served (as discussed hereafter) on 1 July 1994 and filed on 5 July 1994, it was filed within five days of service. Thus, as the above analysis demonstrates, plaintiff complied with Rule 5(d).

In the opinion below, the Court of Appeals cited to *Nationwide Mut. Ins. Co. v. Chantos*, in stating that "Rule 56(c) implicitly requires that opposing affidavits be 'filed prior to the day of the [summary judgment] hearing.' " *Precision Fabrics Group, Inc. v. Transformer Sales & Service, Inc.*, 120 N.C. App. 866, 869, 463 S.E.2d 787, 789 (1995) (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974)). In *Nationwide*, the Court of Appeals focused on the legislative intent in applying Rule 56(c) and found that it *implicitly* requires that affidavits in support of a motion for summary judgment be filed *and* served prior to the date of the summary judgment hearing. The issue before the Court of Appeals related to the allowance of affidavits in support of a motion for summary judgment where the moving party withheld serving and filing the affidavits until the day of the hearing on the motion. Relying on that portion of Rule 56(c) which specifically provides that opposing affidavits may be served by the adverse party prior to the day of the hearing, the Court of Appeals continued:

> It is clear that opposing affidavits are to be served prior to the day of the hearing. It follows that the clear intent of the legislature is that supporting affidavits should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing.

Nationwide, 21 N.C. App. at 130, 203 S.E.2d at 423.

[2] This Court has held that " 'the province of construction lies wholly within the domain of ambiguity, and . . . if the language used is clear and admits but one meaning, the Legislature should be taken to mean what it has plainly expressed.' " *Nova Univ. v. Board of Governors*, 305 N.C. 156, 170, 287 S.E.2d 872, 881 (1982) (quoting *Asbury v. Town of Albemarle*, 162 N.C. 247, 250, 78 S.E. 146, 148 (1913)) (alteration in original). Since nothing in Rule 56(c) or any other rule specifically requires "filing" of the opposing affidavit prior to the day of the summary judgment hearing, we must decline to, in effect, amend the Rules. "If changes seem desirable, it is a matter for the legislature." *Powell v. Board of Trustees*, 3 N.C. App. 39, 43, 164 S.E.2d 80, 83 (1968).

[3] We now turn to the issue of whether plaintiff's affidavit was served on defendant in a timely manner. Rule 5(b) provides in pertinent part:

> With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with

> due return . . . may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court . . . . *Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.*

N.C.G.S. § 1A-1, Rule 5(b) (emphasis added). Here, counsel for plaintiff attested that on 1 July 1994, she deposited the documents in the mail addressed to defendant's attorney. Thus, plaintiff's affidavit was served on defendant's attorney within the meaning of Rule 5(b), service being "complete upon deposit . . . in a post office or official depository under the exclusive care and custody of the United States Postal Service." Therefore, plaintiff served defendant with the affidavit in opposition to the summary judgment motion on 1 July 1994.

The next rule applicable to this case is Rule 56(c), which provides that "[t]he adverse party *prior to the day of hearing* may serve opposing affidavits." N.C.G.S. § 1A-1, Rule 56(c) (1990) (emphasis added). In the present case, the hearing was scheduled for 5 July 1994. Plaintiff complied with the requirements in Rule 56(c) by placing the affidavit in the mail on 1 July 1994 and thus served the opposing affidavit "prior to the day of hearing." Service, as noted, was complete upon depositing the affidavit in the mail.

Finally, Rule 6(d) specifically provides, "When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits may unless the court permits them to be served at some other time be *served not later than one day before the hearing.*" N.C.G.S. § 1A-1, Rule 6(d) (1990) (emphasis added). Thus, from a timing standpoint, as service occurred upon mailing, plaintiff also complied with Rule 6(d), as 1 July 1994 is not later than "one day before the hearing," which occurred on 5 July 1994.

[4] In the opinion below, the Court of Appeals relied on Rule 6(e) for the computation of time allowed for serving an affidavit in opposition to a summary judgment motion with the court. Rule 6(e) provides:

> Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

N.C.G.S. § 1A-1, Rule 6(e). This rule is not applicable to the case at bar. "Rule 6(e) allows a party an additional three days 'to do some act or take some proceedings' when notice is served by mail." *Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 20, 422 S.E.2d 365, 367 (1992) (quoting N.C.G.S. § 1A-1, Rule 6(e)). In the present case, there is no act or proceeding for defendant to complete within a prescribed period of time upon service of plaintiff's affidavit. "Rule 6(e) was designed to 'alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right.' " *Williams v. Moore*, 95 N.C. App. 601, 604, 383 S.E.2d 416, 417 (1989) (quoting *Planters Nat'l Bank & Trust Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97 (1973)).

Further, *Battle v. Nash Technical College*, the case relied on by the trial court in excluding plaintiff's affidavit, is distinguishable from the case at bar. 103 N.C. App. 120, 404 S.E.2d 703. In *Battle*, the Court of Appeals affirmed the trial court's action in refusing to consider opposing affidavits "presented" on the day of the hearing. However, in that case, there was no suggestion that this material was served at an earlier time. In the present case, the affidavit was in fact served by mail on defendant prior to the day of the hearing. In *Battle*, because the affidavit had not been served prior to the hearing and thus did not meet the requirements of the Rules of Civil Procedure, it was properly excluded by the trial court.

[5] Finally, we note that the trial court is provided a great deal of discretion in continuing a hearing on a motion for summary judgment, and in this case, a continuance would have been an appropriate solution to the problem presented. The established practice is well summarized in the treatise on North Carolina Civil Procedure by G. Gray Wilson which, in discussing Rule 6(d), provides:

> On its face, the rule also permits opposing affidavits to be served by mail on the day prior to the hearing, even where the moving party may not receive the affidavits before the hearing. The court is not authorized to disregard such affidavits on that basis. In that event, the court should exercise its discretion to continue the hearing if requested.

G. Gray Wilson, *I North Carolina Civil Procedure*, § 6-5, at 112 (2d ed. 1995). Here, neither party requested that the hearing be continued. However, even without a request by a party, it is still within the trial court's discretion to continue the hearing in order to give defendant's counsel time to respond to plaintiff's counter affidavit. Refusing to consider an affidavit which is timely served and filed, even if defendant's attorney had not yet received it, is error.

For the foregoing reasons, we hold the trial court improperly granted defendant's motion for summary judgment. Therefore, we reverse and remand the case to the Court of Appeals for further remand to Superior Court, Guilford County, for reconsideration of defendant's motion for summary judgment after admitting plaintiff's affidavit.

REVERSED AND REMANDED.

Chief Justice MITCHELL dissenting.

I believe that N.C.G.S. § 1A-1, Rule 56(c) implicitly requires that the plaintiff's opposing affidavits be filed in this case prior to the day of the summary judgment hearing. *Nationwide Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). The plaintiff failed to comply with that requirement. Therefore, I dissent from the decision of the majority and would hold that the Court of Appeals did not err in affirming the trial court's order allowing defendant's motion for summary judgment.

STATE OF NORTH CAROLINA v. ELWIN ANEURIN JONES

No. 545A95

(Filed 8 November 1996)

Indigent Persons § 19 (NCI4th)— motion for appointment of psychiatric expert—improper denial

In this noncapital prosecution of defendant for the first-degree murder of his estranged wife, the hearing court erred in denying defendant's pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense where defendant's counsel demonstrated to the hearing court

that the only defense he intended to raise was that defendant suffered from diminished capacity at the time of the killing and thus may not have acted with premeditation and deliberation or the specific intent to kill; defendant's counsel presented medical notes of a Virginia doctor which indicated that defendant suffered from mental illness, particularly depression, and had suicidal inclinations, that for five months prior to the killing defendant was being treated with Prozac as well as with other drugs to counteract the side effects of Prozac, and that defendant had no prior history of violence; and defense counsel presented his own affidavit wherein he stated that defendant admitted to not being in control of his mental processes at the time of the killing and had advised counsel that he had no premeditated intent to kill. Defendant made the requisite threshold showing that his mental capacity when the offense was committed would be a significant factor at trial and that there was a reasonable likelihood that an expert would be of material assistance in the preparation of his defense.

Am Jur 2d, Constitutional Law § 848; Criminal Law §§ 46-51, 67, 68; Homicide §§ 114, 115, 133, 251.

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

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues. 17 ALR4th 575.

Notice to government of defense based upon defendant's mental condition at time of alleged crime, and court-ordered psychiatric examination thereon, under Rule 12.2, Federal Rules of Criminal Procedure. 63 ALR Fed. 552.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Seay, J., at the 7 August 1995 Criminal Session of Superior Court, Wilkes County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 October 1996.

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

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried noncapitally for the first-degree murder of his estranged wife, Lisa Jones. The jury found defendant guilty as charged. The trial court sentenced him to a mandatory term of life imprisonment.

The evidence presented at trial tended to show that in January 1994, defendant and his wife, Lisa Jones, lived in Richmond, Virginia. They were having marital difficulties, and defendant suffered from severe depression as a result. In February 1994 defendant went to see Dr. J. Daniel Foster for advice and treatment concerning his mental condition. Dr. Foster found defendant to be suffering from depression and hypertension and prescribed the medication Prozac. The Prozac made defendant nervous and unable to sleep, so Dr. Foster prescribed additional drugs to counteract its side effects.

Sometime in February, Lisa told defendant that she no longer loved him and wished to separate. In March the two had a heated argument in the course of which defendant threatened to kill himself, pulled out a gun, and fired a shot. On 1 June 1994 Lisa obtained a restraining order barring defendant from their apartment. Shortly thereafter, defendant left for Europe. When he returned, he learned that Lisa had moved to Wilkesboro, North Carolina, due to a job transfer. He further learned that she was accompanied by her daughter and by Ed Jordan, a man with whom she had forged a close personal relationship.

Defendant went to Wilkesboro in pursuit of Lisa. On 23 July 1994 defendant followed her from her hotel towards the K-Mart where she worked. He caught up with her in a parking lot near Wal-Mart and asked if they could work things out, to which Lisa replied that their relationship was over. Defendant then asked her if it was true that Ed Jordan had been staying at their apartment while defendant was out of town. Lisa responded that it was. She then drove away.

Defendant followed Lisa to the K-Mart. Once there, he parked and walked over to her car. He opened the door, grabbed Lisa by the neck, and fired multiple shots into the back of her head. Defendant immediately fled the scene. He was apprehended six months later in Calhoun, Georgia.

Defendant contends the hearing court committed reversible error in denying his pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense. We agree.

Defense counsel filed a written pretrial motion requesting the appointment of a psychiatric expert to evaluate defendant's mental condition. On 24 April 1995 Judge Julius Rousseau conducted an *ex parte* hearing on the motion. At the hearing defense counsel argued that he had a medical statement from Dr. Foster in Richmond establishing that defendant had been treated for depression and suicidal tendencies in the months preceding the murder. Counsel further noted that defendant had no history of violence or criminal activity of any sort prior to this incident. He concluded that without professional evaluation of defendant's mental state at the time of this crime, defendant could not be provided a proper and adequate defense.

In response Judge Rousseau stated that a particularized need for an expert had to be shown and that defendant's motion had fallen short of meeting that threshold. He left the motion open with instructions for defense counsel to file a supplementary supporting affidavit demonstrating a particularized need for a psychiatric expert.

The hearing resumed on 2 May 1995. At that time defense counsel presented his own affidavit, wherein he stated in part:

> I believe that a psychological evaluation of the Defendant is absolutely necessary for me to properly defend him. The Defendant is charged with first degree murder in this case and has absolutely no history of criminal or violent behavior. Prior to the alleged murder, the Defendant had been treated by Dr. J. Daniel Foster of Richmond, Virginia for depression and other medical problems. On or about the time of the alleged murder, the Defendant was taking Prozac as prescribed by Dr. Foster, as well as other medications. These medications may have had an effect on the Defendant's mentality or behavior at the time of said murder. The Defendant has advised Counsel that he had no intent or premeditation with respect to the alleged murder, and further, that the mental processes which controlled his behavior at that time were not within his own control. Based on the history of the Defendant given to Counsel, he has made a number of suicide attempts both before and after the alleged murder.
>
> . . . [E]valuation is crucial to my defending the Defendant in that his entire defense in this case may revolve around the question of whether there was premeditation and deliberation.

Attached to the affidavit were copies of three pages of medical notes from Dr. Foster, documenting his treatment of defendant for

mental illness from 11 February 1994 until 17 May 1994. According to the notes, defendant suffered from depression as a result of family stress and marital discord. He had frequent suicidal ideations and felt like he "[was] falling apart." He had difficulty sleeping and was described as "listless, agitated and hostile." Over the course of his treatment, defendant lost seventeen pounds. At each visit, Dr. Foster prescribed Prozac in an attempt to stabilize defendant's mental condition.

Judge Rousseau subsequently denied defendant's motion for the appointment of a psychiatric expert. He made no findings of fact or conclusions of law.

Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), and our cases decided pursuant to *Ake*, compel the conclusion that the hearing court erred in denying defendant's motion for a psychiatric expert to assist in the preparation of his defense. In *Ake*, the United States Supreme Court held:

> [W]hen a[n indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83, 84 L. Ed. 2d at 66. This Court, following *Ake*, has required, upon a threshold showing of a specific need for expert assistance, the provision of funds for an expert. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988).

To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his case. *State v. Phipps*, 331 N.C. 427, 446, 418 S.E.2d 178, 187 (1992). In determining whether a defendant has made the requisite threshold showing, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986).

In this case, counsel for defendant clearly demonstrated to the hearing court that the only defense he intended to raise or could raise

was that at the time of the killing, defendant suffered from diminished capacity and therefore may not have acted with premeditation and deliberation or the specific intent to kill. There was sufficient evidence before the court, in the form of Dr. Foster's dated medical notes, indicating that defendant suffered from mental illness, particularly depression, and that he had suicidal inclinations. Defendant was being treated with Prozac, a psychotropic drug, as well as other drugs to counteract the side effects of the Prozac. He had been taking this medication for more than five months prior to the killing, with only variable results. Defendant had no history of prior violence, and it was evident that his homicidal conduct in this instance was inconsistent with this prior history. Defense counsel presented his own affidavit wherein, under oath, he stated that defendant admitted to not being in control of his mental processes at the time of the murder and had advised counsel that he had no premeditated intent to kill.

We conclude that, under all the facts and circumstances known at the time the motion for psychiatric assistance was ruled upon, defendant had made the requisite threshold showing that his mental capacity when the offense was committed would be a significant factor at trial and that there was a reasonable likelihood that an expert would be of material assistance in the preparation of his defense. Defendant's mental state at the time of the murder was the only triable issue of fact in this case. He was entitled to present information on this issue to the jury in an intelligible manner so as to assist it in making an informed and sensible determination. He must therefore be given a new trial at which the court must, upon the threshold showing of need made here, appoint a psychiatric expert for the purpose of evaluating defendant and assisting him in preparing and presenting his defense.

In view of our disposition of this issue and the improbability that the other errors assigned will recur upon retrial, we find it unnecessary to address defendant's remaining arguments.

NEW TRIAL.

JOHN D. HOGAN AND WIFE, JANET S. HOGAN v. THE CITY OF WINSTON-SALEM

No. 96A96

(Filed 8 November 1996)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(1) (substantial constitutional question) and 7A-30(2) (dissenting opinion in the Court of Appeals) from the decision of a divided panel of the Court of Appeals, 121 N.C. App. 414, 466 S.E.2d 303 (1996), affirming an order entered on 3 January 1995 by Freeman, J., in Superior Court, Forsyth County. Heard in the Supreme Court 15 October 1996.

Randolph M. James, P.C., by Randolph M. James and Steven S. Long; and Howard C. Jones II for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Roddey M. Ligon, Jr., and Gusti W. Frankel, for defendant-appellant.

PER CURIAM.

AFFIRMED.

HEDRICK v. RAINS

[344 N.C. 729 (1996)]

LESLIE B. HEDRICK, AND BETSY B. MARLOWE, CO-EXECUTORS FOR THE ESTATES OF LESLIE L. BALDWIN AND GERTRUDE BALDWIN v. HAROLD RAINS, COLUMBUS COUNTY SHERIFF, AND COLUMBUS COUNTY

No. 105PA96

(Filed 8 November 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 121 N.C. App. 466, 466 S.E.2d 281 (1996), which reversed an order denying defendant Rains' motion for judgment on the pleadings entered 9 September 1994 in Superior Court, Columbus County, by Jenkins, J., and remanded for entry of a judgment in accordance with the opinion of the Court of Appeals. Heard in the Supreme Court 15 October 1996.

Randolph M. James P.C., by Randolph M. James and Steven S. Long, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter and Ursula M. Henninger, and Hill & High, by James E. Hill, Jr., for defendant-appellee Harold Rains, Columbus County Sheriff.

PER CURIAM.

The decision of the Court of Appeals is affirmed, but we note with disapproval the citation of the Restatement (Second) of Torts as authority. Except as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law.

AFFIRMED.

NINA GOOCH NIFONG PLAINTIFF v. C.C. MANGUM, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD PARTY DEFENDANT

No. 150A96

(Filed 8 November 1996)

On appeal as of right pursuant to N.C.G.S. § 7A-30(2) and on discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision by a divided panel of the Court of Appeals, 121 N.C. App. 767, 468 S.E.2d 463 (1996), affirming an order for summary judgment for defendant C.C. Mangum, Inc. entered 15 July 1994 in Superior Court, Durham County. Heard in the Supreme Court 17 October 1996.

Pulley, Watson, King & Lischer, P.A., by Michael J. O'Foghludha and Stella A. Boswell, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and William W. Pollock, for defendant-appellee C.C. Mangum, Inc.

Twiggs, Abrams, Strickland & Trehy, P.A., by Jerome P. Trehy, Jr., for The North Carolina Academy of Trial Lawyers, amicus curiae.

Johnston, Taylor, Allison & Hord, by John B. Taylor, for Carolinas Associated General Contractors, Inc., amicus curiae.

PER CURIAM.

AFFIRMED.

CAROLYN OWEN, PETITIONER v. UNC-G PHYSICAL PLANT, RESPONDENT

No. 162PA96

(Filed 8 November 1996)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 121 N.C. App. 682, 468 S.E.2d 813 (1996), affirming the judgment of the trial court entered by Morgan (Melzer A., Jr.), J., on 23 January 1995, out of session and out of district by consent of the parties after hearing at the 19 September 1994 Civil Session of Superior Court, Guilford County, and remanding this case to the trial court for further remand to the State Personnel Commission for proceedings consistent with the opinion. Heard in the Supreme Court 14 October 1996.

Judith G. Behar, for petitioner-appellee.

Michael F. Easley, Attorney General, by Anne J. Brown, Assistant Attorney General, for respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CHRIST LUTHERAN CHURCH, BY AND THROUGH ITS TRUSTEES, DALE MATTHEWS, O.W. JARRETT, AND GARY CARPENTER v. STATE FARM FIRE AND CASUALTY COMPANY

No. 297A96

(Filed 8 November 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, 122 N.C. App. 614, 471 S.E.2d 124 (1996), affirming an order entered by Bogle, J., on 31 May 1995, in Superior Court, Catawba County. Heard in the Supreme Court 16 October 1996.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr., and Peter R. Gruning, for plaintiff-appellant.

Patrick, Harper & Dixon, by Stephen M. Thomas and Kimberly A. Huffman, for defendant-appellee.

PER CURIAM.

AFFIRMED.

BOGER v. GATTON

No. 415P96

Case below: 123 N.C. App. 635

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

CARTER v. NORTHERN TELECOM

No. 380P96

Case below: 123 N.C. App. 547

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

CASEY v. BLYTHE CONSTRUCTION, INC.

No. 433P96

Case below: 124 N.C. App. 787

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

CREASMAN v. N.C. BD. OF PHARMACY

No. 344P96

Case below: 123 N.C. App. 159

Petition by respondent (N.C. Board of Pharmacy) for discretionary review pursuant to G.S. 7A-31 denied 7 November 1996.

CROUSE v. FLOWERS BAKING CO.

No. 432P96

Case below: 123 N.C. App. 555

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 November 1996. The decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for a hearing on the merits. If the Form 21 is relevant to the issues raised in the appeal, the Court of Appeals is directed to order the Form 21 made a part of the Records on Appeal pursuant to Rule 9(b)(5) of the Rules of Appellate Procedure.

HYDE v. ABBOT LABORATORIES, INC.

No. 424P96

Case below: 123 N.C. App. 572

Petition by defendant (Bristol-Myers Squibb Co. and Mead Johnson & Co.) for discretionary review pursuant to G.S. 7A-31 denied 7 November 1996.

IN RE ESTATES OF BARROW

No. 351P96

Case below: 122 N.C. App. 717

Petition by respondent for discretionary review pursuant to G.S. 7A-31 dismissed as moot 30 October 1996.

NOONKESTER v. DOE

No. 413P96

Case below: 123 N.C. App. 784

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

PATTERSON v. MARKHAM & ASSOCIATES

No. 359P96

Case below: 123 N.C. App. 448

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

POWELL v. DOE

No. 393P96

Case below: 123 N.C. App. 392

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

RADZISZ v. HARLEY DAVIDSON OF METROLINA

No. 411PA96

Case below: 123 N.C. App. 602

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

RICHLAND RUN HOMEOWNERS ASSN. v. CHC DURHAM CORP.

No. 391A96

Case below: 123 N.C. App. 345

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 7 November 1996.

SCHWAB v. KILLENS

No. 436P96

Case below: 124 N.C. App. 788

Motion by petitioner (Schwab) for temporary stay denied 22 October 1996.

STATE v. AMON

No. 425P96

Case below: 123 N.C. App. 785

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

STATE v. ARMIJO

No. 287P96

Case below: 122 N.C. App. 576

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

STATE v. ARMSTRONG

No. 418P96

Case below: 123 N.C. App. 785

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

STATE v. BYNUM

No. 404P96

Case below: 122 N.C. App. 399

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 November 1996.

STATE v. FERNANDEZ

No. 414P96

Case below: 123 N.C. App. 785

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

STATE v. FLEMING

No. 428P96

Case below: 122 N.C. App. 754

Petition by defendant (Lenoris Fleming) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 November 1996.

STATE v. FOWLER

No. 423P96

Case below: 123 N.C. App. 786

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

STATE v. GREEN

No. 38A87-2

Case below: Superior Court Wake County

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County denied 7 November 1996. Motion by defendant for order to continue resentencing until after petition for writ of certiorari is decided dismissed as moot 7 November 1996.

STATE v. JOHNSTON

No. 396P96

Case below: 123 N.C. App. 292

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

STATE v. MCNEILL

No. 184A96

Case below: Superior Court Wake County

Petition by defendant for writ of certiorari to review the order of the Superior Court, Wake County allowed 29 October 1996. Motion by defendant to bypass N.C.Court of Appeals allowed 29 October 1996.

STATE v. PRUDHOMME

No. 419P96

Case below: 123 N.C. App. 786

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

STATE v. RICH

No. 384A95

Case below: Superior Court Greene County

Motion by the defendant (Rich) to withdraw appeal and schedule execution date denied 29 October 1996.

STATE v. TALFORD

No. 403P96

Case below: 123 N.C. App. 360

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 November 1996.

STATE v. WILLIAMS

No. 175A85-2

Case below: Superior Court Gaston County

Petition by defendant for writ of certiorari to review the order of the Superior Court, Gaston County denied 7 November 1996.

TELLEKAMP v. GUILFORD COUNTY

No. 387PA96

Case below: 123 N.C. App. 360

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 November 1996. Petition by defendant for writ of certiorari to review the order of the North Carolina Court of Appeals allowed 7 November 1996.

TERRY v. ARATEX SERVICES

No. 421P96

Case below: 124 N.C. App. 789

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

TIMMONS v. N.C. DEPT. OF TRANSPORTATION

No. 377PA96

Case below: 123 N.C. App. 456

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 November 1996.

WILLIAM C. VICK CONSTRUCTION CO. v.
N.C. FARM BUREAU FEDERATION

No. 372P96

Case below: 123 N.C. App. 97

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

APPENDIXES

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTION

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. §7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new subsection (b) to Rule 5 and amendments to subsection (a) of Rule 5, to read as follows:

Rule 5. Form of Pleadings

(a) If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

All papers presented to the court for filing shall be letter size (8 1/2" x 11"), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(b) All papers filed in civil actions, special proceedings and estates shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. The Clerk of Superior Court shall require a party to refile any paper which does not include the required cover sheet. This subsection of this rule shall become effective on October 1, 1996. Prior to that date filings with and without cover sheets will be accepted.

Adopted by the Court in Conference this 5th day of September, 1996. The amendment shall be effective 1 October 1996, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

ORR, J.
For the Court

ORDER ADOPTING RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(b) provides for this Court to implement section 7A-38.2 by adopting rules and regulations governing the operation of the Commission,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(b), Rules of the North Carolina Supreme Court for the Dispute Resolution Commission are hereby adopted to read as in the following pages. These Rules shall be effective on the 1st day of November, 1996.

Adopted by the Court in conference the 10th day of October, 1996. The Appellate Division Reporter shall publish the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission in their entirety, as amended through this action, at the earliest practicable date.

Orr, J
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

I. OFFICERS OF THE COMMISSION.

A. **Officers**. The Commission shall establish the offices of Chair, Vice-Chair, and Secretary/Treasurer.

B. **Appointment; Elections**.

1. The Chair shall be appointed for a two year term and shall serve at the pleasure of the Chief Justice of the North Carolina Supreme Court.

2. The Vice-Chair and Secretary/Treasurer shall be elected by vote of the full Commission and shall serve two year terms.

C. **Committees**.

1. The Chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

2. The Chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. **Office**. The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to establish and maintain an office for the conduct of Commission business.

B. **Staff.** The Chair, in consultation with the Director of the Administrative Office of the Courts, is authorized to appoint an Executive Secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the Executive Secretary the authority to employ necessary secretarial and staff assistants, with the approval of the Director of the Administrative Office of the Courts.

III. COMMISSION MEMBERSHIP.

A. **Vacancies**. Upon the death, resignation or permanent incapacitation of a member of the Commission, the Chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. **Disqualifications**. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. **Conflicts of Interest and Recusals**. All members and ex-officio members of the Commission must:

1. Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote.

2. Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

3. Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. **Compensation**. Pursuant to N. C. Gen. Stat. §138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. **Meeting Schedule**. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the Chair or other officer acting for the Chair.

B. **Quorum**. For purposes of voting to discipline or decertify a mediator or mediation trainer or training program, at least seven members of the Commission must be present to constitute a quorum. Five members shall constitute a quorum for the transaction of all other business. Decisions shall be made by a majority of members present and voting, except that decisions to discipline or decertify shall require a vote of six members.

C. **Public Meetings**. All meetings of the Commission and minutes of such meetings shall be open and available to the public except that meetings or portions of meetings involving potentially adverse

actions against mediators or mediation training programs may be treated as confidential.

D. **Matters Requiring Immediate Action**. If, in the opinion of the Chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile, or other practicable method; provided, all formal Commission decisions taken are reported to the Executive Secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the Director of the Administrative Office of the Courts, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this State and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in the *Rules Implementing Mediated Settlement Conferences (Rules)* and as against such other requirements of the North Carolina Supreme Court Dispute Resolution Committee or the Commission which amplify and clarify those *Rules*. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses,

and telephone numbers and make those lists available upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile and keep current a list of certified mediators, which specifies the judicial districts in which each mediator wishes to practice. Periodically disseminate copies of that list to each judicial district with a mediated settlement conferences program, and make the list available upon request to any attorney, organization, or member of the public seeking it.

F. Prepare and keep current biographical information on certified mediators who wish to appear in the Mediator Information Directory contemplated in the *Rules*. Periodically disseminate updated biographical information to Senior Resident Superior Court Judges in districts in which mediators wish to serve, and

G. Make reasonable efforts on a continuing basis to ensure that the judiciary, clerks of court, court administration personnel; attorneys; and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct adopted by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Commission's Standards. A certified mediator shall inform the Commission of any complaint filed against or disciplinary action imposed upon the mediator by any other professional organization. Failure to do so is a violation of these Rules. Violations of the Commission's Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the

Commission. The Commission may, through a standing committee, render advisory opinions on questions of ethics submitted by certified mediators.

VIII. COMPLAINT AND HEARING PROCEDURES

A. **Initiation of Complaints.**

1. By the Commission. Any member of the Commission or its Executive Secretary may bring to the attention of the full Commission any matter concerning the character, conduct or fitness to practice as a mediator or any matter concerning a certified mediation training program. The Commission may authorize the Executive Secretary to conduct an inquiry, including gathering information and interviewing persons. The Executive Secretary shall seek to resolve the matter in a manner acceptable to all parties. After reviewing the report of the Executive Secretary, the Commission may authorize a complaint against a mediator, trainer or training program. The Chair of the Commission shall appoint a panel to conduct a hearing if a complaint is filed. Such hearing shall be conducted in accordance with procedures set forth in subsection D.

2. By a Citizen. Any person, including mediation participants, attorneys for participants, and interested third parties such as insurance company representatives, may file with the Commission a complaint involving the character, conduct or the fitness to practice of a mediator. Any person, including a training program participant, may file a complaint with the Commission against a certified mediation training program or against any individual responsible for conducting, administering or promoting such a training program.

B. **Form**

All complaints shall be reduced to writing on a form approved by the Commission.

C. **Preliminary Inquiry; Resolution; Action.**

1. The Executive Secretary of the Commission shall seek to resolve the issues raised by complaints authorized by subsection A.(2), through contacts with the complaining party, the mediator, trainer, representative of the training program or others. The Executive Secretary may consult with the Chair or any member of the Commission for guidance or assistance in the informal resolution of complaints. In the event the Executive Secretary is unable to resolve

a complaint in a manner acceptable to all parties, the Executive Secretary shall forward a copy of the complaint and the written results of any investigation to the Chair for further consideration.

2. The Chair or a member of the Commission appointed by the Chair shall determine whether a formal hearing is warranted or what other means or procedures should be followed to resolve the issues raised by the complaint.

D. **Hearings.**

1. Hearing Panel. If a hearing is to be held, the Chair of the Commission shall appoint a panel of three Commissioners to conduct the hearing. The three Commissioners appointed shall make such disclosures as required by Section III.C. The panel shall elect one of its members to serve as chair of the panel.

2. Notice. The Executive Secretary shall serve a copy of the written complaint on all parties along with notice of a date, time, location of the hearing and the names of panel members appointed to conduct the hearing. The hearing shall be held within sixty (60) days after the date notice is served.

3. Challenges. Any challenge to the membership of the panel shall be addressed to the Chair who shall take appropriate action.

4. Response. Within twenty (20) days after service of the complaint and notice of hearing, the person(s) or organization(s) that are the subject(s) of the complaint (designated as "respondents"), may file a written response, by hand-delivery or registered or certified mail, with the Executive Secretary at the office established by the Commission. The Chair of the Commission and the Chair of the panel may grant an extension of time for response for an additional ten (10) days if good cause therefor is shown in a written application filed within the twenty (20) days allowed for response. Failure to file a timely response may be considered by the hearing panel.

E. **Hearing Procedures.**

1. By appointment with the Executive Secretary, parties may examine all relevant documents and evidence in the Commission office prior to the hearing. With the approval of the Executive Secretary, copies of relevant documents and evidence may be mailed to a requesting party or parties.

2. The specific procedure to be followed in a hearing shall be determined by the panel with the primary objective being a just, fair

and prompt resolution of all issues raised in a complaint. The Rules of Evidence shall be relied on as a guide to that end but need not be considered binding. The panel shall be the judge of the relevance, and materiality and weight of the evidence offered.

3. Neither the complainant nor any party shall have any ex parte communications with the members of the panel, except with respect to scheduling matters.

4. The panel may, in special circumstances and for good cause (especially when there is no objection), permit an attorney to represent a party by telephone or receive evidence by telephone with such limitations and conditions as it may find just and reasonable.

5. No official transcript of the proceedings need be made. The panel may permit any party to record a hearing in any manner that does not interfere with the proceeding.

6. If the complainant fails to appear at a hearing or provide evidence in support of the complaint, it may be dismissed for want of prosecution and reinstated only on a showing of good cause for the default.

7. If a person or organization, the subject of a complaint, fails to appear at a scheduled hearing or to participate in good faith or to otherwise respond, the panel may proceed to a decision on the evidence before it.

F. **Panel Decision.**

1. A panel may dismiss a complaint at any point in the proceedings and file a written report stating the reason for the dismissal.

2. If after a hearing, a majority of the panel finds there is substantial and competent evidence to support the imposition of sanctions against a mediator or any person or organization, the panel may recommend to the full Commission imposition of one or more appropriate sanctions, including the following:

a. written admonishment;

b. additional training to be completed;

c. restriction on types of cases to be mediated in the future;

d. suspension for a specified term;

e. decertification; or

f. imposition of costs of the proceeding.

3. If there is a finding that the complaint was frivolous or made with the intent to vex or harass the person or training program complained about, the Commission may assess costs of the proceeding against a complaining party.

4. The Chair of the panel shall promptly forward a written report of the panel's decision and recommendation, if any, to the Executive Secretary who shall, in turn, mail copies to the Chair and to the parties by registered or certified mail.

IX. COMMISSION DECISION.

A. Final action on any panel recommendation for discipline or adverse personnel action is reserved for Commission decision.

B. If a decision is made or an agreement reached limiting a mediator's service to specified types of cases or to suspend or decertify a mediator, trainer or training program, the Executive Secretary shall notify appropriate judicial districts in writing of the sanction. If a training program's certification is suspended or revoked, the Executive Secretary shall remove that program from the list of certified training programs.

C. All decisions of the Commission are public records.

X. INTERNAL OPERATING PROCEDURES.

A. The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

STANDARDS OF PROFESSIONAL CONDUCT

Adopted by the North Carolina Dispute Resolution Commission

May 10, 1996

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators who participate in mediated settlement conferences pursuant to NCGS 7A-38.1 in the State of North Carolina or who are certified to do so.

Mediation is a private and consensual process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the

mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality, or

(2) the mediator determines that he cannot serve impartially.

III. Confidentiality: A mediator shall, subject to statutory obligations to the contrary, maintain the confidentiality of all information obtained within the mediation process.

A. Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

B. Even where there is a statutory duty to report information if certain conditions exist, a mediator is obligated to resolve doubts regarding the duty to report in favor of maintaining confidentiality.

C. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in

confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, provided identifying information is removed.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the

process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the acceptability, sufficiency and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV.E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal of other professional advice whether in response to statements or questions by the parties or otherwise.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process: A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V.D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

WHEREAS, section 7A-38.1 of the North Carolina General Statutes established a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 15th day of July, 1996.

Adopted by the Court in conference the 12th day of June, 1996. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

Orr, J.

For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

RULE 1. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

A. BY ORDER IN EACH ACTION

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Timing of the Order.** The Senior Resident Superior Court Judge shall issue the order as soon as practicable after the time for the filing of answers has expired. Rules 1.A.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) **Content of Order.** The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(4) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court

Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) **Motion to Dispense With Mediated Settlement Conference.** A party may move the Senior Resident Superior Court Judge, within 10 days after the Court's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) **Motion to Authorize the Use of Other Settlement Procedures.** A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

(7) **Exemption from Mediated Settlement Conference.** The Senior Resident Superior Court Judge may be required by the Administrative Office of the Courts to exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

B. BY LOCAL RULE (Reserved for future adoption.)

C. MOTION TO AUTHORIZE OTHER SETTLEMENT PROCEDURES.

(Reserved for future adoption.)

RULE 2. SELECTION OF MEDIATOR

A. Selection of Certified Mediator by Agreement of Parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order. Such notice shall state the name, address and telephone number

of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts.

B. Nomination and Court Approval of a Non-Certified Mediator. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on a form prepared and distributed by the Administrative Offices of the Courts.

C. Appointment of Mediator by the Court. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so,

the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

E. Disqualification of Mediator. Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. Where Conference Is To Be Held. Unless all parties and the mediator otherwise agree, the mediated settlement con-

ference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. When Conference Is To Be Held. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.A.(1) shall state a date of completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. Request to Extend Date of Completion. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by entering a written order setting a new date for the completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

E. The Mediated Settlement Conference Is Not To Delay Other Proceedings. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS

A. Attendance.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. Notifying Lien Holders. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. Finalizing Agreement. If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a Resident or Presiding Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and

the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. Authority of Mediator.

(1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the Conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(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 timely to determine that an impasse exists and that the conference should end.

(4) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent without permission from the mediated settlement conference. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

A. By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. By Court Order. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $100 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $100.

C. Indigent Cases. No party found to be indigent by the court for purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of 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 case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, or

(ii) a member in good standing of the Bar of another state; and completes a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Dispute Resolution Commission; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and

(b) has at least five years of experience as a judge, practicing attorney, law professor, mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B. (1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission;

(b) after completing the 20 hour training required by Rule 8.B.(2)(a), five years of experience as a mediator, having mediated: (i) at least 12 cases in each year, and (ii) for at least 20 hours in each year, or equivalent experience;

(c) a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Dispute Resolution Commission;

(d) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's mediation experience;

(e) a four year degree from an accredited college or university.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator:

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts; and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.1.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

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APPEAL AND ERROR

§ 150 (NCI4th). Preserving constitutional issues for appeal

An issue as to whether defendant's double jeopardy rights were violated when judgment was entered against him for both first-degree murder and felony child abuse was not preserved for appellate review. **State v. Elliott,** 242.

§ 155 (NCI4th). Preserving question for appeal; effect of failure to make motion; objection, or request; criminal actions

Defendant waived appellate review of an officer's rebuttal testimony by failing to object at trial and to argue specifically that the admission of this testimony constituted plain error. **State v. Workman,** 482.

§ 341 (NCI4th). Failure to properly assign error

Defendant did not assign error to the prosecutor's closing arguments involving the value of mitigating circumstances in a capital sentencing proceeding and they are beyond the scope of review. **State v. Elliott,** 242.

A defendant's argument concerning inconsistency in a jury verdict in a noncapital first-degree murder prosecution was not before the Supreme Court where defendant did not make any assignment of error relating to his contention that the jury's verdict was inconsistent. **State v. Bruton,** 381.

§ 421 (NCI4th). Form and content of appellant's brief

An assignment of error for which defendant did not make any argument or cite any authority was deemed abandoned. **State v. Elliott,** 242.

§ 447 (NCI4th). Issues first raised on appeal

Defendant could not argue on appeal from a noncapital first-degree murder prosecution that statements from another man who confessed to a girlfriend and later committed suicide were admissible as statements against penal interest where defendant had argued at trial the state of mind and dying declaration hearsay exceptions. **State v. Sharpe,** 190.

§ 504 (NCI4th). Error as harmless or prejudicial; invited error

Where defendant agreed that he offered an accomplice's out-of-court statements to a witness for purposes of corroboration, the trial court's limitation of the jury's consideration of the testimony to corroboration was invited error from which defendant cannot gain relief. **State v. Roseboro,** 364.

Where defendant stated he had no objection to the court's substitution of the word "especially" for "unusually" in a proposed instruction on depravity of mind in a capital sentencing proceeding which referred to "a circumstance which makes a murder unusually heinous, atrocious, or cruel," any error resulting from the court's modification of the proposed instruction was invited error. **State v. Wilkinson,** 198.

ARREST AND BAIL

§ 93 (NCI4th). Method of making arrest; entry on private premises generally

Officers had reasonable cause to believe that defendant was inside his trailer at the time they arrived to execute arrest warrants, even though defendant's car was not at the trailer, so that the officers did not make an unlawful entry into the trailer which would require the suppression of a T-shirt and boots observed in plain view and later seized pursuant to a search warrant. **State v. Workman,** 482.

ARREST AND BAIL—Continued

§ 101 (NCI4th). Resisting arrest; defense for use of deadly weapon or force

The trial court did not err by failing to charge the jury that defendant's arrest was illegal as a matter of law and that he had a right to protect himself by any means, including shooting the arresting officer. **State v. Cunningham,** 341.

ATTORNEYS AT LAW

§ 12 (NCI4th). Admission to practice of law; proof of moral character and fitness

A bar applicant whose application to the North Carolina Bar by comity was denied on character and fitness grounds was given adequate notice of the questions he was to be asked at his hearing before the Board of Law Examiners. **In re Golia-Paladin,** 142.

There was no error in the denial of an application to the North Carolina Bar by comity on character grounds where the applicant contended that the Board's determination in an earlier application that he had failed to demonstrate the required character and fitness was upheld by the North Carolina Supreme Court. **Ibid.**

The Board of Law Examiners did not err in rejecting a comity application on character grounds by determining that the applicant willfully failed to provide the Board material documents concerning a class action lawsuit applicant brought against the New York State Grievance Committee and its members. **Ibid.**

The Board of Law Examiners did not err in denying a comity application on character grounds by concluding that the applicant's denial of a charge in a New York zoning action displayed a lack of fairness and candor and had a tendency to deceive. **Ibid.**

The State Bar did not err by denying a comity application on character grounds where the applicant contends that he was permitted to assert a temporary position as a defendant in a zoning case in order to improve his chances where the position asserted was not illegal. **Ibid.**

§ 13 (NCI4th). Admission to practice of law; failure to disclose

The Board of Law Examiners did not err in denying a comity application on character grounds by finding that the applicant failed to fully disclose material matters and made numerous untruthful statements about the number of times he had sat for various bar examinations and that these statements had the effect of misleading and deceiving the Board. **In re Golia-Paladin,** 142.

BURGLARY AND UNLAWFUL BREAKINGS

§ 10 (NCI4th). Particular elements of burglary; occupancy

Where the premises are in the sole possession of the wife, the husband can be guilty of burglary if he makes a nonconsensual entry into her premises with the intent to commit a felony therein. **State v. Singletary,** 95.

§ 57 (NCI4th). Sufficiency of evidence; first-degree burglary

The State's evidence was sufficient to establish the element of first-degree burglary that defendant wrongfully entered the dwelling house "of another" where it tended to show that defendant broke into and entered an apartment in the exclusive possession of his estranged wife. **State v. Singletary,** 95.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 70 (NCI4th). Sufficiency of evidence; constructive breaking

There was sufficient evidence of a constructive breaking to support defendant's conviction of first-degree burglary where defendant gained entry into a minister's home at 4:00 a.m. by telling the minister he needed to talk with him. **State v. Ball,** 290.

§ 78 (NCI4th). Sufficiency of evidence; intent to commit larceny

There was sufficient evidence of an intent to commit larceny at the time of the breaking to support defendant's conviction of first-degree burglary. **State v. Ball,** 290.

§ 149 (NCI4th). Failure to instruct on defendant being on own premises or having right to enter dwelling house

The trial court did not err by failing specifically to instruct the jury that defendant could not be found guilty of burglary if the dwelling was his own home where the evidence did not support defendant's contention that the victim's apartment was his home at the time of the breaking or entering. **State v. Singletary,** 95.

§ 150 (NCI4th). Jury instructions; occupancy or ownership of house

Where the evidence in a first-degree burglary prosecution showed that defendant was unaware of his codefendant's initial breaking or entering of the victim's apartment, and defendant disputed only whether the victim was alive at the time he subsequently broke and entered the apartment with the codefendant to take the victim's television set, the trial court's instruction which required the jury to find that defendant participated in the initial breaking and entering in order to find that the apartment was occupied was favorable to defendant and not plain error. **State v. Roseboro,** 364.

§ 151 (NCI4th). Jury instructions; elements of burglary; felonious intent

The trial court did not commit plain error by failing to instruct on the legal definition of first-degree sexual offense in a capital sentencing proceeding when it gave an instruction for the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a first-degree burglary for which the felonious intent was the intent to commit a first-degree sexual offense. **State v. Wilkinson,** 198.

§ 165 (NCI4th). Jury instructions; misdemeanor breaking or entering as lesser included offense of first-degree burglary; instruction not required

The State's evidence in a first-degree burglary prosecution relevant to the time before defendant broke and entered his estranged wife's apartment supports the inference that defendant intended to commit a felonious assault at the time of the breaking or entering, and defendant's after-the-fact assertion that his intention to commit a felony was formed after he broke and entered the apartment did not negate the felonious intent shown by his actions so as to require the trial court to instruct on the lesser offense of misdemeanor breaking or entering. **State v. Singletary,** 95.

CONSTITUTIONAL LAW

§ 216.1 (NCI4th). Former jeopardy; other particular combinations of charges

Assuming the issue had been preserved for appeal, double jeopardy did not preclude punishing defendant for felony child abuse and first-degree murder arising from the same conduct **State v. Elliott,** 242.

CONSTITUTIONAL LAW—Continued

§ 252 (NCI4th). Discovery; information or materials sought; miscellaneous

The trial court did not err in a capital resentencing proceeding by denying defendant a new sentencing hearing based on the State's psychiatrist informing counsel that his examinations did not reveal the existence of any mitigating circumstances and then testifying at the sentencing hearing that defendant's mental condition supported the existence of two mitigating circumstances. **State v. Heatwole,** 1.

The trial court did not abuse its discretion in a capital resentencing proceeding by not ordering a new sentencing hearing based on the State's failure to provide defense counsel with statements defendant made to his sister. **Ibid.**

A defendant charged with the murder of a police officer was not prejudiced by the denial of his motion for an in camera inspection of the deceased officer's personnel file and delivery to him of materials pertaining to any actions against the officer involving assaults or the use of excessive force. **State v. Cunningham,** 341.

§ 276 (NCI4th). Effectiveness of waiver of right to counsel generally

A first-degree murder defendant's Fifth Amendment right to counsel was not invoked when his attorney demanded that he be present during any interrogation of defendant and no finding of fact on this issue was necessary. **State v. Peterson,** 172.

§ 277 (NCI4th). Waiver of right to counsel; particular circumstances

Defendant waived his right to counsel when he refused to allow the public defender or anyone whose name was furnished by the public defender to represent him and stated that he would represent himself unless a specific member of the Michigan bar was appointed to represent him. **State v. Cunningham,** 341.

§ 293 (NCI4th). What constitutes denial of effective assistance of counsel; counsel representing both codefendants

The rights of one codefendant to effective assistance of counsel and due process of law were not violated because both defendants were represented by the same attorney at a noncapital first-degree murder trial. **State v. Bruton,** 381.

§ 313 (NCI4th). What constitutes denial of effective assistance of counsel; miscellaneous

The trial court did not err by directing defense counsel to proceed in a capital sentencing proceeding with mitigating evidence they had developed after defense counsel informed the court that they had been instructed by defendant not to put on certain expert witnesses. **State v. Wilkinson,** 198.

§ 343 (NCI4th). Presence of defendant at proceedings; pretrial proceedings

Defendant was not deprived of his constitutional right to be present at every stage of his capital trial when prospective jurors were preliminarily sworn, oriented and qualified generally for jury service by a deputy clerk of court outside defendant's presence. **State v. Workman,** 482.

§ 344 (NCI4th). Presence of defendant at proceedings; voir dire

A trial court's private, unrecorded conversation with a prospective juror outside defendant's presence in a capital first-degree murder prosecution was harmless beyond a reasonable doubt where defendant failed to object to the trial court's reconstruction of the communication and the prospective juror was properly excused for medical reasons. **State v. Hartman,** 445.

CONSTITUTIONAL LAW—Continued

§ 344.1 (NCI4th). Presence of defendant at proceedings; conduct of trial

The violation of defendant's constitutional right to be present at every stage of his capital trial when he was removed from the courtroom for disruptive behavior was harmless beyond a reasonable doubt. **State v. Cunningham,** 341.

The trial court did not err in a capital first-degree murder prosecution by conducting unrecorded bench conferences out of defendant's presence or in the absence of defense counsel where the record does not affirmatively show that defense counsel did not attend the conferences and reflects that defense counsel actually requested many of the conferences. **State v. Harden,** 542.

§ 346 (NCI4th). Right to call witnesses and present evidence generally

The trial court did not deny defendant the right to present evidence in a first-degree murder trial in ruling that defendant had rested his case when defendant refused to continue presenting evidence after defendant told the court he was too sick and tired to continue but a doctor could find nothing wrong with defendant. **State v. Cunningham,** 341.

§ 350 (NCI4th). *Right of confrontation;* waiver generally

The trial court did not deny defendant his right to confront witnesses by excusing him from the courtroom where defendant waived his right by refusing to call witnesses and by disrupting the court proceedings with unfounded complaints of illness. **State v. Cunningham,** 341.

§ 353 (NCI4th). Self-incrimination; determination of applicability of privilege

There was no error in a capital murder prosecution in the trial court's denial of defendant's request to examine a defense witness on voir dire to ascertain whether he would invoke the privilege against self-incrimination. **State v. Wooten,** 316.

§ 371 (NCI4th). Death penalty; first-degree murder

Although defendant argued that the constitutionality of North Carolina's death penalty should be reconsidered in light of Justice Blackman's dissenting opinion in *Callins v. Collins,* 510 U.S. 1141, the North Carolina Supreme Court declined to change its position. **State v. Norman,** 511.

A sentence of death for a defendant with an IQ of 69 was not unconstitutional. **Ibid.**

§ 372 (NCI4th). Death penalty; *effect of prosecutorial discretion*

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to declare the death penalty unconstitutional as applied in that judicial district based upon the State permitting another defendant to plead guilty to first-degree murder and receive a life sentence. **State v. Heatwole,** 1.

CRIMINAL LAW

§ 76 (NCI4th). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for a change of venue based on pretrial publicity. **State v. Burrus,** 79.

CRIMINAL LAW—Continued

§ 78 (NCI4th). Change of venue; circumstances insufficient to warrant change

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion for a change of venue for pretrial publicity. **State v. Harden,** 542.

§ 101 (NCI4th). Discovery proceedings; defendant's statement

The trial court did not abuse its discretion in a capital resentencing hearing by not ordering a new sentencing proceeding based on the State's failure to provide defense counsel with statements defendant made to his sister. **State v. Heatwole,** 1.

Where a witness told police she overheard a conversation between defendants in which defendant Shoffner said he and defendant Workman were "going up the road to get some money" and that "I guess we'll just have to rob somebody," the State complied with its statutory discovery obligation to divulge the "substance" of defendant's oral statements when it presented a document to defendant Shoffner which included a statement by him that "We will have to rob someone," and due process did not require the State to disclose any more information about defendant's statements. **State v. Workman,** 482.

§ 106 (NCI4th). Discovery proceedings; statements of State's witnesses

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's pretrial motion to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce. **State v. Ocasio,** 568.

§ 107 (NCI4th). Discovery proceedings; reports not subject to disclosure

The trial court did not err during a capital resentencing proceeding by denying defendant's request to view notes the prosecutor took during an interview with the witness who was defendant's stepbrother and the son of a victim. **State v. Heatwole,** 1.

§ 108 (NCI4th). Discovery proceedings; documents and intangible objects

The trial court did not abuse its discretion in a first-degree murder prosecution by sealing the district attorney's file in another case and not allowing defendant access to its contents. **State v. Heatwole,** 1.

§ 112 (NCI4th). Regulation of discovery; time, place, and manner of discovery and inspection

The prosecution in a noncapital first-degree murder prosecution did not fail to comply with *Brady v. Maryland* by giving defendants an officer's notes during trial instead of before trial. **State v. Taylor,** 31.

§ 113 (NCI4th). Regulation of discovery; failure to comply

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a prosecution for first-degree murder and other crimes where defendant's girlfriend testified concerning a statement made to her by defendant and defendant argued that the State had failed to disclose the substance of the statements. **State v. Braxton,** 702.

§ 137 (NCI4th). Plea of guilty; waiver of counsel

The trial court did not err in a capital resentencing proceeding by denying defendant's motion to set aside his guilty pleas because there was no written waiver of counsel signed by defendant. **State v. Heatwole,** 1.

CRIMINAL LAW—Continued

§ 196.1 (NCI4th). Right to counsel at trial; voluntary waiver

The trial court did not err in a capital resentencing proceeding by denying defendant's motion to set aside his guilty plea because there was no written waiver of counsel signed by defendant. **State v. Heatwole,** 1.

§ 252 (NCI4th). Continuance; illness or incapacitation of accused

The trial court did not err by failing to grant several continuances and a recess requested by defendant during trial on the ground that he was tired and too ill to continue where defendant was examined by medical personnel and no medical basis was found for his complaints. **State v. Cunningham,** 341.

§ 263 (NCI4th). Continuance; time for review of transcripts of hearings or trials

The trial court did not err in the denial of defendant's motion for a continuance of his first-degree murder retrial to read a transcript of his first trial which was delivered to him three days before the retrial. **State v. Cunningham,** 341.

§ 339 (NCI4th). Severance of multiple defendants; defendants' defenses not antagonistic

The defenses of defendant and his codefendant were not antagonistic in this prosecution for two first-degree murders, and the trial court did not abuse its discretion by denying defendant's motion for severance. **State v. Workman,** 482.

§ 352 (NCI4th). Appearance of defendant in shackles or handcuffs generally

The trial court did not err by not conducting an inquiry and not declaring a mistrial ex mero motu where a panel of prospective jurors was allowed to see defendant in leg irons. **State v. Thomas,** 639.

§ 370 (NCI4th). Expression of opinion on evidence during trial; questioning relevancy of evidence

There was no prejudicial error in a capital murder prosecution where defendant's mother testified that she had attempted suicide by slitting her wrists thirty times, defense counsel requested permission for defendant's mother to show the jury her wrists, and the trial court said, "I guess so. I don't see how that's relevant, but step down and show them your wrists." **State v. Hartman,** 445.

§ 375 (NCI4th). Expression of opinion on evidence during trial; miscellaneous comments and actions

There was no error during a noncapital first-degree murder prosecution where defendants contended that the court continually expressed opinions on the evidence and disparaged defendants' attorneys. **State v. Taylor,** 31.

§ 395 (NCI4th). Expression of opinion on evidence during trial; statements made during jury selection

The trial court did not err by informing the jury venire in a capital trial that the court was seeking jurors with no predisposition concerning the case. **State v. Ball,** 290.

The trial court did not express an opinion which might have improperly influenced other jurors and did not by its demeanor discourage other prospective jurors from disclosing any possible influence from factors outside the evidence during jury selection for a capital murder prosecution. **State v. Hartman,** 445.

CRIMINAL LAW—Continued

§ 412 (NCI4th). Argument of counsel; opening statements

The prosecutor's opening statement that the pathologist's opinion would be that a murder victim "died right as the rape began or that she died during the rape" did not misconstrue the pathologist's testimony and was not improper. **State v. Roseboro,** 364.

§ 418 (NCI4th). Argument of counsel; objection to impropriety

The trial court did not prevent defendant from objecting to improper argument by the prosecutor when it told defendant that it was "not going to let you interrupt the other side." **State v. Cunningham,** 341.

§ 425 (NCI4th). Argument of counsel; failure to call other particular witnesses or offer particular evidence

There was no gross impropriety in a first-degree murder prosecution where the prosecutor argued that a letter would have been read from the witness stand if it was exculpatory. **State v. Burrus,** 79.

§ 437 (NCI4th). Argument of counsel; culpability of other persons

The trial court did not err by refusing to permit defense counsel to argue to the jury in a first-degree murder trial that defendant should be allowed to plead guilty to second-degree murder because two equally culpable codefendants had been permitted to plead guilty to second-degree murder. **State v. Roseborough,** 121.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses generally

There was no gross impropriety in a first-degree murder prosecution where the trial court did not intervene ex mero motu during the prosecutor's closing argument regarding the credibility of the State's witnesses. **State v. Burrus,** 79.

§ 441 (NCI4th). Argument of counsel; comment on character and credibility of witnesses; expert witnesses

There was no error in sentencing phase closing arguments in a first-degree capital murder trial where the prosecutor stated that defendant's psychologist was not a forensic psychiatrist, but a psychologist who "helps children get over divorce." **State v. Norman,** 511.

§ 442 (NCI4th). Argument of counsel; comment on jury's duty

The prosecutor's argument in a capital sentencing proceeding that "the only thing standing between defendant and freedom" was the jury did not require intervention by the trial court. **State v. Ball,** 290.

The trial court did not abuse its discretion by not intervening ex mero motu in a prosecutor's argument in a capital sentencing proceeding where the prosecutor argued that the jury was the last link in the State's chain of law enforcement and that the law enforcement officers and the prosecutor had done all they could. **State v. Elliott,** 242.

§ 443 (NCI4th). Argument of counsel; explanation of roles of judge, prosecutor, defense counsel

The trial court did not err by failing to intervene ex mero motu in a prosecution for capital first-degree murder and felony child abuse where defendant contended that the prosecutor argued that he was a representative of the victim, but the remarks only reminded the jury that he was an advocate for the State and the victim. **State v. Elliott,** 242.

§ 445 (NCI4th). **Argument of counsel; introduction of counsel's personal beliefs; other**

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital sentencing proceeding where the prosecutor argued that this killing was the "worst of the worst." **State v. Elliott,** 242.

§ 447 (NCI4th). **Argument of counsel; comment on rights of victim, victim's family**

The prosecutor's closing argument that a murder victim's mother, father, and widow "are counting on me to present this summation to you so that justice will be done" was not an improper appeal to the sympathy of the jury and was not grossly improper. **State v. Cunningham,** 341.

The trial court did not err in a prosecution for capital first-degree murder and felony child abuse by not intervening ex mero motu when the prosecutor argued that the victim should receive a fair trial. The prosecutor had also told the jury that defendant should receive a fair trial. **State v. Elliott,** 242.

§ 450 (NCI4th). **Argument of counsel; violent, dangerous, or depraved nature of offense or conduct**

The trial court did not abuse its discretion by not intervening ex mero motu in a capital sentencing proceeding where the prosecutor argued that this killing was the "worst of the worst" on the ground that the argument placed defendant at an unfair disadvantage. **State v. Elliott,** 242.

§ 452 (NCI4th). **Argument of counsel; comment on aggravating or mitigating circumstances**

There was no gross impropriety in a first-degree murder sentencing hearing where the prosecutor said "You may find the defendant suffers from a serious mental illness. So what." **State v. Heatwole,** 1.

The prosecutor's argument concerning the violent nature of defendant's prior felony conviction in California was properly made in reference to the aggravating circumstance that defendant had previously been convicted of a violent felony and did not urge the jury to consider the facts of the prior felony in order to find the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Ball,** 290.

The prosecutor's comment that, in order to find a mitigating circumstance, the jury must find that it exists and has mitigating value was incorrect as to statutory circumstances, but any prejudice was cured by the court's correct instructions to the jury. **Ibid.**

The prosecutor's arguments in a capital sentencing proceeding that the mitigating circumstances submitted by defendant did not excuse defendant's conduct and that the jury should not find the "no significant history of prior criminal activity" and "age" mitigating circumstances were not improper. **Ibid.**

A prosecutor's argument in a capital resentencing hearing was not so grossly improper as to require the trial court to intervene ex mero motu and did not leave the jury to return a sentence of death based on passion, prejudice, or other arbitrary factors where the previous jury had rejected the especially heinous, atrocious, or cruel aggravating circumstance, the court in this proceeding had granted defendant's motion that this circumstance not be allowed, and defendant alleged the prosecutor described defendant's offenses in ways that suggested the murder was especially heinous, atrocious, or cruel. **State v. Thomas,** 639.

CRIMINAL LAW—Continued

There was no error in a capital first-degree murder prosecution where the prosecutor stated that the catchall mitigating circumstance indicated that defendant was "grasping at straws." **State v. Norman,** 511.

§ 454 (NCI4th). Argument of counsel; capital cases generally

The trial court did not abuse its discretion by not intervening ex mero motu in a capital sentencing proceeding where, in context, the thrust of the prosecutor's argument was that the especially heinous, atrocious, or cruel nature of the killing justified imposing the death penalty. **State v. Elliott,** 242.

A prosecutor's remarks in a capital sentencing hearing were not so grossly improper as to require intervention ex mero motu where defendant contended that the remarks constituted "theo-babble" which suggested that the death penalty was divinely required. **State v. Elliott,** 242.

§ 456 (NCI4th). Argument of counsel; comment on judicial or executive review; capital cases

A prosecutor's argument in a capital sentencing proceeding that this killing was the "worst of the worst" did not improperly diminish the jury's responsibility for recommending a sentence of death. **State v. Elliott,** 242.

§ 458 (NCI4th). Argument of counsel; comment on possibility of parole, pardon, or executive commutations

The State did not improperly inject the issue of parole eligibility into a capital sentencing proceeding by questions on cross-examination of defendant's mental health expert pointing out that defendant had been incarcerated only a short time in California when a report was prepared stating that defendant's adjustment to prison had been good. **State v. Ball,** 290.

§ 460 (NCI4th). Argument of counsel; permissible inferences

There was no gross impropriety in a first-degree murder prosecution where the prosecutor in his argument commented that an accomplice who testified against defendant had not attempted to cut a victim's throat. **State v. Burrus,** 79.

§ 461 (NCI4th). Argument of counsel; comment on matters not in evidence

There was no gross impropriety in a first-degree murder prosecution where defendant contended that the prosecutor injected matters outside the record. **State v. Burrus,** 79.

A prosecutor's argument in a capital sentencing hearing was not so grossly improper as to require intervention ex mero motu where the prosecutor's argument related to the nature of defendant's crime and was supported by facts in evidence and reasonable inferences therefrom. **State v. Elliott,** 242.

§ 462 (NCI4th). Argument of counsel; comment on matters not in evidence; requiring court action ex mero motu

The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu in the prosecutor's argument where defendant contended that the prosecutor argued facts not in evidence in contending that defendant's witness admitted that defendant was convicted of assaulting a sailor while serving in the Marine Corps. **State v. Heatwole,** 1.

CRIMINAL LAW—Continued

§ 463 (NCI4th). Argument of counsel; comments supported by evidence

The prosecutor's closing argument that if a murder victim was dead before the rape occurred, she had not been dead longer than five minutes did not misconstrue a pathologist's testimony and was not improper. **State v. Roseboro,** 364.

The prosecutor's closing argument in a prosecution for first-degree murder of a police officer that defendant had committed the misdemeanor of communicating a threat was supported by the evidence. **State v. Cunningham,** 341.

The prosecutor did not argue facts not in evidence when he argued that a crime lab chemist measured the density and refractive index of glass fragments taken from the victim's face and from a broken police car window and they were the same. **Ibid.**

The trial court did not err in a prosecution for capital first-degree murder and felony child abuse by not intervening ex mero motu when the prosecutor argued that the jury should make the victim's life worth something and not let defendant get away with claiming before trial that her death was an accident. **State v. Elliott,** 242.

There was no error during a capital first-degree murder prosecution where the prosecutor was allowed to argue during the guilt phase testimony which defendant contends was not in evidence; the statement attributed to a witness by a prosecutor was close enough. **State v. Norman,** 511.

Statements in the prosecutor's closing argument were either reasonable inferences drawn from the evidence or inconsequential deviations in an immaterial aspect of the evidence which were cured by the court's instruction on the duty of the jury to rely on its own recollection of the evidence. **State v. Price,** 583.

§ 465 (NCI4th). Argument of counsel; explanation of applicable law

There was no prejudice in a first-degree murder prosecution where defendant complained that the prosecutor misstated the law regarding acting in concert, but the jury rejected that theory and found defendant guilty of murder based on premeditation and deliberation. **State v. Burrus,** 79.

Defendant's due process rights were not violated by any error in the prosecutor's definition of reasonable doubt where the court correctly instructed the jury as to reasonable doubt after the closing arguments. **State v. Roseboro,** 364.

Any error in an alleged misstatement of law by the prosecutor in her closing argument was cured by the court's instructions on the relevant law. **State v. Price,** 583.

§ 468 (NCI4th). Argument of counsel; miscellaneous

There was no prosecutorial misconduct in a noncapital first-degree murder prosecution where defendants contended that the prosecutor argued that on several points the State's case was uncontradicted and, with other prosecutorial misconduct, gave the jury a substantial reason to wonder why defendants did not testify. **State v. Taylor,** 31.

The trial court did not err in a noncapital murder prosecution by not intervening ex mero motu in the prosecutor's closing argument. **State v. Ocasio,** 568.

There was no error in a prosecution for first-degree murder and attempted armed robbery where defendant contended that sustaining two objections to his closing argument impinged on his right to present a defense and violated the law regarding closing arguments. **State v. Miller,** 658.

CRIMINAL LAW—Continued

§ 473 (NCI4th). Conduct of counsel during trial; miscellaneous

The cumulative conduct of the prosecution in a capital resentencing proceeding did not deprive defendant of a fair trial. **State v. Heatwole,** 1.

§ 475 (NCI4th). Conduct affecting jury; exposure to evidence not formally introduced

The trial court did not err in a capital resentencing proceeding by denying a motion for appropriate relief made two days after the verdict where defense counsel had informed the jurors during jury selection that one defense contention would be that defendant was a paranoid schizophrenic and one juror who was enrolled in a graduate class in psychology had asked his professor during the trial if paranoid schizophrenics were violent. **State v. Heatwole,** 1.

§ 478 (NCI4th). Conduct affecting jury; communications with jurors generally; admonitions by court

There was no error in the trial judge's ex parte contact with the jury when prospective jurors were sent from the courtroom and the judge led them to their room because of a shortage of deputies in the courtroom. **State v. Cunningham,** 341.

§ 486 (NCI4th). Exposure of jurors to publicity generally

The trial court did not abuse its discretion in a capital sentencing proceeding arising from the murder of two Charlotte police officers by failing to conduct a jury voir dire regarding extensive publicity in the local media concerning shootings of two South Carolina officers during the jury's deliberations. **State v. Harden,** 542.

§ 496 (NCI4th). Deliberations; review of testimony

There was no plain error in a capital sentencing proceeding where the trial court denied the jury's request for a transcript of defendant's testimony and the testimony of defense experts in forensic psychiatry and psychopharmacology. **State v. Harden,** 542.

§ 497 (NCI4th). Deliberations; use of evidence by the jury

Assuming it was error for the trial court to permit evidence to be sent to the jury room without defendant's consent, this error was harmless in light of the strong evidence of defendant's guilt. **State v. Cunningham,** 341.

§ 537 (NCI4th). Mistrial; misconduct of victim or victim's family during trial

The trial court did not err in a prosecution for first-degree murder and other crimes by not declaring a mistrial on the grounds that members of the audience were wearing badges with photographs that defendant alleged were of one of the victims. **State v. Braxton,** 702.

§ 543 (NCI4th). Mistrial; conduct or statements involving prosecutor; examination or cross-examination of witnesses generally

The trial court did not abuse its discretion during a first-degree murder sentencing hearing by denying defendant's motion for a mistrial where the prosecutor asked defendant's high school teacher, who had testified about defendant's ability and character, whether she thought the family and friends of the victim thought defendant deserved to die for the crime and whether she thought defendant was respectful of the victim when defendant poured gasoline on him and set him on fire. **State v. Norman,** 511.

CRIMINAL LAW—Continued

§ 560 (NCI4th). Mistrial; particular testimony; hearsay

The trial court did not err by not granting a mistrial in a capital prosecution for first-degree murder where the trial court had granted a motion in limine to exclude evidence that the victim was pregnant when killed, a witness testified as to what she had heard the victim say during a telephone conversation with defendant, it was not clear that the victim was speaking of an unborn baby, and the court instructed the jury to disregard this testimony. **State v. Cox,** 184.

§ 641 (NCI4th). Prosecutor's discretion; effect of dismissal on acquittal

The trial court did not err by submitting to the jury a charge of first-degree murder based on premeditation and deliberation after the district attorney announced at the pretrial and charge conferences that the State would not ask for a conviction based on premeditation and deliberation but would try defendant only for felony murder. **State v. Hales,** 419.

§ 680 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases generally

There was no plain error in a capital murder prosecution in the court's failure to give a peremptory instruction on the statutory mitigating circumstance of defendant's age. **State v. Elliott,** 242.

§ 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 a capital sentencing proceeding by not giving a peremptory instruction on the mitigating circumstance of impaired capacity. **State v. Wooten,** 316.

§ 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 proceeding by not giving a peremptory instruction on the mitigating circumstance of mental and emotional disturbance. **State v. Wooten,** 316.

§ 683 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases; significant history of prior criminal activity

The trial court erred by failing to give a mandatory peremptory instruction on the mitigating circumstance that defendant had no significant history of prior criminal activity where the State and defendant stipulated that defendant had no significant history of prior criminal activity. **State v. Flippen,** 689.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

There was no error in a capital first-degree murder prosecution in the court's instructions on expert witnesses where the charge given instructed the jury in substance as requested by defendant. **State v. Norman,** 511.

§ 707 (NCI4th). Error in statement or application of law; conflicting or ambiguous instructions

Where the court instructed the jury that to convict under the felony murder rule, the State must prove that "during the commission of the felonious assault, defendant

CRIMINAL LAW—Continued

killed the victim," the trial court's omission of the phrase "during the commission of" when the court thereafter read the summary paragraph on felony murder was not prejudicial error where the court later specifically corrected the instruction when it repeated the summary paragraph in its entirety. **State v. Price,** 583.

§ 747 (NCI4th). Instructions to jury; opinion of court on evidence; characterizing defendant's statements as a confession

The trial court did not express an opinion on the evidence by instructing that there was evidence which tended to show that defendant confessed that he committed the crime charged. **State v. Cunningham,** 341.

§ 757 (NCI4th). Approved or nonprejudicial definitions of reasonable doubt generally

There was no error in a prosecution for first-degree murder and attempted armed robbery where defendant had requested the pattern jury instruction regarding the legal concepts of burden of proof and reasonable doubt and the court gave a version which it had written. **State v. Miller,** 658.

§ 775 (NCI4th). Instructions on defense of voluntary intoxication

In a prosecution for first-degree murder and willfully setting fire to a dwelling of which defendant was an occupant wherein the trial court instructed on voluntary intoxication as it affected defendant's ability to form an intent to kill, any error in the court's refusal to also instruct on intoxication in the burning case was harmless where the jury rejected defendant's contention that he was unable to form an intent to kill. **State v. Hales,** 419.

§ 793 (NCI4th). Instruction as to acting in concert

The trial court did not err in a noncapital first-degree murder prosecution by charging on acting in concert as to one defendant. **State v. Taylor,** 31.

§ 796 (NCI4th). Instruction as to aiding and abetting generally

The trial court did not err in a noncapital first-degree murder prosecution as to either defendant by charging on aiding and abetting as to one defendant. **State v. Taylor,** 31.

§ 809 (NCI4th). Instructions on defendant's failure to testify generally

Defendant was not prejudiced by the court's instruction on defendant's failure to testify without a request by defendant. **State v. Cunningham,** 341.

§ 860 (NCI4th). Instruction on defendant's eligibility for parole

The trial court did not err in a first-degree murder prosecution by denying defendant's pretrial motion to instruct the jury on parole eligibility. **State v. Elliott,** 242.

§ 1150 (NCI4th). Aggravating factors under Fair Sentencing Act; use of weapon normally hazardous to lives of more than one person; evidence of element of offense

The trial court did not err in a noncapital first-degree murder prosecution by finding as to one defendant the aggravating factor that he knowingly created a great risk of death to more than one person by means of a weapon or device normally hazardous to the lives of more than one person, and the evidence essential to prove this factor was not necessary to prove an essential element of second-degree murder on the basis of acting in concert. **State v. Bruton,** 381.

CRIMINAL LAW—Continued

§ 1160 (NCI4th). Aggravating factors under Fair Sentencing Act; aged victim

The trial court did not err when sentencing defendant for robbery by finding the aggravating factor that the victim was very old. **State v. Hartman,** 445.

§ 1237 (NCI4th). Mitigating factors under Fair Sentencing Act; defendant's cooperation in apprehending or prosecuting other felon generally

The trial court did not abuse its discretion in sentencing defendant for noncapital first-degree murder, burglary, and larceny by failing to give sufficient credit for the assistance defendant gave that enabled the State to secure guilty pleas from defendant's codefendants. **State v. Ocasio,** 568.

§ 1298 (NCI4th). Capital punishment generally

The trial court did not err in a prosecution for murder, kidnapping, and robbery by refusing to grant defendant's motion to declare that he was not eligible for the death penalty. **State v. Leary,** 109.

§ 1303 (NCI4th). Capital punishment; selection and composition of the jury

There was no error in a capital sentencing so grossly improper as to require the trial court to intervene ex mero motu where defendant contended that the prosecutor in voir dire engaged in a series of lectures intended to establish rapport with the jurors and that the prosecutor's statements were unduly prejudicial in that they led the jurors to expect a large number of mitigating circumstances and to believe that the mitigating circumstances have less value than aggravating circumstances. **State v. Thomas,** 639.

§ 1309 (NCI4th). Capital punishment; submission and competence of evidence generally

The trial court did not abuse its discretion in a capital resentencing proceeding by admitting into evidence autopsy photographs. **State v. Heatwole,** 1.

§ 1312 (NCI4th). Capital punishment; evidence of prior criminal record or other crimes

The trial court did not abuse its discretion in a capital sentencing proceeding by admitting the testimony of a court clerk with respect to information in an indictment concerning a prior conviction of defendant. **State v. Wooten,** 316.

The trial court did not err in a capital sentencing proceeding by allowing presentation of anecdotal evidence regarding defendant's prior criminal record and bad acts. **State v. Harden,** 542.

There was no prejudicial error in a capital resentencing where the State introduced in support of the aggravating circumstance of a previous conviction involving violence a copy of a 1976 California change of plea and order. **State v. Thomas,** 639.

§ 1314 (NCI4th). Capital punishment; submission and competence of evidence; aggravating and mitigating circumstances

The trial court did not err in a capital resentencing proceeding by allowing the prosecutor to elicit testimony from the psychiatric expert that there is no connection between schizophrenia and murder or by denying defendant's motion in limine to prohibit the prosecutor from arguing that most people with mental illnesses do not commit crimes. **State v. Heatwole,** 1.

CRIMINAL LAW—Continued

The trial court did not err in a capital resentencing proceeding where the especially heinous, atrocious, or cruel aggravating circumstance was not submitted by allowing the state to introduce an affidavit sent by defendant to officers admitting to the murders and explaining the details and by admitting a letter from defendant to his father expressing lack of remorse for killing one victim. **Ibid.**

The trial court did not err in a capital resentencing proceeding by permitting the State on redirect examination to question its psychiatric expert about whether defendant was able to understand and appreciate the nature of his actions. **Ibid.**

§ 1318 (NCI4th). Capital punishment; instructions generally

Placing defendant on trial for his life for two first-degree murders when his codefendant actually committed the murders during an attempted robbery did not violate *Enmund v. Florida* where defendant was found guilty of two counts of felony murder, and the trial court instructed the jury that before it could recommend that defendant be sentenced to death, the State must prove beyond a reasonable doubt that defendant "killed or attempted to kill the victim or intended to kill the victim or intended that deadly force would be used in the course of the felony or was a major participant in the underlying felony and exhibited reckless indifference to human life." **State v. Workman,** 482.

§ 1319 (NCI4th). Capital punishment; instructions; function of jury

The trial court did not err in a capital first-degree murder prosecution in a four-page summary of trial procedures and capital punishment given to prospective jurors where the instructions did not have the effect of prejudicing defendant's right to a fair and impartial jury. **State v. Wooten,** 316.

§ 1322 (NCI4th). Capital punishment; instructions; parole eligibility

The trial court properly responded to questions by prospective jurors about the meaning of life imprisonment by stating that "for the purposes of this trial, life imprisonment means life in prison." **State v. Roseboro,** 364.

The trial court did not err in a capital resentencing by informing the jury that eligibility for parole is not a proper matter for the jury to consider. **State v. Thomas,** 639.

§ 1323 (NCI4th). Capital punishment; instructions; aggravating and mitigating circumstances generally

The trial court erred by instructing the jurors in a capital sentencing proceeding that if none of them found a statutory mitigating circumstance to be mitigating, they would so indicate by instructing their foreman to write "no" in the space provided. **State v. Roseboro,** 364.

§ 1326 (NCI4th). Capital punishment; aggravating and mitigating circumstances; burden of proof

The trial court did not err in a capital first-degree murder prosecution in a four-page summary of trial procedures and capital punishment given to prospective jurors where the trial court properly instructed on the three findings necessary to support the imposition of the death penalty—existence of any aggravating circumstances, substantiality of those aggravators, and failure of the mitigators to outweigh the aggravators. **State v. Wooten,** 316.

§ 1336 (NCI4th). Capital punishment; aggravating circumstances generally

The trial court's failure to instruct the jury that it could not use the same evidence to support more than one aggravating circumstance could not have affected the outcome and was not plain error. **State v. Wilkinson,** 198.

§ 1337 (NCI4th). Capital punishment; particular aggravating circumstances; previous conviction for felony involving violence

The trial court did not err in a capital resentencing hearing by permitting the State to introduce extensive evidence of the aggravating circumstance that defendant had been previously convicted of a felony involving violence or the threat of violence where three witnesses testified to circumstances surrounding a 1976 crime spree which culminated in defendant's attempted shooting of a law enforcement officer. **State v. Heatwole,** 1.

§ 1338 (NCI4th). Capital punishment; particular aggravating circumstances; avoiding arrest or effecting escape

In a capital sentencing hearing for three first-degree murders, the evidence supported the trial court's submission of the aggravating circumstance that the last two murders were committed for the purpose of avoiding or preventing a lawful arrest. **State v. Wilkinson,** 198.

§ 1339 (NCI4th). Capital punishment; particular aggravating circumstances; capital felony committed during commission of another crime

The trial court did not commit plain error by failing to instruct on the legal definition of first-degree sexual offense in a capital sentencing proceeding when it gave an instruction for the (e)(5) aggravating circumstance that the murder was committed while defendant was engaged in the commission of a first-degree burglary for which the felonious intent was the intent to commit a first-degree sexual offense. **State v. Wilkinson,** 198.

The trial court did not improperly permit the jury to double count two aggravating circumstances based upon the same evidence when it submitted the (e)(5) circumstance that each murder was committed while defendant was engaged in the commission of a burglary and the (e)(11) circumstance that each murder was part of a course of conduct involving violence against other persons. **Ibid.**

§ 1343 (NCI4th). Capital punishment; particular aggravating circumstances; especially heinous, atrocious, or cruel offense; instructions

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not rendered unconstitutionally vague and arbitrary by the court's use of the disjunctive with the narrowing phrases or by the inclusion of a requested instruction on depravity. **State v. Wilkinson,** 198.

The trial court's instruction for the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutionally vague. **State v. Elliott,** 242.

The trial court's instruction on the especially heinous, atrocious, or cruel aggravating circumstance was not unconstitutional as applied to defendant where defendant contended that most killings of children by their parents were tried noncapitally. **Ibid.**

There was no plain error in a capital resentencing where the previous jury had rejected the especially heinous, atrocious, or cruel aggravating circumstance, the trial court in this proceeding granted defendant's motion that this circumstance might be allowed, and defendant argued that the prosecutor impermissibly called attention to the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Thomas,** 639.

§ 1345 (NCI4th). Capital punishment; particular aggravating circumstances; evidence sufficient to support finding of particularly heinous, atrocious or cruel offense

The trial court did not err in a capital sentencing proceeding by submitting the especially heinous, atrocious or cruel aggravating circumstance where the evidence permitted the jury to conclude that the killing would have been physically agonizing or conscienceless, pitiless, or unnecessarily torturous to the two-year-old victim, and the victim's age and the existence of a parental relationship with defendant could also be considered. **State v. Elliott,** 242.

§ 1346 (NCI4th). Capital punishment; particular aggravating circumstances; creating risk of death to more than one person

G.S. 15A-2000(e)(10) is concerned with the creation of a risk of death to more than one person; it is not necessary that more than one person was actually injured. **State v. Norman,** 511.

The trial court did not err in a capital sentencing proceeding by submitting the aggravating circumstance that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the State's evidence showed that defendant threw a burning paper bag and gasoline into a convenience store during business hours. **Ibid.**

§ 1347 (NCI4th). Capital punishment; particular aggravating circumstances; murder as course of conduct

The trial court did not improperly permit the jury to double count two aggravating circumstances based upon the same evidence when it submitted the (e)(11) course of conduct aggravating circumstance and the (e)(5) circumstance that each murder was committed while defendant was engaged in the commission of a burglary, or by submitting the (e)(11) course of conduct aggravating circumstance and the (e)(4) circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. **State v. Wilkinson,** 198.

§ 1348 (NCI4th). Capital punishment; consideration of mitigating circumstances; definition

The trial court did not err by failing to give defendant's requested instruction that mitigation means "something that might cause you to lessen or reduce defendant's punishment" since the pattern jury instruction given by the court substantially conformed with the proposed instruction. **State v. Wilkinson,** 198.

Defendant's constitutional rights were not violated by the jury's failure to find that nonstatutory mitigating circumstances supported by uncontradicted evidence existed and had mitigating value. **Ibid.**

The trial court in a capital sentencing proceeding for three first-degree murders did not err by failing to repeat the full set of instructions on Issues Two, Three, and Four related to the finding and weighing of mitigating circumstances with respect to each victim. **Ibid.**

The trial court did not err in a capital first-degree murder prosecution by preliminarily instructing potential jurors in a summary of trial procedures and capital punishment that mitigating circumstances were "things that might tend to mitigate the offense." **State v. Wooten,** 316.

The trial court did not err in a capital sentencing hearing by rejecting defendant's request that the jurors be instructed that they could base their recommendation upon any sympathy or mercy they have for defendant arising from the evidence. **Ibid.**

The trial court did not err in a capital sentencing proceeding by giving a definition of mitigation drawn directly from the relevant pattern jury instruction. **Ibid.**

The trial court did not err in a capital sentencing proceeding in its definition of mitigating circumstances. **State v. Harden,** 542.

§ 1355 (NCI4th). Capital punishment; particular mitigating circumstances; lack of prior criminal activity

The trial court did not err by submitting, over defendant's objection, the mitigating circumstance that defendant had no significant history of prior criminal activity where defendant had previously been convicted of robbery, felonious assault, and forgery. **State v. Ball,** 290.

§ 1357 (NCI4th). Capital punishment; particular mitigating circumstances; mental or emotional disturbance; instructions

The trial court did not err by instructing the jury that it could find the (f)(2) mental or emotional disturbance mitigating circumstance if it found that defendant suffered from voyeurism. **State v. Wilkinson,** 198.

§ 1357 (NCI4th). Capital punishment; particular mitigating circumstances; mental or emotional disturbance

There was no plain error in a capital sentencing proceeding in the trial court's use of the conjunctive in listing supporting evidence when instructing on the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance. **State v. Hartman,** 445.

There was no plain error in a capital sentencing proceeding where defendant argued that the use of the conjunctive in instructions on impaired capacity and mental or emotional disturbance impaired the jury's consideration of relevant mitigating evidence. **State v. Harden,** 542.

§ 1360 (NCI4th). Capital punishment; particular mitigating circumstances; impaired capacity of defendant; instructions

The jury's failure to find the (f)(6) impaired capacity mitigating circumstance did not render sentences of death unreliable and cruel or unusual punishment where the court instructed on this circumstance and permitted the jury to consider evidence of impaired capacity offered by defendant. **State v. Wilkinson,** 198.

There was no plain error in a capital sentencing proceeding where defendant argued that the use of the conjunctive in instructions on impaired capacity and mental or emotional disturbance impaired the jury's consideration of relevant mitigating evidence. **State v. Harden,** 542.

§ 1362 (NCI4th). Capital punishment; particular mitigating circumstances; age of defendant

The trial court did not err by submitting to the jury in a capital sentencing proceeding the mitigating circumstance of "age" although defendant was thirty-five years old at the time of the murder. **State v. Ball,** 290.

The trial court did not err in a capital sentencing proceeding in its instruction on the mitigating circumstance of age where the court gave an instruction consistent with the pattern jury instruction which said that the mitigating effect of defendant's

age is for the jury to determine from all the facts and circumstances. **State v. Wooten,** 316.

§ 1363 (NCI4th). Capital punishment; other mitigating circumstances arising from the evidence

The trial court did not commit plain error in a capital resentencing hearing by not instructing the jury sua sponte that an honorable military discharge has mitigating value per se; although an honorable discharge has mitigating value in the Fair Sentencing Act, it is not included in the specific mitigating circumstances in the death penalty statute and thus may be considered but need not be found to be mitigating. **State v. Heatwole,** 1.

There was no error in a capital sentencing proceeding where the jury failed to find the nonstatutory mitigating circumstance that defendant had a good employment record. **State v. Elliott,** 242.

There was no prejudicial error in a capital sentencing proceeding by refusing to submit specific requested nonstatutory mitigating circumstances where defendant was not denied the benefit of any of his proposed nonstatutory mitigating circumstances. Viewed contextually, the substance of the mitigating circumstances that defendant requested were subsumed into other mitigating circumstances. **State v. Hartman,** 445.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death was not disproportionate. **State v. Heatwole,** 1; **State v. Elliott,** 242; **State v. Wooten,** 316; **State v. Thomas,** 639.

Sentences of death imposed upon defendant for three first-degree murders were not excessive or disproportionate where defendant beat all three victims to death with a bowling pin and committed multiple sexual offenses against the two female victims. **State v. Wilkinson,** 198.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant stabbed the victim numerous times in her own bedroom. **State v. Ball,** 290.

A sentence of death for a first-degree murder was not disproportionate where defendant was found guilty based on both the felony murder rule and premeditation and deliberation; the jury found the murder to be especially heinous, atrocious or cruel; the victim suffered great physical pain in that he was burned alive and survived for twelve hours, knowing that death was imminent; defendant, having set the victim on fire, did nothing to procure medical assistance, to inquire into the victim's condition, or to express remorse to the victim; defendant stood and watched the victim burn and then left the scene, went to a friend's house, and did not call the police until several hours later; and, although defendant contends that he is not "normal," his mental status does not render the death sentence disproportionate. **State v. Norman,** 511.

A sentence of death for a first-degree murder was not disproportionate where the evidence tended to show that the victim, an elderly man in poor health, had befriended the twenty-eight-year-old defendant, taking him into his home and offering him respect and good will; defendant took the victim's belongings and attained money by using his personal checks over several days following the murder while leaving the victim's body in the recliner in which he was murdered; and the victim was killed in the solace of his home. **State v. Hartman,** 445.

CRIMINAL LAW—Continued

A sentence of death was not disproportionate where the evidence clearly showed that defendant deliberately murdered two police officers for the purpose of evading a lawful arrest. **State v. Harden,** 542.

DIVORCE AND SEPARATION

§ 392.1 (NCI4th). Amount of child support; child support guidelines

The trial court could properly consider voluntary support provided by the maternal grandparents on a regular basis in determining whether to deviate from the child support guidelines. **Guilford County ex rel. Easter v. Easter,** 166.

The trial court erred in deviating from the child support guidelines by reducing the mother's obligation based on support provided by the maternal grandparents where the court failed to make required statutory findings relating to the reasonable needs of the child and the relative ability of each parent to provide support. **Ibid.**

EVIDENCE AND WITNESSES

§ 82 (NCI4th). Definition of relevant evidence

There was no prejudice in a capital first-degree murder prosecution in the admission of an officer's testimony about a witness's burns, observed when the officer spoke with the witness at a hospital. **State v. Norman,** 511.

§ 155 (NCI4th). Telephone conversations; manner and sufficiency of authentication or identification; circumstantial evidence; identification by caller

The trial court did not err in a capital prosecution for first-degree murder by not granting a mistrial after the victim's aunt testified as to what she heard the victim say to defendant in a telephone conversation. **State v. Cox,** 184.

§ 163 (NCI4th). Threats made by defendant; effect of length of time between threat and harm

The trial court did not err in a capital prosecution for a first-degree murder committed on 27 January 1994 by admitting testimony that on 30 November 1993 defendant told the victim that he would kill her if she did not come out of her room. **State v. Cox,** 184.

§ 173 (NCI4th). State of mind of victim

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by admitting statements the victim made within hours of his death. **State v. Miller,** 658.

§ 179 (NCI4th). Facts indicating state of mind; motive in murder and like cases

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence of a fight between the victim and defendant's cousin as furnishing a motive for the shooting. **State v. Taylor,** 31.

§ 222 (NCI4th). Flight

The trial court did not err in a capital first-degree murder prosecution by instructing the jury on flight; regardless of the reason for the flight, the relevant inquiry is whether there is evidence that defendant left the scene and took steps to avoid apprehension. **State v. Norman,** 511.

EVIDENCE AND WITNESSES—Continued

§ 264 (NCI4th). Character or reputation of victim

There was no prejudicial error in a capital prosecution for first-degree murder which resulted in a life sentence where the State introduced evidence of the victim's character for peacefulness before his character was put in issue. **State v. Johnston,** 596.

§ 373 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan, scheme, or design; rape and other sex offenses generally

In a prosecution of defendant for indecent liberties and rape involving his two adolescent stepgranddaughters, testimony by three other female members of defendant's family recounting how defendant had sexually abused them when they were young did not pertain to acts too remote in time to be admissible under Rule 404(b) to show defendant's common plan or scheme to sexually abuse female family members. **State v. Frazier,** 611.

§ 410 (NCI4th). Tentativeness or uncertainty of identification; in-court identification

Defendant was not prejudiced by the trial court's erroneous failure to rule on defendant's motion to strike conjectural identification testimony placing defendant at a topless bar the night of a murder. **State v. Roseboro,** 364.

§ 663 (NCI4th). Ruling on objection to evidence

Defendant was not prejudiced by the trial court's erroneous failure to rule on defendant's motion to strike conjectural identification testimony placing defendant at a topless bar the night of a murder. **State v. Roseboro,** 364.

§ 665 (NCI4th). Necessity for objection or motion to strike; waiver of objection generally

There was no error in a noncapital first-degree murder prosecution in the court's failure to strike testimony that "they will shoot you" where the court sustained defendants' objections but they did not request that the testimony be struck. **State v. Taylor,** 31.

§ 672 (NCI4th). Objections and exceptions to evidence; introduction of like evidence without objection as waiver

Defendant's objection to the admission for corroborative purposes of a burglary victim's statement to a detective about what defendant told her was waived when the detective gave similar testimony without objection. **State v. Singletary,** 95.

§ 714 (NCI4th). Means of withdrawing evidence; form and sufficiency of instruction

Our system is based upon the assumption that trial jurors are men and women of character and sufficient intelligence to fully understand and comply with proper instructions of the court not to consider certain evidence and they are presumed to have done so. **State v. Hartman,** 445.

§ 728 (NCI4th). Error as harmless or prejudicial; ownership or possession of firearms or other weapons

There was no prejudicial error in a capital first-degree murder prosecution where the victim had been stabbed where the court permitted testimony describing defendant's use of a knife to skin a deer. **State v. Johnston,** 596.

EVIDENCE AND WITNESSES—Continued

§ 761 (NCI4th). Cure of prejudicial error in admission of evidence; substantially similar evidence admitted without objection

There was no prejudicial error in a first-degree murder sentencing hearing where the victim's mother testified that the victim's grandmother had told her about an incident in a phone booth in which someone had hung up on the victim and been looking for him with a gun. **State v. Taylor,** 31.

There was no prejudicial error in a noncapital first-degree murder prosecution where the court admitted testimony from the chief of police in Garysburg that the Sheriff of Northampton County had asked him if he knew a male living in Garysburg who may have been involved in the shooting. **Ibid.**

§ 764 (NCI4th). Prejudicial error in admission of evidence; objection to question sustained; question not answered

There was no prejudicial error in a capital first-degree murder prosecution where the prosecutor asked the first twelve venire members whether someone's sexual persuasion would have any bearing on their decision and the court sustained defendant's immediate objection. **State v. Hartman,** 445.

§ 770 (NCI4th). Prejudicial error in admission of evidence; evidence admitted for restricted purpose

Any error in the admission for corroborative purposes of a burglary victim's statement to a detective about what defendant told her was rendered harmless when the victim testified that defendant made this statement to her and it then became substantive evidence. **State v. Singletary,** 95.

§ 771 (NCI4th). Prejudicial error in admission of evidence; evidence admitted against codefendant

Assuming testimony by the assistant manager of a grocery store that the two defendants were in her store on the afternoon of two murders at another grocery store and that she saw defendant Workman put his hand inside her pocketbook was admissible only as to defendant Workman and was improperly admitted as to defendant Shoffner, this error was not prejudicial to defendant Shoffner where he elicited testimony on cross-examination of the witness that he was not near defendant Workman when Workman put his hand in the witness's pocketbook. **State v. Workman,** 482.

§ 788 (NCI4th). Prejudicial error in exclusion of evidence; other evidence of same import admitted

The trial court in a capital prosecution for first degree murder which resulted in a life sentence did not err by not allowing defendant to elicit testimony from the victim's companion that the victim was in an aggressive posture the night he was murdered where the question had already been asked and answered. **State v. Johnston,** 596.

§ 850 (NCI4th). Hearsay evidence; statement offered to prove truth of matter asserted

The trial court did not err in a first-degree murder prosecution by overruling objections to testimony which defendant contended was impermissible hearsay where the specific statements complained of either were not hearsay or were admissible under a recognized exception to the hearsay rule. **State v. Burrus,** 79.

EVIDENCE AND WITNESSES—Continued

§ 851 (NCI4th). Hearsay evidence; exclusionary rule

The trial court properly excluded defendant's question to a crime scene technician as to whether a report by another showed that some materials were not where the witness reported them to be because the question sought to elicit hearsay testimony. **State v. Cunningham,** 341.

Testimony defendant attempted to elicit from an investigator that Dwight Johnson told the investigator that a friend of Charlie Bush accused Bush of having "just shot that cop" and Bush did not deny having done so was double hearsay and properly excluded. **Ibid.**

§ 876 (NCI4th). Hearsay evidence; statements offered to show state of mind of victim

Testimony by four witnesses that a murder victim had told them that defendant had threatened to kill her, that he had physically abused her, that defendant had followed or stalked her, and that she was becoming more afraid of defendant was admissible under the state of mind exception to the hearsay rule. **State v. Crawford,** 65.

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by admitting statements the victim made within hours of his death. **State v. Miller,** 658.

§ 881 (NCI4th). Hearsay evidence; to show motive

The trial court did not err in a capital prosecution for first-degree murder by not granting a mistrial after the victim's aunt testified that she heard the victim say to defendant in a telephone conversation that she didn't want him and didn't want to go back with him because he tried to get her to kill her child and the court granted a motion to strike. The statement was not introduced to prove the truth of the statement but to prove that she said it, which gave defendant a motive to kill her. **State v. Cox,** 184.

§ 920 (NCI4th). Particular evidence as hearsay or not; miscellaneous

There was no error in a first-degree murder prosecution where a motion in limine was allowed to prevent defendants from asking questions on cross-examination of the sheriff as to what one of his deputies had told him. **State v. Taylor,** 31.

The trial court did not err in a noncapital first-degree murder prosecution in granting a motion in limine precluding defendants from asking a deputy sheriff on cross-examination what someone had told him. There is no exception to the hearsay rule to show an officer's knowledge as a result of an investigation. **Ibid.**

§ 928 (NCI4th). Present sense impression generally

There was no error in a noncapital first-degree murder prosecution where the court admitted testimony that a witness saw defendant in the yard of her daughter with a sawed-off shotgun, the witness called her daughter, and the daughter said that defendant was not after her but was after the victim. **State v. Taylor,** 31.

§ 929 (NCI4th). Excited utterances generally; statement made while declarant under stress of excitement

The trial court did not err in a prosecution for first-degree murder and other crimes by allowing one of defendant's accomplices to testify that another accomplice had said as they returned to the car from the scene of the shooting, "I didn't believe you would shoot him." **State v. Braxton,** 702.

EVIDENCE AND WITNESSES—Continued

§ 983 (NCI4th). Statement under belief of impending death generally

The trial court did not err in a noncapital first-degree murder prosecution by not allowing testimony concerning statements from another man who told his girlfriend that he had killed the victim and that he would kill himself before he went to jail for killing a white man where the man later committed suicide. **State v. Sharpe,** 190.

§ 1134 (NCI4th). Acts and declarations of companions, codefendants, and co-conspirators; applicability of *Bruton* rule

The admission of hearsay testimony by a witness in a prosecution for attempted robbery and two murders that she overheard either defendant or his codefendant state, "I guess we'll just have to rob somebody," did not violate defendant's right of confrontation under the *Bruton* rule because this testimony was admissible under exceptions to the hearsay rule. **State v. Workman,** 482.

Where a witness testified that she did not know which defendant made a statement that he guessed they would have to rob somebody, a detective's testimony elicited on cross-examination by defendant Workman that the witness had identified defendant Shoffner as the one who made the statement was admissible to show a prior inconsistent statement by the witness and did not violate the *Bruton* rule. **Ibid.**

Testimony by the codefendant Workman's mental health expert that Workman told him that, after hearing two screams, he panicked and committed two murders was not sufficiently specific to implicate the defendant Shoffner and thus did not violate the *Bruton* rule by allowing a codefendant's out-of-court statements incriminating defendant to be presented through the testimony of the codefendant's expert witness. **Ibid.**

§ 1216 (NCI4th). Confessions and other inculpatory statements; application of the *Bruton* rule; codefendant not implicated by confession or statement

There was no error as to one defendant in a noncapital first-degree murder prosecution where an officer was allowed to testify that, when the other defendant was advised of the shooting, this defendant said that he didn't know anything about it and had been home all night. **State v. Taylor,** 31.

§ 1217 (NCI4th). Confessions and other inculpatory statements; application of the *Bruton* rule; confession or statement by testifying defendant generally

An officer's rebuttal testimony that the codefendant told the police that defendant had proposed that the two commit a robbery and the codefendant said "Okay" did not violate the *Bruton* rule where the codefendant had already testified and was available for cross-examination. **State v. Workman,** 482.

§ 1230 (NCI4th). Confessions and other inculpatory statements; effect of constitutional requirements on admissibility generally

The North Carolina Constitution does not require all law enforcement officers to warn all criminal suspects, regardless of whether they are in custody, that they are free to walk away immediately, that they have the right to an attorney before answering any question, and that anything they say will be used against them in a court of law. **State v. Leary,** 109.

EVIDENCE AND WITNESSES—Continued

§ 1235 (NCI4th). Confessions and other inculpatory statements; custodial interrogation defined

The North Carolina Supreme Court declined to adopt a subjective rather than objective state of mind test for determining whether a defendant was in custody when a statement was given. **State v. Leary,** 109.

The trial court did not err in a prosecution for murder, robbery, and kidnapping by denying defendant's motion to suppress his statements to a law enforcement officer where defendant asserted that the first statement occurred during an in-custody interrogation without Miranda warnings and that the second was tainted by the first. **Ibid.**

§ 1242 (NCI4th). Confessions and other inculpatory statements; particular statements as volunteered or resulting from custodial interrogation; statements made in police custody following arrest

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his inculpatory statement where during questioning defendant indicated that he could show officers where the gun was located and then did so. **State v. Burrus,** 79.

§ 1246 (NCI4th). Confessions and other inculpatory statements; warnings as to rights; where defendant is a juvenile

There was no error in a capital first-degree murder prosecution which resulted in a life sentence where defendant was seventeen years old when arrested, and the arresting officers could not find a juvenile rights form and instead used an adult Miranda form and inserted an additional clause asking whether the juvenile wished to have parents present. **State v. Miller,** 658.

§ 1249 (NCI4th). Confessions and other inculpatory statements; form and sufficiency of warnings as to rights

Defendant's confession was not inadmissible because the officer warned him that anything he said could be used against him rather than that anything he said could "and will" be used against him. **State v. Cunningham,** 341.

§ 1259 (NCI4th). Confessions and other inculpatory statements; right to remain silent; what constitutes invocation of right

Defendant did not invoke his right to remain silent by refusing to answer certain questions and by remaining silent after certain questions were asked of him. **State v. Cunningham,** 341.

§ 1261 (NCI4th). Confessions and other inculpatory statements; right to presence of parent, custodian, or guardian generally

There was no error in a capital first-degree murder prosecution which resulted in a life sentence where defendant was seventeen years old when arrested, his mother was brought to the police station, she stepped out of the room at his request and sat on a bench outside an open door where he could see her if he leaned forward, and defendant waived his rights and made a statement. **State v. Miller,** 658.

§ 1262 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights generally

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to exclude his inculpatory statement where defendant waived his rights orally and in writing. **State v. Ocasio,** 568.

EVIDENCE AND WITNESSES—Continued

§ 1278 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; miscellaneous

There was no error in a capital prosecution for first-degree murder and other crimes in which the death penalty was not recommended where defendant's motion to suppress his confessions and statements to law enforcement officers was denied. **State v. Braxton,** 702.

§ 1323 (NCI4th). Confessions and other inculpatory statements; determination of admissibility; necessity for findings

A motion to suppress a first-degree murder defendant's statement to officers was remanded for findings of fact. **State v. Peterson,** 172.

§ 1356 (NCI4th). Proving confessions; sound recordings

There was no error in a first-degree murder prosecution in the admission of inculpatory statements which were not electronically recorded; the North Carolina Supreme Court has ruled against requiring the recordation of in-custody interrogation. **State v. Burrus,** 79.

§ 1482 (NCI4th). Physical evidence generally; bullets

There was no prejudicial error in a noncapital first-degree murder prosecution where the trial court admitted into evidence ammunition and a twenty-two-caliber gun seized from defendant's residence even though the evidence at trial did not link any of the items to the killing of the victim; the nine-millimeter ammunition supported the State's theory of the case and admission of the other items was harmless due to the overwhelming evidence of defendant's guilt. **State v. Bruton,** 381.

§ 1501 (NCI4th). Physical evidence; bloody or torn clothing; victim

The trial court did not err in a prosecution for capital first-degree murder arising from the killing of two police officers by allowing the introduction of the bloody clothes of both officers. **State v. Harden,** 542.

§ 1674 (NCI4th). Admission of photographs; necessity of showing chain of custody

There was no error in a noncapital first-degree murder prosecution in the introduction into evidence of a picture which the pathologist testified appeared to be a picture of the person upon whose body she performed an autopsy; if an item to be introduced had unique features so it is readily identifiable, no chain of custody evidence is necessary. **State v. Taylor,** 31.

§ 1685 (NCI4th). Circumstances where number of photographs held not excessive

Photographs and slides introduced by the State in a prosecution of defendant for the murder of his two-year-old stepdaughter were neither repetitious nor unfairly prejudicial. **State v. Flippen,** 689.

§ 1688 (NCI4th). Photographs of the victims prior to crime

The trial court did not err in a capital first-degree murder prosecution by showing to the jury a photograph of the victim taken before his death. **State v. Norman,** 511.

The trial court did not abuse its discretion in the capital first-degree murder prosecution of defendant for the murder of two police officers by overruling defense objections to the introduction of photographs of the victims where two of the photographs

EVIDENCE AND WITNESSES—Continued

were introduced to illustrate the testimony of the victims' relatives regarding the victims' appearance in life. **State v. Harden,** 542.

§ 1693 (NCI4th). Photographs of homicide victims, generally

Assuming arguendo that the trial court erred by admitting an autopsy photograph on the ground that it was not properly authenticated as a fair and adequate representation of the victim's mouth and lips at the time she received treatment from emergency medical personnel, defendant was not unfairly prejudiced by its admission. **State v. Flippen,** 689.

The trial court did not err in a capital resentencing proceeding by admitting into evidence seven photographs where, although some of the photographs were gruesome, they were relevant to illustrate the circumstances of the killing and tended to establish that the murder was committed during the commission of a sexual offense. **State v. Thomas,** 639.

§ 1694 (NCI4th). Photographs of homicide victims; location and appearance of victim's body

The trial court did not abuse its discretion in the capital first-degree murder prosecution of defendant for the murder of two police officers by overruling defense objections to the introduction of photographs used to illustrate the testimony of police officers who carried the victims to the hospital. **State v. Harden,** 542.

The trial court did not err in a capital first-degree murder prosecution which resulted in a life sentence by permitting the prosecutor to use photographs of the victim to cross-examine defendant where the photographs had been admitted into evidence and published to the jury to illustrate the testimony of the pathologist and various other State's witnesses. **State v. Johnston,** 596.

§ 1700 (NCI4th). Photographs of crime victims; to illustrate testimony of pathologist as to cause of death

The trial court did not err in a capital first-degree murder prosecution by showing to the jury autopsy photographs of the victim. **State v. Norman,** 511.

The trial court did not abuse its discretion in the capital first-degree murder prosecution of defendant for the murder of two police officers by overruling defense objections to the introduction of autopsy photographs of the victims. **State v. Harden,** 542.

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by permitting the introduction of three photographs which were used to illustrate the testimony of the pathologist as to the victim's cause of death. **State v. Ocasio,** 568.

§ 1767 (NCI4th). Experiments and tests; similarity of circumstances or conditions generally

The court did not err in admitting a piece of mounted windowpane glass through which an expert witness had fired a bullet to illustrate his testimony that a bullet had been fired from inside a police car based upon the coning effect the bullet had on the window glass of the car, although the coning was more pronounced in the glass which was introduced than in the police car glass. **State v. Cunningham,** 341.

§ 1958 (NCI4th). Business entries, records, and reports; medical records and other medical documents

A triage nurse's report was not sufficiently authenticated to be admissible as part of the medical records the pathologist relied upon to formulate his opinion as to a murder victim's injuries. **State v. Flippen,** 689.

EVIDENCE AND WITNESSES—Continued

§ 1980 (NCI4th). Search warrants and related documents

Defendant opened the door for the State on cross-examination to have an officer read the entire affidavit for a warrant to search defendant's home which revealed that he had previously served a prison sentence for a felony. **State v. Cunningham,** 341.

§ 2051 (NCI4th). Opinion testimony by lay person; instantaneous conclusions of the mind; "shorthand statements of fact"

The trial court did not err in a capital prosecution for first-degree murder which resulted in a life sentence by allowing the victim's girlfriend to testify with respect to the victim's options in leaving the scene and with respect to defendant's intent at that time. **State v. Johnston,** 596.

Testimony that a defendant on trial for felony murder told a witness to borrow money from his mother "like he might have been desperate for money" was admissible as a shorthand statement of fact. **State v. Workman,** 482.

§ 2084 (NCI4th). Opinion testimony by lay persons; sanity or mental condition generally

There was no prejudicial error in a noncapital first-degree murder prosecution where testimony was allowed that defendant was neater than his brother. **State v. Taylor,** 31.

§ 2148 (NCI4th). Opinion testimony by experts; generally; when allowed; requirement of relevancy

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excluding expert defense testimony about whether the victims, police officers, were following proper police procedures at the time they were murdered. **State v. Harden,** 542.

§ 2172 (NCI4th). Basis for expert's opinion; necessity to disclose facts underlying conclusions; request to state

In a prosecution for the first-degree murders of two grocery store workers wherein defendant presented expert opinion testimony that defendant panicked and did not act voluntarily when he heard two screams inside the grocery store, and that those screams triggered a "robbery/murder script" that did not originate in defendant's mind, testimony that defendant identified the codefendant as the person who implanted the "script" in his mind was not admissible under Rule 705 to show the basis for the expert's opinion and was properly excluded. **State v. Workman,** 482.

§ 2266 (NCI4th). Opinion testimony by experts; conclusion that wounds were characteristic of battered child syndrome

The trial court did not abuse its discretion in a prosecution for capital first-degree murder and felony child abuse by permitting the State to present to the jury testimony from an expert in pediatrics and child abuse with respect to battered child syndrome. **State v. Elliott,** 242.

§ 2267 (NCI4th). Opinion testimony by experts; cause of death; opinion based on examination of body after death

The trial court did not err by permitting a pathologist's testimony that the child victim died as a result of a "homicidal assault" where the pathologist used this term to differentiate the victim's death from a death resulting from injuries sustained over a period of time. **State v. Flippen,** 689.

EVIDENCE AND WITNESSES—Continued

§ 2363 (NCI4th). Opinion testimony by experts; fire and arson

A witness accepted as an expert in the field of incendiary fires was qualified to render an opinion that a fire was intentionally set, and his opinion was helpful to the jury in reaching its decision. **State v. Hales,** 419.

§ 2479 (NCI4th). Exclusion or sequestration of witnesses; criminal prosecutions generally

The trial court did not abuse its discretion in denying defendant's pretrial motion to sequester the witnesses in a capital trial. **State v. Ball,** 290.

§ 2528 (NCI4th). Qualification of witnesses; persons of limited mental capacity; ability to express himself as to matter

The trial court did not err in a capital prosecution for first-degree murder by not acting ex mero motu to disqualify the victim's mother as a witness where the witness had difficulty answering some of the questions and gave answers that were not responsive, and the court indicated at a bench conference that it believed the witness was of "low mentality" and said that it would allow the prosecutor to ask leading questions. **State v. Cox,** 184.

§ 2750.1 (NCI4th). Scope of examination; when defendant "opens door"

Defendant opened the door for the State on cross-examination to have an officer read the entire affidavit for a warrant to search defendant's home which revealed that he had previously served a prison sentence for a felony. **State v. Cunningham,** 341.

There was no prejudicial error in a capital prosecution for first-degree murder which resulted in a life sentence where defense counsel asked the victim's girlfriend whether the victim was under the influence of alcohol the night of the murder, whether the victim was aggressive, and whether she and the victim were wanting to fight that night, and asked on redirect whether the witness and victim had ever been in a fight with anyone or if the victim had ever been in a fight in her presence. Defense counsel had cross-examined the witness in a manner suggesting that the victim was looking for a fight on the night of his murder. **State v. Johnston,** 596.

There was no error in a capital prosecution for first-degree murder which resulted in a life sentence where the defense brought out on cross-examination of the pathologist who performed the autopsy on the victim that the pathologist had performed only three or four autopsies involving stab wounds at the time he did the autopsy and that he had consulted with two of his colleagues; the prosecutor asked on redirect which colleagues had been consulted; and the pathologist identified his colleagues and further stated that they had concurred with his opinions. Defendant opened the door by creating an inference on cross-examination. **Ibid.**

§ 2809 (NCI4th). Leading questions; questions which did not aid party's case

There was no prejudicial error in a capital first-degree murder prosecution where defendant contended that the prosecutor improperly led a twelve-year-old victim and that the prosecutor's incorrect repetition of the answer was the only evidence that the defendant had any intention to kill the victim. **State v. Norman,** 511.

§ 2815 (NCI4th). Leading questions; particular situations generally

The trial court did not abuse its discretion in a capital prosecution for first-degree murder by allowing the State to ask leading questions where the witness had difficulty answering some of the questions and gave answers that were not respon-

sive, and the court indicated at a bench conference that it believed the witness was "of low mentality" and said that it would allow the prosecutor to ask leading questions. **State v. Cox,** 184.

§ 2817 (NCI4th). Leading questions; questions directing attention to subject matter at hand

The trial court did not err in a first-degree murder prosecution in allowing the State to ask questions which defendant contends were leading. **State v. Burrus,** 79.

§ 2873 (NCI4th). Scope and extent of cross-examination generally; relevant matters

The trial court did not err by refusing to permit defendant to ask a witness on cross-examination if he could identify a flashlight as the one he testified he had observed where the flashlight was not introduced into evidence. **State v. Cunningham,** 341.

§ 2902 (NCI4th). Redirect examination; clarification of testimony on direct

There was no plain error in a noncapital first-degree murder prosecution where a State's witness was allowed to testify about a prior burglary by defendant where the prosecutor introduced the statement only on redirect examination in response to defense counsel's questioning of the witness. **State v. Ocasio,** 568.

§ 2903 (NCI4th). Redirect and recross examination; explanation of matter elicited on cross-examination

The trial court did not err in a noncapital first-degree murder prosecution by allowing testimony from the victim's uncle on redirect that he was scared for his nephew and that his nephew was worried where the testimony clarified questions asked on cross-examination. **State v. Taylor,** 31.

§ 2909 (NCI4th). Redirect and recross examination; examination as to particular matters elicited on cross-examination

There was no error in a noncapital first-degree murder prosecution where evidence of the character of the victim and the two defendants was introduced on redirect examination in response to questions asked on cross-examination. **State v. Taylor,** 31.

§ 2913 (NCI4th). Recross-examination; repetitious inquiry

The trial court in a capital prosecution for first-degree murder which resulted in a life sentence did not err by not allowing defendant to elicit testimony from the victim's companion that the victim was not in an aggressive posture the night that he was murdered where the question had already been asked and answered. **State v. Johnston,** 596.

§ 3165 (NCI4th). Corroboration; prior consistent statements; when evidence is offered

The trial court did not err by refusing to allow defendant's self-serving post-arrest statement to be read to the jury in a capital sentencing proceeding prior to defendant's own testimony. **State v. Ball,** 290.

§ 3191 (NCI4th). Corroboration; testimony by law enforcement officials; statement by State's witness

The trial court did not err in a noncapital first-degree murder prosecution by allowing a police officer to testify that a friend of the victim had said that one defend-

ant had shot the victim where the testimony was admitted to corroborate the testimony of the friend. **State v. Taylor,** 31.

The trial court did not err in a noncapital first-degree murder prosecution by admitting evidence that a deputy was approached by a friend of the victim at the hospital after the shooting and told that defendant had been fighting with the victim. **Ibid.**

§ 3199 (NCI4th). Corroboration; memoranda

There was no error in a noncapital first-degree murder prosecution in allowing the State to introduce the notes an officer made of interviews with several of the witnesses where the notes were consistent with the witnesses' testimony and were introduced to corroborate the testimony of the witnesses. **State v. Taylor,** 31.

§ 3210 (NCI4th). Credibility of witnesses; demeanor of witness

Testimony by a witness that the death of a murder victim had affected his ability to sleep was properly admitted to explain the demeanor of the witness. **State v. Taylor,** 31.

HOMICIDE

§ 44 (NCI4th). When is homicide committed in perpetration of felony

A killing is committed in the perpetration of a kidnapping when there is no break in the chain of events so that the kidnapping and the homicide are part of the same series of events, forming one continuous transaction. **State v. Roseborough,** 121.

§ 230 (NCI4th). Sufficiency of evidence; first-degree murder generally

The trial court did not err in a first-degree murder prosecution by denying defendant's motions to dismiss and for a directed verdict based on insufficient evidence where there was overwhelming evidence of defendant's guilt. **State v. Burrus,** 79.

§ 244 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation, generally

The trial court did not err by overruling defendant's objection to the submission to the jury of the charge of first-degree murder as to one victim on the theory of premeditation and deliberation. **State v. Leary,** 109.

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution. **State v. Norman,** 511.

§ 250 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; prior altercations, threats, and the like, along with other evidence

The trial court did not err in a noncapital first-degree murder prosecution by not granting defendants' motion to dismiss based on insufficient evidence of premeditation and deliberation where defendants contended that the killing took place while they were under the influence of a quarrel or scuffle, but premeditation and deliberation may easily be inferred from the State's evidence. **State v. Taylor,** 31.

The circumstantial evidence in this case was sufficient to permit the jury to infer that defendant killed his wife with premeditation and deliberation so as to support his conviction of first-degree murder. **State v. Crawford,** 65.

HOMICIDE—Continued

§ 253 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; nature and execution of crime; severity of injuries, along with other evidence

There was sufficient evidence to support a verdict of guilty of first-degree murder based on premeditation and deliberation in a prosecution arising from the death of a two-year-old child. **State v. Elliott,** 242.

The State's evidence of a brutal beating received by the two-year-old victim was sufficient to support an inference of premeditation and deliberation by defendant and thus to support submission of an issue of defendant's guilt of first-degree murder. **State v. Flippen,** 689.

§ 255 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; where defendant continued to inflict injuries after victim felled

There was sufficient evidence of premeditation and deliberation by defendant, including his infliction of three gunshot wounds after the victim had been shot two times and lay on the ground begging for his life, to support submission to the jury of an issue as to defendant's guilt of first-degree murder. **State v. Lane,** 618.

§ 256 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; evidence concerning planning and execution of crime

The trial court did not err in a noncapital first-degree murder prosecution by denying a defendant's motion to dismiss the charge at the close of all the evidence where the defendant confronted the victim armed with a loaded, semiautomatic pistol, began an argument, intentionally deceived the victim by telling the victim he did not have a gun, pointed the gun at the victim when the victim attempted to flee, shouted an obscenity-laced statement, and shot the victim in the back. **State v. Bruton,** 381.

§ 257 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; where defendant took weapon with apparent intent to use weapon

The State's evidence was sufficient to support defendant's conviction of first-degree murder based upon the theory of premeditation and deliberation where defendant took a gun to his estranged wife's apartment, broke into the apartment, and chased the victim as he fled from the apartment and shot him in the back. **State v. Singletary,** 95.

The trial court did not err in a capital first-degree murder prosecution arising from the shooting of two police officers by denying defendant's motion to dismiss the charges where defendant specifically argued that there was insufficient evidence that the killing was premeditated and deliberate, but the State's evidence tended to show that defendant's intent changed sometime during his struggle with the officers from a mere attempt to flee to the killing of the officers to further his escape. **State v. Harden,** 542.

§ 262 (NCI4th). Sufficiency of evidence; what constitutes murder in perpetration of felony; unbroken chain of events

A felonious assault on one victim occurred during the same series of events as the shooting of a second victim and had a causal relationship with the shooting so that the trial court did not err in submitting to the jury the charge of first-degree murder of the second victim under the felony murder theory. **State v. Price,** 583.

HOMICIDE—Continued

§ 266 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; robbery generally

The State's evidence was sufficient to support defendant Shoffner's conviction on two counts of felony murder predicated upon the felony of attempted armed robbery. **State v. Workman,** 482.

§ 278 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; arson

Evidence that defendant used gasoline and fire to burn a mobile home while it was occupied was sufficient to show that the underlying felony of willfully setting fire to a dwelling of which defendant was an occupant was committed with a deadly weapon so as to support defendant's conviction of felony murder. **State v. Hales,** 419.

§ 283 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; kidnapping

The State's evidence was sufficient for the jury reasonably to infer that the killing of one victim and the kidnapping of a second victim were part of one continuous chain of events so that the kidnapping was an appropriate predicate felony to support defendant's conviction of felony murder even though the murder occurred before the kidnapping. **State v. Roseborough,** 121.

The trial court did not err in a noncapital prosecution for first-degree murder by denying defendant's motions to dismiss numerous charges where defendant was convicted of two counts of first-degree murder solely on the basis of felony murder with the underlying felonies being kidnapping and the evidence was clearly sufficient to show that defendant acted in concert in committing these offenses. **State v. Ocasio,** 568.

§ 285 (NCI4th). Sufficiency of evidence; second-degree murder; based on amount of involvement in the crime

The evidence in a first-degree murder prosecution was sufficient to support one defendant's conviction of second-degree murder where the evidence was uncontested that this defendant was present at the scene of the crime and substantial evidence supported a finding that he acted in concert to pursue a common plan or purpose to murderously assault the victim. **State v. Bruton,** 381.

§ 357 (NCI4th). Sufficiency of evidence; effect of lack of evidence of involuntary manslaughter

There was no error in a noncapital first-degree murder prosecution of two defendants where one defendant contended that the trial court erred by refusing to instruct on involuntary manslaughter, but the jury could not have found him guilty of involuntary manslaughter even if he was culpably negligent in discharging his weapon because the evidence was undisputed that the other codefendant fired the shot which killed the victim. **State v. Bruton,** 381.

§ 374 (NCI4th). Sufficiency of evidence; acting in concert; first-degree murder

Because defendant acted in concert to commit the first-degree kidnapping of one victim, and the second victim was killed in the perpetration of the kidnapping, defendant is guilty of felony murder for the killing of the second victim. **State v. Roseborough,** 121.

HOMICIDE—Continued

§ 446 (NCI4th). Instructions; presumption or inference of unlawfulness and malice; use of hands or feet as deadly weapon

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the court's instruction on malice where defendant contended that the instruction unconstitutionally reduced the State's burden of proof. The instruction informed the jury that it could infer malice from an attack by hand alone when the attack was made by a strong or mature person upon a weaker or defenseless person, but did not require such an inference. **State v. Elliott,** 242.

§ 477 (NCI4th). Instructions; motive

The trial court did not commit prejudicial error in a murder case by failing to include in its charge on motive an instruction that "the absence of motive is equally a circumstance to be considered on the side of innocence." **State v. Hales,** 419.

There was no plain error in a capital prosecution for first-degree murder where defendant did not request and the court did not give an instruction that absence of a motive is a circumstance which could be considered in determining defendant's guilt or innocence. **State v. Elliott,** 242.

§ 478 (NCI4th). Instructions; transferred intent

The trial court did not err by instructing the jury that defendant would be guilty of first-degree murder under the doctrine of transferred intent if the jury found beyond a reasonable doubt that "defendant intended to kill another person with premeditation and deliberation and that by mistake she killed the deceased in this case." **State v. Hales,** 419.

§ 482.1 (NCI4th). Instructions; inference of premeditation and deliberation

There was no plain error in the trial court's instruction on premeditation and deliberation in a prosecution for capital first-degree murder where the instruction, which was based upon the pattern jury instruction, did not permit the jury to infer premeditation and deliberation from lack of evidence of provocation and was consistent with the rule that lack of provocation by the deceased is a circumstance that may be considered in determining premeditation and deliberation. **State v. Elliott,** 242.

§ 483 (NCI4th). Instructions; premeditation and deliberation; definitions and use of terms

There was no plain error in a prosecution for capital first-degree murder in the trial court's instruction on premeditation and deliberation where the court did not instruct the jury that a child was incapable of provocation and the instruction was consistent with the pattern jury instructions. **State v. Elliott,** 242.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

The trial court did not err by instructing the jury that premeditation and deliberation could be inferred from certain listed circumstances, including lack of provocation, even if the evidence did not support a finding of lack of provocation by the victim. **State v. Crawford,** 65.

§ 493 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

There was no plain error in a prosecution for capital first-degree murder and felony child abuse in the court's instruction on premeditation and deliberation. **State v. Elliott,** 242.

HOMICIDE—Continued

§ 495 (NCI4th). Instructions; matters considered in proving premeditation and deliberation; anger, passion, and the like where killing was product of premeditation and deliberation

The trial court did not err in a capital murder prosecution by refusing to instruct the jury on the elements of premeditation and deliberation pursuant to defendant's request where the only substantive difference between the instruction given and defendant's requested instruction is that defendant's requested instruction requires the deliberation to occur before the scuffle or quarrel began, which is an incorrect statement of the law. **State v. Harden,** 542.

§ 501 (NCI4th). Instructions; felony murder rule; instruction on murder along with separate and distinct felony

Where the court instructed the jury that to convict under the felony murder rule, the State must prove that "during the commission of the felonious assault, defendant killed the victim," the trial court's omission of the phrase "during the commission of" when the court thereafter read the summary paragraph on felony murder was not prejudicial error where the court later specifically corrected the instruction when it repeated the summary paragraph in its entirety. **State v. Price,** 583.

§ 506 (NCI4th). Instructions; felony murder rule; where more than one felony allegedly committed in the same transaction

The trial court did not err by denying defendant's motion to arrest judgment on each of three robbery convictions underlying defendant's felony murder conviction where the trial court arrested judgment in the case of the robbery which was the basis for the felony murder conviction and the instructions in their entirety clearly informed the jury that the felony underlying the murder conviction was the robbery of the murder victim and no other. **State v. Braxton,** 702.

§ 509 (NCI4th). Instructions; felony murder rule; relationship to acting in concert, aiding and abetting, and the like generally

Where the trial court's instructions as a whole correctly conveyed to the jury the law of felony murder based on the underlying felony of kidnapping and the principle of acting in concert, the fact that the court also gave an acting in concert instruction using the word "murder" did not improperly change the theory of the case to add a specific intent element to the felony murder charge. **State v. Roseborough,** 121.

§ 519 (NCI4th). Instructions; second-degree murder; intentional killing by use of deadly weapon

Any error in the court's instruction that required the jury to find an intent to kill rather than an intent to inflict a wound which caused death in order to convict defendant of second-degree murder was favorable to defendant and not prejudicial. **State v. Cunningham,** 341.

§ 552 (NCI4th). Instructions; second-degree murder as lesser-included offense of first-degree murder generally; lack of evidence of lesser crime

The trial court in a first-degree murder prosecution did not err by refusing to instruct the jury on second-degree murder where the State offered evidence that the murder was premeditated and deliberate, and defendant simply denied that he was the perpetrator. **State v. Lane,** 618.

HOMICIDE—Continued

§ 558 (NCI4th). Instructions; voluntary manslaughter as lesser included offense of higher degrees of homicide generally

There was no error in a capital first-degree murder prosecution which resulted in a life sentence where the court refused to instruct the jury on voluntary manslaughter. **State v. Johnston,** 596.

§ 596 (NCI4th). Instructions; self-defense; definitions of terms and use of particular words or phrases generally

The trial court did not err in giving a self-defense instruction that defendant must have reasonably believed that it was necessary to kill the victim in order to protect himself from death or serious bodily injury. **State v. Crawford,** 65.

§ 686 (NCI4th). Misadventure or accidental death; failure to instruct as plain error

The trial court did not commit plain error by failing to charge on accident in a first-degree murder prosecution arising from the burning of a mobile home where the jury found defendant guilty of first-degree murder based upon an intentional killing with premeditation and deliberation. **State v. Hales,** 419.

§ 705 (NCI4th). Cure of error in instructions by conviction; effect of alternate theory to support conviction of first-degree murder

Defendant was not prejudiced by the trial court's submission of the charge of first-degree murder based on premeditation and deliberation where the jury found defendant guilty only on the theory of felony murder. **State v. Price,** 583.

§ 706 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to voluntary manslaughter instruction

Any error in the trial court's failure to give the jury a special instruction on heat of passion as it relates to discovering a spouse in the act of adultery was harmless where the jury was instructed on voluntary manslaughter in addition to first-degree and second-degree murder, and the jury found defendant guilty of first-degree murder. **State v. Singletary,** 95.

Any error in the trial court's failure to submit voluntary manslaughter was harmless where the court submitted first-degree murder based on premeditation and deliberation and second-degree murder, and the jury found defendant guilty of first-degree murder. **State v. Cunningham,** 341.

The trial court's failure to submit to the jury in a first-degree murder prosecution the lesser included offense of voluntary manslaughter based on imperfect self-defense and heat of passion, if error, was harmless where the jury found defendant guilty of first-degree murder based on felony murder, and the trial court submitted to the jury possible verdicts of guilty of first-degree murder based on felony murder, guilty of first-degree murder based on premeditation and deliberation, guilty of second-degree murder, or not guilty. **State v. Price,** 583.

§ 709 (NCI4th). Cure of error in instructions by conviction; alleged error in regard to involuntary manslaughter instruction

Any error in the court's failure to instruct on involuntary manslaughter was harmless where the jury was properly instructed on first-degree and second-degree murder and returned a verdict of first-degree murder based on premeditation and deliberation. **State v. Hales,** 419.

HOMICIDE—Continued

§ 727 (NCI4th). Propriety of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger

The trial court erred in a noncapital murder prosecution which resulted solely in felony murder convictions by failing to arrest judgments on the underlying convictions for kidnapping. **State v. Ocasio,** 568.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 62 (NCI4th). Tort liability generally

The continuing course of treatment doctrine is the law of North Carolina and tolls the running of the statute of limitations for the period between the original negligent act and the ensuing discovery and correction of its consequences; the claim still accrues at the time of the original negligent act or omission. **Horton v. Carolina Medicorp, Inc.,** 133.

The continuing course of treatment doctrine applies to institutional defendants. **Ibid.**

INDIGENT PERSONS

§ 19 (NCI4th). Supporting services; psychologist and psychiatrist

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for funds to hire a psychiatrist or psychologist where defendant did not show that retention of experts would materially assist in the preparation of his case. **State v. Sokolowski,** 428.

The hearing court erred in denying defendant's pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense in a noncapital prosecution for the first-degree murder of his estranged wife. **State v. Jones,** 722.

§ 23 (NCI4th). Supporting services; ballistics experts

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for funds to hire a firearms and ballistics expert where defendant did not show that the retention of experts would materially assist in the preparation of his case. **State v. Sokolowski,** 428.

§ 24 (NCI4th). Supporting services; other experts

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion for funds to hire a forensic pathologist and a behavioral pharmacologist where he did not show that retention of experts would materially assist in the preparation of his case. **State v. Sokolowski,** 428.

INJUNCTIONS

§ 7 (NCI4th). Restraint of act already done

Plaintiff's complaint was sufficient to allow the trial court to order a mandatory injunction if plaintiff prevailed on the merits and the court deemed a mandatory injunction just and proper. **Roberts v. Madison County Realtors Assn.,** 394.

A mandatory injunction was not automatically unavailable to plaintiff in an action involving the merger of the Madison County Realtors Association and the Asheville Board of Realtors once the merger occurred, and plaintiff's claim for equitable relief was thus not rendered moot by the merger. **Ibid.**

JUDGES, JUSTICES, AND MAGISTRATES

§ 36 (NCI4th). Censure or removal; conduct prejudicial to the administration of justice; particular illustrations

A district court judge is censured based on his actions in a worthless check case in which the prosecuting witness was a personal friend of his and his issuance of an ex parte arrest order in a custody dispute. **In re Ammons,** 195.

JUDGMENTS

§ 237 (NCI4th). Persons regarded as privies; units of government

Where the State brings an action to establish paternity and recover public assistance paid on behalf of a State-administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program, and the doctrines of res judicata and collateral estoppel did not bar the State's action where a similar action against defendant by the Forsyth County DSS had been voluntarily dismissed with prejudice. **State ex rel. Tucker v. Frinzi,** 411.

JURY

§ 30 (NCI4th). Competency and qualification of jurors; discretion of trial judge; review of decision

There was no merit to defendant's assignment of error that G.S. 15A-1211(b) was violated because a deputy clerk of court, rather than the trial court, examined the basic qualifications of the prospective jurors in a capital trial where defendant failed to follow the procedures set out in that statute for challenges to the jury panel. **State v. Workman,** 482.

§ 32 (NCI4th). Exemptions and excuses from jury duty generally

The trial court did not err in a prosecution for murder, kidnapping, and robbery by denying defendant's motion to dismiss the jury venire after the district court judge excused jurors outside the presence of defendant and his counsel. **State v. Leary,** 109.

§ 70 (NCI4th). Procedure for selecting trial jury generally

The trial court did not err by utilizing a jury selection information sheet in a capital trial which failed to define for prospective jurors the concept of mitigation. **State v. Ball,** 290.

§ 79 (NCI4th). Excusing jurors generally

The trial court did not err by informing the jury venire in a capital trial that the court was seeking jurors with no predisposition concerning the case. **State v. Ball,** 290.

§ 82 (NCI4th). Excusing jurors; hardship

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing the only remaining black female because of personal commitments. **State v. Norman,** 511.

§ 88 (NCI4th). Discrimination on basis of race generally in selection of jury

The trial court did not abuse its discretion in a capital first-degree murder prosecution by excusing the only remaining black female because of personal commit-

ments. Although defendant argued that the juror should not have been considered in isolation, defendant is not entitled to a petit jury composed in whole or in part of persons of a certain race. **State v. Norman,** 511.

§ 103 (NCI4th). Examination of veniremen individually or as a group; sequestration of venire generally

The trial court did not err in a capital first-degree murder prosecution by denying defendant's motion for individual voir dire and sequestration of prospective jurors. **State v. Wooten,** 316.

§ 110 (NCI4th). Examination of veniremen individually or as group; sequestration of venire; prejudice or preconceived opinions about case

The trial court did not abuse its discretion in a prosecution arising from a murder and robbery by denying defendant's motion for an individual voir dire of prospective jurors. **State v. Burrus,** 79.

§ 114 (NCI4th). Examination of veniremen individually or as group; to give fair trial in capital cases

The trial court did not err by denying defendant's motion for individual voir dire in a capital trial without affording defendant the opportunity to present evidence or argument in support of his motion. **State v. Ball,** 290.

§ 115 (NCI4th). Propriety and scope of voir dire examination generally

There was no abuse of discretion in a first-degree murder prosecution in not allowing defendant to rehabilitate certain prospective jurors. **State v. Burrus,** 79.

§ 123 (NCI4th). Voir dire examination; questions tending to stake out or indoctrinate jurors

The trial court properly refused to permit defense counsel to ask prospective jurors how many of them thought that drug abuse was irrelevant to punishment in this case because the question was an improper attempt to "stake out" the jurors on how they would react to evidence of defendant's history of drug abuse. **State v. Ball,** 290.

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding a question which seemed designed to determine how well prospective jurors would stand up to other jurors in the event of a split decision. **State v. Elliott,** 242.

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding a question to a prospective juror where defendant asked whether the juror understood that he has the right to stand by his beliefs. **Ibid.**

The trial court did not abuse its discretion during jury selection for a first-degree murder prosecution by preventing defense counsel from asking prospective jurors whether they would hold to the presumption of innocence. **Ibid.**

§ 124 (NCI4th). Voir dire examination; ambiguous and confusing questions; incorrect or inadequate statements of law

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by excluding the question will each of you make up your own mind about each and every aspect of this case; in the context of this portion of

the voir dire, the excluded question may have the tendency to suggest that jurors should make decisions without considering the opinions of other jurors. **State v. Elliott,** 242.

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by not allowing defendant to explain malice to prospective jurors where defendant's attempt to define malice did not provide the jury with a complete statement of law. **Ibid.**

§ 127 (NCI4th). Voir dire examination; questions relating to juror's qualifications, personal matters, and the like generally

The trial court did not err by refusing to permit defense counsel to ask a prospective juror who indicated that he had utilized the services of a therapist whether he had found the treatment of the therapist helpful. **State v. Ball,** 290.

§ 131 (NCI4th). Voir dire examination; perceptions regarding criminal justice system

The trial court did not abuse its discretion in a capital prosecution for first-degree murder which resulted in a life sentence by permitting the prosecutor to ask prospective jurors if they understood that the State might call family members and associates of defendant as "hostile" witnesses. **State v. Johnston,** 596.

§ 139 (NCI4th). Voir dire examination; presumption of innocence and principle of reasonable doubt

There was no prejudicial error during jury selection for a capital first-degree murder prosecution by sustaining the State's objection when defendant asked whether a prospective juror understood that satisfies beyond a reasonable doubt means fully satisfies or entirely convinces you where the court read to the jury a pattern jury instruction containing that phrase and correctly instructed the entire jury at the end of each phase of the trial. **State v. Norman,** 511.

§ 141 (NCI4th). *Voir dire examination; parole procedures*

Defendant was not denied due process by the trial court's refusal to allow him to question prospective jurors in a capital trial about their understanding of parole eligibility. **State v. Roseboro,** 364.

The trial court properly denied defendant's pretrial motion for permission to question potential jurors in a capital sentencing proceeding regarding their beliefs about parole eligibility. **State v. Wilkinson,** 198.

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution by denying defendant's pretrial motion to permit voir dire of prospective jurors on their perceptions of parole eligibility. **State v. Elliott,** 242.

The trial court did not err in a capital resentencing by denying defendant's motion to question potential jurors concerning parole eligibility. **State v. Thomas,** 639.

§ 145 (NCI4th). Voir dire examination; in relation to cases involving capital punishment generally

The trial court did not err in a first-degree murder prosecution by giving prospective jurors a four-page outline of the law where the court made it clear that the first duty of the jury was to determine defendant's guilt or innocence and that the discussion of sentencing issues was simply to help the jurors understand the jury selection process. **State v. Wooten,** 316.

JURY—Continued

§ 148 (NCI4th). Propriety of prohibiting voir dire or inquiry into attitudes toward capital punishment

The trial court did not err during jury selection for a first-degree murder by disallowing questions asking a prospective juror whether he could think of any situation where he could vote to impose a sentence other than death for first-degree murder. **State v. Elliott,** 242.

Defendant could not show prejudicial error during jury selection for a capital first-degree murder prosecution where the trial court restricted voir dire of a particular juror, defendant exercised a peremptory challenge, and defendant did not exhaust his peremptory challenges. **Ibid.**

§ 150 (NCI4th). Voir dire examination; propriety of rehabilitating jurors challenged for cause due to opposition to death penalty

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution where defendant contended that there was disparate treatment of defendant and the State and that there were sixteen instances in which the court denied rehabilitation of prospective jurors who were unable to vote for the death penalty, in contrast to the court's allowing extensive rehabilitation of prospective jurors who believed the death penalty should be imposed in every case of first-degree murder. **State v. Norman,** 511.

§ 153 (NCI4th). Voir dire examination; whether jurors could vote for death penalty verdict

The trial court did not err in a capital first-degree murder prosecution by allowing the prosecutor to ask during voir dire whether prospective jurors could write the word death and sign their names on the sentence recommendation form if chosen as a foreperson and the State proved the case beyond a reasonable doubt where the prosecutor subsequently peremptorily challenged jurors expressing hesitancy about returning a death sentence. **State v. Wooten,** 316.

§ 172 (NCI4th). Challenges to the array or panel; violation of fair cross-section requirement for juries

A defendant in a capital first-degree murder prosecution was not deprived of his Sixth Amendment right to a trial by a jury representing a fair cross-section of the community where the court excused seven of nine African-American women and two of four African-American men after they said they would be unable to vote for the death penalty. **State v. Norman,** 511.

§ 190 (NCI4th). Challenges for cause; necessity of exhausting peremptory challenges generally

A defendant in a capital first-degree murder prosecution satisfied the mandates of G.S. 15A-1214(h) for preserving an assignment of error from a denial of a challenge for cause during jury selection where defendant challenged a prospective juror for cause; the challenge was denied; defendant exhausted his peremptory challenges and renewed his challenge for cause as to that juror; and the trial court also denied that challenge. **State v. Hartman,** 445.

§ 191 (NCI4th). Challenges for cause; necessity of exhausting peremptory challenges to preserve exception to denial of challenge

Defendant failed to preserve his right to assign error to the denial of challenges for cause where he did not renew any of his previously denied challenges for cause after exhausting his peremptory challenges. **State v. Ball,** 290.

JURY—Continued

§ 203 (NCI4th). **Challenges for cause; effect of preconceived opinions, prejudices, or pretrial publicity; where juror indicated ability to be fair and impartial**

The trial court did not err during jury selection for a first-degree murder prosecution by denying defendant's motion to excuse a prospective juror for cause where the juror had stated upon further questioning that he could put out of his mind what he had heard before and decide the case solely on what he heard in the courtroom. **State v. Burrus,** 79.

The trial court did not err during jury selection for a capital first-degree murder prosecution by denying challenges for cause to two jurors who stated that this particular homicide was "terrible" and "painful" where both jurors stated that they could follow the law. **State v. Norman,** 511.

The trial court did not err during jury selection for a capital first-degree murder prosecution by not excusing for cause a prospective juror who worked as a telecommunicator for emergency services and who had dispatched rescue vehicles to this crime scene, whose wife worked for the owner of the convenience store where the crime occurred, and who knew "a little" about the case, but who stated unequivocally that he could be a fair and impartial juror and follow the law. **Ibid.**

§ 204 (NCI4th). **Challenges for cause; inability to render verdict in accordance with law due to matter of conscience**

The trial court did not abuse its discretion during jury selection in a capital first-degree murder prosecution by excusing two prospective jurors for cause where one stated that she would require the State to prove each element beyond all doubt and the other that he would hold the State to a higher burden at the sentencing phase. **State v. Norman,** 511.

§ 205 (NCI4th). **Challenges for cause; acquaintance or friendship**

The trial court did not abuse its discretion during jury selection for a capital first-degree murder prosecution where a prospective juror was acquainted with the victim and the prospective witnesses but never fluctuated in her clear and decisive answers to both the trial court and the prosecutor that she could remain a fair and impartial juror. **State v. Hartman,** 445.

§ 219 (NCI4th). **Challenges for cause; 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 err by excusing for cause three prospective jurors who stated unequivocally that they would be unable to follow the law and recommend a sentence of death even if that was what the facts and circumstances required. **State v. Wilkinson,** 198.

§ 222 (NCI4th). **Challenges for cause; scruples against, or belief in, capital punishment; necessity that veniremen be unequivocal in opposition to death penalty generally**

The trial court did not err in jury selection for a capital first-degree murder prosecution by excusing for cause twelve prospective jurors based on their answers to the trial court's death qualification questions. **State v. Norman,** 511.

The trial court did not err by excusing for cause a prospective juror who stated in response to questions by the trial court and the prosecutor that she did not think she could vote for the death penalty. **State v. Flippen,** 689.

JURY—Continued

§ 226 (NCI4th). Challenges for cause; scruples against, or belief in, capital punishment; rehabilitation of jurors

The trial court did not err by excusing prospective jurors for cause on the basis of their death penalty views without allowing defendant an opportunity to rehabilitate them. **State v. Flippen,** 689.

§ 227 (NCI4th). Challenges for cause; exclusion of veniremen based on opposition to capital punishment; effect of equivocal, uncertain, or conflicting answers

The trial court did not err by allowing the State's challenge for cause of a prospective juror who was never able to state clearly, through her responses in toto, her willingness to temporarily set aside her own beliefs and render a verdict that would require the death penalty. **State v. Ball,** 290.

§ 232 (NCI4th). Constitutionality of death qualification of juries

Death qualification of a jury does not result in a guilt-prone jury and does not deny a defendant the right of a fair trial and fair sentencing proceeding. **State v. Workman,** 482.

§ 235 (NCI4th). Propriety of death-qualifying jury

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to seat jurors without regard to death-qualification and by denying his request for separate sentencing jury. **State v. Leary,** 109.

§ 248 (NCI4th). Use of peremptory challenge to exclude on the basis of race generally

The trial court did not err in a capital prosecution for first-degree murder by excusing a prospective juror on a peremptory challenge by the State after a *Batson* challenge without making any findings of fact or conclusions of law and without giving defendant an opportunity for surrebuttal. **State v. Peterson,** 172.

§ 257 (NCI4th). Use of peremptory challenge to exclude on the basis of race; sufficiency of evidence to establish prima facie case

There was no error in a capital prosecution for first-degree murder where the State used a peremptory challenge to excuse a black juror and defendant asserted that the challenge was exercised solely on the basis of race. **State v. Peterson,** 172.

§ 258 (NCI4th). Peremptory challenges; primia facie case; effect of some blacks not being peremptorily challenged by State, along with other circumstances

The trial court did not err during jury selection for a capital first-degree murder prosecution by finding that defendant had not made out a prima facie case of discrimination in the State's use of a peremptory challenge where the judge found that the State had not previously used a peremptory challenge to strike an African-American juror, that an African-American man was seated on the panel, and that there was no discernible pattern of removing African-American jurors. **State v. Norman,** 511.

§ 260 (NCI4th). Effect of racially neutral reasons for exercising peremptory challenges

There was no error in a capital murder prosecution in the prosecutor's use of peremptory challenges where there was sufficient evidence to support the trial court's finding that the reasons proffered by the prosecutor for the challenges were race neutral. **State v. Harden,** 542.

JURY—Continued

§ 262 (NCI4th). Use of peremptory challenge to exclude on basis of beliefs in relation to capital punishment generally

Defendant's constitutional rights were not violated when the trial court allowed the prosecutor to peremptorily challenge several prospective jurors who showed reluctance about imposing the death penalty. **State v. Wilkinson,** 198.

§ 266 (NCI4th). Swearing of jury

There was no plain error in a capital resentencing where defendant alleged that the case was not tried before a jury duly sworn in open court in the presence of defendant and his counsel but, to the extent that the record shows anything, it shows that the jurors were duly sworn. **State v. Thomas,** 639.

LARCENY

§ 164 (NCI4th). Instructions to jury; elements of crime generally

The trial court's omission of an element of felonious larceny (knowledge by defendant that he was not entitled to take the property) in the body of the charge did not create an internal conflict in the instructions when the court fully instructed as to all six elements in the final mandate and was not plain error. **State v. Roseboro,** 364.

LIMITATIONS, REPOSE, AND LACHES

§ 24 (NCI4th). Medical malpractice; continued course of treatment

The trial court properly granted defendant's motion to dismiss where the continuing course of treatment doctrine tolled the statute of limitations only from the time of the original negligence until the performance of corrective surgery, even though plaintiff alleged complications associated with her recovery from the second procedures. **Horton v. Carolina Medicorp., Inc.,** 133.

MUNICIPAL CORPORATIONS

§ 443 (NCI4th). Waiver of governmental immunity; specific acts as waiving immunity

The City of Charlotte did not participate in a local government risk pool which waived its sovereign immunity for tort claims by its agreement with Mecklenburg County and the Charlotte-Mecklenburg Board of Education creating a Division of Insurance and Risk Management to handle liability claims against the three entities because the agreement did not require the pool to pay all claims for which a member incurs liability. **Lyles v. City of Charlotte,** 676.

§ 444 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance generally

Defendant city did not waive its sovereign immunity for plaintiff's Woodson claim for the death of her police officer husband by its purchase of liability insurance for accidental injury to city employees which excluded coverage for "bodily injury intentionally caused or aggravated by or at the direction of the Insured." **Lyles v. City of Charlotte,** 676.

NEGLIGENCE

§ 108 (NCI4th). Premises liability; criminal activity

Summary judgment was properly entered on behalf of defendant-security company in a negligence action where plaintiff was stabbed in the presence of defendant's security guard while visiting a tenant at an apartment complex. **Cassell v. Collins,** 160.

RAPE AND ALLIED OFFENSES

§ 29 (NCI4th). First-degree sexual offense; necessity of proving that victim was alive at time of sexual act

The State presented sufficient factual bases to support defendant's pleas of guilty to four counts of first-degree sexual offense and one count of attempted first-degree rape, even if the evidence failed to show that the victims were alive at the time defendant committed the acts constituting those crimes, where the sexual acts were committed in conjunction with the murders of the victims as part of one continuous transaction. **State v. Wilkinson,** 198.

ROBBERY

§ 84 (NCI4th). Sufficiency of evidence; attempted armed robbery generally

The evidence was sufficient to support defendant's conviction of attempted armed robbery of the male victim as well as the female victim where defendant attacked both victims with a knife and told the female victim to give him her money. **State v. Ball,** 290.

§ 85 (NCI4th). Sufficiency of evidence; attempted armed robbery; to show overt act; necessity of more than mere preparation

There was sufficient evidence to support convictions for attempted armed robbery and first-degree murder based on felony murder where there was sufficient evidence of intent to commit armed robbery and overt acts toward its commission where defendant clearly intended to rob the victim but ran away voluntarily after shooting him in the head. The law draws no culpability distinction between voluntary or involuntary modes or causes of cessation. **State v. Miller,** 658.

§ 138 (NCI4th). Lesser included offenses; charged crime of robbery with firearm or dangerous weapon; larceny

The trial court did not err in a prosecution for robbery with a firearm by failing to submit the lesser included offense of larceny. **State v. Hartman,** 445.

SEARCHES AND SEIZURES

§ 60 (NCI4th). Search and seizure by consent; voluntary, free, and intelligent consent

The trial court did not err in a noncapital first-degree murder prosecution by overruling defendant's motion to suppress evidence seized in a warrantless search of his home and evidence seized during a search pursuant to warrants based on that evidence. **State v. Sokolowski,** 428.

SEARCHES AND SEIZURES—Continued

§ 100 (NCI4th). Application for search warrant; affidavits containing erroneous, inaccurate or false information

A search pursuant to a warrant based upon a statement that defendant was a convicted felon who had a firearm in his home in violation of the federal firearms law was not unlawful, although subsequent federal decisions held it is not a violation of federal law for a convicted felon in North Carolina to have a firearm in his home, where it was not clear that this was the law when the affidavit was executed. **State v. Cunningham,** 341.

STATE

§ 33 (NCI4th). State Tort Claims Act; agents of the State within the Act

Summary judgment for defendant on jurisdictional grounds was properly denied in an action in the Industrial Commission under the Tort Claims Act against the North Carolina Department of Human Resources for failure to properly supervise the Cleveland County Department of Social Services in the provision of child protective services to a child who was ultimately injured. **Gammons v. N.C. Dept of Human Resources,** 51.

§ 39 (NCI4th). Exclusive jurisdiction of Industrial Commission as the court for negligence claims against State

The North Carolina Industrial Commission was not deprived of jurisdiction under the Tort Claims Act by allegations that three members of the Parole Commission acted wantonly, recklessly, and maliciously and were grossly negligent in granting and supervising parole of an inmate who subsequently shot plaintiff and his wife. **Collins v. North Carolina Parole Commission,** 179.

§ 55 (NCI4th). Sufficiency of evidence; other types of actions

The Industrial Commission correctly dismissed claims against three former members of the Parole Commission arising from the parole of an inmate who subsequently shot plaintiff and his wife. **Collins v. North Carolina Parole Commission,** 179.

TRIAL

§ 60 (NCI4th). Time for filing affidavits in opposition to summary judgment

An affidavit by plaintiff's expert in opposition to defendant's motion for summary judgment was filed within five days of service as required by Rule 5(d) where plaintiff served the affidavit by mailing it to defendant's attorney and filed it with the court four days later on the date of the summary judgment hearing. **Precision Fabrics Group v. Transformer Sales and Service,** 713.

Nothing in Rule 56(c) or any other rule requires the "filing" of an affidavit in opposition to a summary judgment motion prior to the day of the summary judgment hearing. **Ibid.**

An affidavit by plaintiff's expert in opposition to defendant's motion for summary judgment was served on defendant's attorney when plaintiff's attorney deposited it in the mail on 1 July addressed to defendant's attorney, and plaintiff met the requirement of Rule 56(c) that the opposing affidavit by served "prior to the day of the hearing" and the requirement of Rule 6(d) that it be served "not later than one day before the hearing" where the hearing was scheduled for 5 July. **Ibid.**

TRIAL—Continued

Rule 6(e), which allows a party an additional three days "to do some act or take some proceedings" when notice is served by mail, was inapplicable to the computation of time for plaintiff to serve an affidavit in opposition to defendant's motion for summary judgment. **Ibid.**

Where the affidavit of plaintiff's expert was timely served by mail four days before the hearing on defendant's motion for summary judgment and was timely filed with the court on the day of the hearing, the trial court erred by refusing to consider the affidavit even if defendant's attorney had not yet received it. **Ibid.**

WORKERS' COMPENSATION

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff's forecast of evidence was insufficient to establish a Woodson claim for an employee's death when the carriage head of a brick-setting machine descended and crushed the decedent as he was leaning over the machine's spreader table. **Rose v. Isenhour Brick & Tile Co.**, 153.

§ 85 (NCI4th). Disbursement of proceeds of settlement; subrogation claim of insurance carrier

The trial court did not act under the authority of G.S. 1A-1, Rule 60(b) in modifying and enforcing a judgment setting a workers' compensation lien against UIM damages even though the motion referred to Rule 60 because the order was devoid of Rule 60 considerations and specifically referred to G.S. 97-10.2. **Hieb v. Lowery,** 403.

The issue of the amount of a workers' compensation lien against UIM damages had been decided three times prior to plaintiffs filing this motion. **Ibid.**

The trial court did not have authority under G.S. 97-10.2(j) to modify previous judgments establishing a workers' compensation lien against UIM judgments. If the legislature had intended insufficient proceeds to be the trigger for a judge's invocation of the discretion provided in the statute, it would have specified "proceeds" within the statute. **Ibid.**

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